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1933

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THE
ALL ENGLAND
LAW REPORTS
REPRINT

Being a selection from the
LAW TIMES REPORTS
1843–1935

REVISED AND ANNOTATED

1933

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LONDON
BUTTERWORTH & CO. (PUBLISHERS) LTD.

1958
LONDIN
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1958

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HASELDINE *v.* HOSKEN

[COURT OF APPEAL (Scrutton, Greer, and Slesser, L.JJ.), February 8, 9, 1933]

[Reported [1933] 1 K.B. 822; 102 L.J.K.B. 441; 148 L.T. 510; 49 T.L.R. 254]

Solicitor—Champerty—Agreement to finance action and share damages—Insurance against negligence and error—Sum paid to settle action for champerty—Right of solicitor to recover under policy—Attorneys and Solicitors Act, 1870 (33 *&* 34 *Vict.*, *c.* 28), *s.* 11.

By a solicitor's indemnity policy a solicitor was insured against loss arising from any claims made against him by reason of any neglect, omission, or error committed by him in or about the conduct of any business conducted by him in his professional capacity as solicitor. During the currency of the policy the solicitor acted in an action on behalf of the plaintiff with whom he made an agreement that, in the event of the action being successful or being settled, he (the solicitor) should be paid a fixed percentage of the amount awarded. That action failed, and the defendant, being unable to recover his costs, brought an action against the solicitor, claiming damages for champerty. The solicitor, having settled that action by payment of a fixed sum to the plaintiff, claimed against the insurance company to be indemnified under his policy for the loss he had sustained.

Held: (i) the policy was intended to cover the case of a solicitor who, in conducting the business of his client, made a mistake about the facts or about the law being in his client's favour or did something in the course of acting for his client which rendered him liable to some third party; but it was not an indemnity against loss arising under an agreement which the solicitor had made, not for the benefit of his client, but for his own benefit in order to secure some advantage to himself from the results of the litigation which by law he ought not to have; such a loss did not arise owing to any neglect, omission, or error of the solicitor in his professional capacity as solicitor; and, therefore, the claim failed.

(ii) even if the facts brought the case within the policy, the agreement was champertous; it was against public policy to insure against the commission of a criminal act; and, therefore, the policy was void so far as affected such a claim as this, and on this ground, too, the action failed.

Notes. Section 11 of the Attorneys and Solicitors Act, 1870, was repealed by the Solicitors Act, 1932, its provisions being re-enacted by s. 63 of the later Act. The 1932 Act was repealed by the Solicitors Act, 1957, s. 65 of which contains the provisions formerly in s. 63 of the 1932 Act.

Referred to: *Davies* v. *Hosken*, [1937] 3 All E.R. 192; *Beresford* v. *Royal Insurance Co.*, [1937] 2 All E.R. 243; *Askey* v. *Golden Wine Co.*, [1948] 2 All E.R. 35.

As to champerty generally, see 1 HALSBURY'S LAWS (3rd Edn.) 39 et seq., and with regard to solicitors' remuneration 31 HALSBURY'S LAWS (2nd Edn.) 166 et seq., and for cases see 1 DIGEST 66 et seq. and 42 DIGEST 130 et seq. For Solicitors Act, 1932, see 24 HALSBURY'S STATUTES (2nd Edn.) 16.

Cases referred to:

(1) *Neville* v. *London Express Newspaper, Ltd.*, [1919] A.C. 368; 88 L.J.K.B. 282; 120 L.T. 299; 35 T.L.R. 167; 63 Sol. Jo. 213, H.L.; Digest Supp.

(2) *Burrows* v. *Rhodes and Jameson*, [1889] 1 Q.B. 816; 68 L.J.Q.B. 545; 80 L.T. 591; 63 J.P. 532; 48 W.R. 13; 15 T.L.R. 286; 43 Sol. Jo. 351; 35 Digest 50, *455*.

(3) *Tinline* v. *Whitecross Insurance Assocn., Ltd.*, [1921] 3 K.B. 327; 90 L.J.K.B. 1118; 125 L.T. 632; 37 T.L.R. 733; 26 Com. Cas. 347; 15 Digest (Repl.) 963, *9332*.

(4) *James* v. *British General Insurance Co., Ltd.*, [1927] 2 K.B. 311; 96 L.J.K.B. 729; 137 L.T. 156; 43 T.L.R. 354; 71 Sol. Jo. 273; Digest Supp.

(5) *Scott* v. *Brown & Co., Slaughter and May* v. *Brown & Co.*, [1892] 2 Q.B. 724; 61 L.J.Q.B. 738; 67 L.T. 782; 57 J.P. 213; 41 W.R. 116; 8 T.L.R. 755; 36 Sol. Jo. 698; 4 R. 42, C.A.; 15 Digest (Repl.) 916, *8807*.

Appeal by Edgar Hosken, an underwriting member of Lloyd's, from an order of SWIFT, J.

The plaintiff, Thomas Percy Haseldine, a solicitor, carrying on business under the name and style of Percy Haseldine & Co., claimed a declaration that Edgar Hosken, the defendant, in the proportion of his insurance with the other underwriters, was liable to indemnify him in respect of any claim which might be made against him during the twelve calendar months commencing on Jan. 16, 1932, under a solicitor's indemnity policy dated Jan. 26, 1932, subscribed by the defendant. By that policy the plaintiff was insured against loss arising from claims made against him by reason of any neglect, omission, or error alleged to have been committed on the part of the firm in or about the conduct of any business conducted by or on behalf of the firm or their predecessors in business in their professional capacity as solicitors to an amount not exceeding the sum of £1,000.

The plaintiff had acted as solicitor for one Broad, then resident in Japan, in an action brought by Broad against Messrs. Sterns of London, in October, 1928, for commission. When the action was first brought the plaintiff made an agreement with one Aveyard, the agent of Broad, under which the plaintiff agreed to pay all disbursements in connection with the action and to make no charge in the event of the action not being successful, and further it was agreed that the plaintiff, in the event of the action being successful or being settled, should be paid out of the damages or moneys awarded on the trial of the action 20 per cent. of the amount so awarded, the minimum amount of the percentage to be £200. By a second agreement made with Broad the percentage was increased to 40 per cent., the minimum amount of the percentage to be £500. The plaintiff having provided the necessary security for costs, the action proceeded to trial and was dismissed. Messrs. Sterns, having been unable to recover any costs from Broad, brought an action against the plaintiff claiming damages for champerty or maintenance under s. 11 of the Solicitors Act, 1870. That action was settled by the plaintiff agreeing to pay by instalments the sum of £950 in full satisfaction. Thereupon the plaintiff brought the present action, claiming to be indemnified under his policy.

SWIFT, J., held that the plaintiff had acted in good faith and entered judgment for him for the amount claimed. The defendant appealed.

Tom Eastham, K.C., and *W. Bowstead* for the defendant.

S. L. Porter, K.C., and *J. P. Eddy* for the plaintiff.

SCRUTTON, L.J.—Mr. Haseldine, a solicitor, brings an action against a Lloyd's underwriter under a policy, called a solicitor's indemnity policy, which insures him against loss arising from claims made against him by reason of any neglect, omission, or error alleged to have been committed on the part of the firm in or about the conduct of any business conducted by or on behalf of the firm or their predecessors in business in their professional capacity as solicitors. The learned judge has given judgment in his favour, and the defendant appeals to this court. Apart from the personal interests of the parties, the case raises questions of public importance. I regret that I am unable to agree with the view that the learned judge has taken.

The facts which give rise to the claim are these. A Mr. Broad, in Japan, was the agent of the well-known firm of Messrs. Sterns, in England, and had been carrying on business for them for some years. He, Broad, alleged that he was entitled to much more commission than Sterns had paid him—to some thousands of pounds commission. Being unable to obtain a settlement from Sterns, he began by sending over to Europe an agent of his, a Mr. Aveyard, to try to obtain from Messrs. Sterns a settlement of the claim for commission on the terms that Aveyard was to pay all the costs but that in return he was to get half the amount that he could get from Sterns. Mr. Broad was, apparently, not in a position to undertake any expensive litigation. Mr. Aveyard appears to have got into touch with Mr. Haseldine, and Mr. Haseldine issued a writ in October, 1928, on behalf of Mr. Broad, against Messrs. Sterns, but, Mr. Broad being in Japan, at a very early stage an order was made for £30 security for costs against Mr. Broad, and the action could not go on unless that £30 was found. Mr. Aveyard seems to have told Mr. Haseldine that he, Mr. Aveyard, had not got any money, and that Mr. Broad had not sent any money, and the question then as between Mr. Aveyard and Mr. Haseldine in the first instance was: How is this action to go on, if at all, when the sum of £30 is being demanded as security for costs? Accordingly, on Nov. 27, 1928, an agreement was made between Mr. Haseldine and Mr. Aveyard, which is the first agreement complained of in the subsequent proceedings. There is no doubt whatever what the terms of the agreement are. They are quite plain. Mr. Haseldine was not to make any charge against Mr. Broad or Mr. Aveyard in respect of his professional charges in the event of the action not being successful, and, apart from the costs

> "we may recover from the defendant in the event of the action being successful or being settled, we shall be paid out of the damages or other moneys awarded on the trial of this action 20 per cent. of the amount so awarded, and, in any event, the minimum amount of the percentage to be paid us shall be the sum of £200."

Then it says:

> "No settlement or compromise of the said action shall be effected without the concurrence of yourself and ourselves."

There is no doubt that that agreement meant that "I, Haseldine, will carry on this action without charge to you, Broad, on the terms that I shall get a percentage of the amount recovered, and the action must not be settled without my consent."

In February, 1930, there were considerable difficulties about discovery which came to this court once or twice, and Mr. Haseldine, who up to that time had only got an agreement with Mr. Aveyard, got another agreement in writing from Mr. Broad. That is dated Feb. 28, 1930. It is a curious fact, although Mr. Haseldine was not asked about it at the trial, and, therefore, there is no evidence on the subject, that a month before that letter of Feb. 28 Mr. Haseldine had taken out his first solicitors' indemnity policy. The letter of Feb. 28 is as plain as the one of Nov. 27, 1928. In it Mr. Haseldine agrees to make no charge against Mr. Broad for carrying on the action. Mr. Broad will pay Mr. Haseldine out of the damages awarded on the trial 40 per cent. of the amount so adjudged to be paid by Sterns, and then,

> "I further agree that no settlement or compromise of the said action shall be effected without the concurrence of yourselves and myself."

Therefore, there is no doubt about the two agreements which Mr. Haseldine made and in consequence of which the action was carried on. The action failed before MacKinnon, J., and I have a distinct recollection of the large bundle of papers which was handed up to us when the matter came on in the Court of Appeal. It failed in the Court of Appeal. We are told by junior counsel for the plaintiff that the judgment in favour of Sterns and the taxed costs amounted to some £1,700, that Mr. Broad had nothing but £500 which he could pay, and that for the rest Sterns were left without any recourse unless they could have it against Mr. Haseldine, and the consequence, therefore, of Mr. Haseldine carrying on this action without himself being on the record liable for costs was that an action had been maintained and carried on at a cost to the successful party—without taking into account his own costs—of £1,700, of which, apparently, there was only ability to recover from Mr. Broad some £500.

Messrs. Sterns somehow or other discovered these letters that I have been reading, and it at once occurred to them, as it would to anyone who knew anything about the matter, that those letters were illegal agreements. For a very long time there has been an offence known to the common law and included in statutes as champerty, one definition of which is a division of the proceeds of litigation, and for a very long time—centuries—it has been an offence for a person to maintain a man on the terms that he shall have a share of the proceeds when the person who is entitled to whatever proceeds there are recovers them. That offence has been known as champerty. Leading counsel for the plaintiff has somewhat surprised me by appearing to argue that these letters do not disclose the offence of champerty. I should have thought that it was perfectly obvious that they did on any definition one has even been able to find of champerty. For instance, if I begin sufficiently far back, if I begin with the statute dealing with maintenance and champerty of the thirty-third year of Edward I, I find a passage which is not cited in the judgments in *Neville* v. *London Express Newspaper, Ltd.* (1), which counsel read to us, and I think is very properly not cited because champerty had nothing to do with the decision in *Neville's Case* (1)—"Champertors be they that move . . . suits . . . at their proper costs for to have . . . part of the gains." A man who has nothing to do with the original merits of the action, but promotes it and helps it and carries it on at his cost so that he may get part of the gains of the plaintiff, is a champertor. I look at *Neville's Case* (1) and I find that Lord Finlay, L.C., says this ([1919] A.C. at p. 382):

> "Champerty is a form of maintenance, and occurs when the person maintaining another takes as his reward a portion of the property in dispute."

There is a manual which solicitors are supposed to know something about, though, apparently, Mr. Haseldine did not read it, which is called Cordery on Solicitors, and at p. 273 of the 3rd Edn. I find this:

> "Champerty is 'when he who maintains another is to have by agreement part of the land or debt in the suit.' "

There follow about twenty authorities for that, beginning with Coke upon Littleton.

> "Thus, in contentious business, an agreement to remunerate a solicitor by a share of, or commission on, or sum proportioned to the amount of, the property to be recovered is bad, and the Solicitors Act, 1870, ss. 4 and 11, has not altered the law."
>
> One turns to s. 11, which is referred to there, and it says:
>
> "Nothing in this Act contained shall be construed to give validity to any purchase by an attorney or solicitor of the interest, or any part of the interest,

> of his client in any suit, action or other contentious proceeding to be brought or maintained, or to give validity to any agreement by which an attorney or solicitor retained or employed to prosecute any suit or action stipulates for payment only in the event of success in such suit, action, or proceeding."

I am quite clear, therefore, that these agreements were champertous.

The next thing that happens is that Messrs. Sterns, having got hold of these letters in some way, at once bring a civil action against the plaintiff, alleging: You have been guilty of an offence which is both a criminal offence and the subject-matter of a civil action by reason of which we have suffered the loss of a large sum of money which we are entitled to recover from the client whom you maintained, but which we cannot recover from him. We have very little information about what really happened in this action, but Mr. Haseldine settled it by making an agreement to pay by instalments a sum of £950, and perhaps it hardly lies in his mouth or his counsel's mouth after that to argue that the agreement was not champertous. He has shown his belief in its being champertous by agreeing to pay this sum of £950. Then comes the next step. Mr. Haseldine goes to Lloyd's underwriters, who have underwritten this policy, and says: "Now pay me the sum I have lost through my neglect, omission, or error." It is at first sight very puzzling to know what can be said to be the neglect or omission or error which had produced the claim. Mr. Haseldine knew what he was doing in this sense, that he made an agreement which clearly expressed what he intended to do. It is quite true that he did not take the trouble to ascertain whether what he was doing was illegal; but that, in my view, when what he was doing was criminal, although he did not know it, is not a neglect, omission, or error contemplated by this policy. I approach this policy in two ways. If making a champertous agreement is neglect, omission, or error, it is contrary to public policy to insure against it; it is contrary to public policy to insure against the commission of an act, knowing that the act you are committing in fact is a crime, though you do not know it. The other view is, and I think it is the more likely view, that the commission of a criminal act, knowing what act you are committing, does not come within the words "neglect, omission, or error."

Some little difficulty has been occasioned, or might be occasioned, by certain cases which have been decided in respect to insurance of motorists who may become criminally liable by what they do on the road. The two cases that I am going to refer to, decided by Bailhache, J., and by Roche, J., following him, began by the consideration of a passage in the judgment of Kennedy, J., in *Burrows* v. *Rhodes and Jameson* (2). That was not this class of case. In *Burrows* v. *Rhodes and Jameson* (2) Mr. Burrows had been induced by mis-statements, alleged to be fraudulent mis-statements, to enter into the unfortunate Jameson Expedition into the Transvaal, and he claimed indemnity for the unpleasant consequences which had happened to him in consequence of his believing those representations by the persons who had made them to him. Kennedy, J., stated the law in this way ([1899] 1 Q.B. at p. 828):

> "It has, I think, long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom."

It will be noticed that Kennedy, J., uses two phrases: "manifestly unlawful," "or the doer of it knows it to be unlawful." Those two phrases must mean two different things, because if the first phrase means that the act is manifestly to the man who does it unlawful, there was no need to use the second phrase, "or the doer of it knows it to be unlawful." I think that the learned judge is clearly meaning an act such that there can be no doubt that it is unlawful.

I make that comment because in one of the two cases that I am going to refer to Roche, J., alters that phrase to "manifestly unlawful to him," which I think is a wrong reading of the language of Kennedy, J. Kennedy, J., goes on with two passages which have considerable relevance in this case. The first is this ([1899] 1 Q.B. at p. 828):

> "Where the circumstances constituting the unlawfulness of the act are known to the doer of it, his inability to claim contribution or indemnity appears to me to be clear."

In the present case the circumstances constituting the unlawfulness were perfectly well known to Mr. Haseldine. He knew that he was making a contract to provide the costs to carry on an action without being able to claim them against his client, on the terms that he should get a certain percentage of the amount recovered and should have power to prevent a settlement of the action. Those circumstances were perfectly well known to Mr. Haseldine. The other passage is this ([1899] 1 Q.B. at p. 829):

> "Nor, in my judgment, can there be any valid claim to indemnity where the doer of the act which constitutes the offence has done it with knowledge of all the circumstances necessary to constitute the act an offence, [that knowledge Mr. Haseldine had; he had written two very clear letters which constitute the offence] but in ignorance that the act done under those circumstances constituted an offence."

A man is presumed to know the law. That first passage of Kennedy, J.'s, that I read has formed the justification for a decision of Bailhache, J., followed by a decision of Roche, J., that a motorist insured under a motor policy may recover damages though his negligence has caused damage to someone else, which constitutes a crime.

The immediate distinction which jumps to the eye in these cases is this: Bailhache, J., in *Tinline* v. *Whitecross Insurance Assocn., Ltd.* (3) says near the end of his judgment ([1921] 3 K.B. at p. 332):

> "It must of course be clearly understood that if this occurrence had been due to an intentional act on the part of the plaintiff the policy would not protect him."

In my view, those are the exact circumstances of this case. Mr. Haseldine intended to make this agreement. He wrote it out himself; he knew what he was doing in the sense that he was entering into that agreement, and that, I think, is an intentional act on the part of the plaintiff quite different from the class of case which was being dealt with in the two motor cases, where the motorist was negligent and the negligence, the failure to do something, had consequences which he did not expect. Roche, J., in the second case, *James* v. *British General Insurance Co., Ltd.* (4) ([1927] 2 K.B. at p. 323), used the same language: "It was negligence, and was not the wilful or advertent doing of the act." That I read to be simply another way of putting the language of Bailhache, J., "an intentional act on the part of the plaintiff."

In the view that I take of the facts of this case those two cases do not affect this case, and I do not think it necessary to express any opinion whether I should follow them if they came before me in a case where it was necessary to consider them. The present position of the law of motor insurance, in view of the provisions about compulsory insurance, is in such a state of complication at present that I do not think we should pronounce any opinion about it until it comes before us in such a way that we are obliged to decide the point, and it must not be taken from the fact that I do not say anything more about the actual decisions in those cases or whether or not I agree with the principle on which they are based, that I approve of them, but, as I have said, the facts in this case are such that they bring it within the point which Kennedy, J., Bailhache, J., and Roche, J., all accepted—where the man intentionally does the act which, though he does not know it, is in fact criminal.

Swift, J., in his judgment, took this view:

> "He [Mr. Haseldine] made an error of judgment. He omitted to consider what his real position was, neglected to take any advice about the matter; he

> made this agreement; I think he made the agreement honestly; it occasioned him the loss which he has sustained, and I think he is entitled to recover that loss from the underwriters";

and again:

> "I cannot think that on the whole a solicitor who is endeavouring to protect himself from slips of negligence and error of judgment and omission in conduct has not covered himself by such a policy as this from damages which have resulted from his inadvertently entering into an agreement which, without his knowledge, certainly without his approval, subsequently turns out to be illegal."

I do not quite understand what the judge means by "subsequently turns out to be illegal." It was illegal from the start. It was expressed in perfectly plain language; on the face of it it meant something which Mr. Haseldine intended it to mean. Where the difficulty has arisen is that, while Mr. Haseldine intended it to mean that, he had forgotten the elementary propositions about champerty and the very clear language of the Solicitors Act which regulates the profession to which he belongs.

The learned judge takes very little account in his judgment of the obvious fact that from the start this agreement was criminal—that is to say, that it subjected the person making it to criminal consequences—and I accept the view of KENNEDY, J., and not the view which is implicit in this judgment, that if you do not know the law you are all right. As KENNEDY, J., said, if you do not know the law so much the worse for you. For that reason I am rather surprised at the judgment of the learned judge. The appeal, therefore, must be allowed, with costs.

GREER, L.J.—I agree that this appeal should be allowed with costs. If it were not for the fact that we are differing from a learned judge of great experience and of sound judgment, I should not have desired to add anything to what my Lord has said. I accept, as I must accept, the learned judge's finding that the plaintiff in this action honestly stated that he did not know that the contracts he made on Nov. 27, 1928, and Feb. 28, 1930, with his client, Mr. Broad, or his representative, were illegal, and that he had apparently never known, or if he had known it had passed from his mind, that it was illegal to make a bargain of the kind that was made in those two contracts, whereby in the earlier contract he was to get 20 per cent. for himself of the amount that was recovered on behalf of his client, and in the second agreement was to get as much as 40 per cent., and in any event his share of the result of the litigation was not to be less than £500. I agree with what my Lord has said, that agreements of that sort ought to be discouraged because they are contrary to the policy of the law in this country—a policy which has been emphasised over and over again, and so seriously emphasised that agreements of this kind are treated not merely as void and unenforceable but as criminal acts which may lead to an indictment.

Champerty is described in STEPHEN'S DIGEST OF THE CRIMINAL LAW (7th Edn. at p. 146), in these words:

> "Champerty is maintenance in which the motive of the maintainer is an agreement that if the proceeding in which the maintenance takes place succeeds the subject-matter of the suit shall be divided between the plaintiff and the maintainor."

That that is an accurate description of the two agreements that were made in this case by Mr. Haseldine with his then client, Mr. Broad, I do not think there can be any question, notwithstanding the endeavour that has been made by counsel for the plaintiff to limit that definition so that it applies only to cases where the person doing the act knows that he is assisting an improper action. Notwithstanding that argument, I think it is quite clear that these two agreements were champertous agreements.

It follows from that that, if there were any contract by policy or in any other way to indemnify a man against acts which are of a criminal character and make him liable to an indictment, it would be necessarily entirely void as being contrary to public policy. In this country, whatever may be the case in other countries, no solicitor is allowed to insure himself against the commission of crime. Solicitors may be allowed to insure themselves against perils of law, but they are not allowed to insure themselves against the commission of crime.

I do not think it necessary to take up time by reading the words of this policy, but I regard it as important that the construction of the policy should be approached from the point of view that it was probably not intended to cover the case of indemnity against a criminal act. What it was intended to do was to cover the case of a solicitor who, in conducting the business of his client, either by conveyancing or by representing him in litigation, made a mistake about the facts with which he was dealing or a mistake about the law being in his client's favour, or did something in the course of acting for his client which rendered him liable to some third party. I think it is such acts as those that were intended to be covered by the policy, not to secure benefits for himself but in respect of something which he was doing on behalf of a client. Read in that way I should treat this indemnity policy as being one which did not in fact cover what happened in this case, and that it was not an indemnity against the two agreements which the solicitor made not for the benefit of his client or about his client's business, but for his own benefit in order to secure some benefit for himself from the results of litigation, and which he ought not to have made according to the law of this country. They were not agreements which he was making in the interests of his client, and I think that the damage did not arise owing to any neglect, omission or error of Mr. Haseldine in his professional capacity as a solicitor, and, therefore, was not covered by the words of the policy.

I agree with what my Lord has said with regard to the two motor cases. I find it a little difficult in principle to distinguish that class of case from the present, but I do not desire to say anything that would preclude the full consideration of any case which raises in the Court of Appeal facts similar to those in the two motor cases. I can conceive it is good sense, and it may be desirable to draw a distinction from that class of case, where the act which is indemnified by the policy is an act which it is intended by the law that people should insure against, an act which is not an intentional doing of something against the law, but an act which by accident results in the death of somebody, which would only have been actionable civilly if it had not resulted in the death of the unfortunate person who was injured. I think there may be good reasons for distinguishing that class of case from the present case, but whether that be so or not I have no doubt whatever in this present case that the appeal ought to succeed. I think that where Swift, J., went wrong was that he did not, in my judgment, pay sufficient attention to the fact that these two agreements were illegal agreements.

SLESSER, L.J.—I agree. I would only quote on the general question of the fact of illegality preventing the successful prosecution of a claim like these two passages, the first from Lindley, L.J., in *Scott* v. *Brown & Co.*, *Slaughter and May* v. *Brown & Co.* (5) to this effect ([1892] 2 Q.B. at p. 728):

> "If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him,"

and the second from Smith, L.J., in the same case ([1892] 2 Q.B. at p. 734):

> "If a plaintiff cannot maintain his cause of action without showing, as part of such cause of action that he has been guilty of illegality, then the courts will not assist him in his cause of action."

But, altogether apart from the question of illegality here, I have come to the conclusion that the plaintiff fails to show that he satisfied the terms of the indemnity policy at all. The obligation to indemnify him for loss in respect of any claim is limited to cases,

> "in or about the conduct of any business conducted by or on behalf of the firm or their predecessors in business in their professional capacity as solicitors."

In my view, looking at these agreements of Nov. 27, 1928, and Feb. 28, 1930, quite apart from any question of champerty, they are agreements not to act as solicitor, but to undertake a personal speculation, and it seems to me to be playing with words to say that when a solicitor assists litigation for the purpose of making a private profit out of the transaction the profit, if ultimately made, can be described as a profit obtained in his professional capacity as solicitor. That view is recognised by s. 11 of the Solicitors Act, 1870, where it says in terms that such an agreement is invalid.

I am unable to see that there was any loss sustained here by any neglect, omission, or error. The loss sustained here is the result of an action brought because Mr. Haseldine financed and assisted in an action, thereby causing damage to Messrs. Sterns—damage which was originally stated as special damage to the amount of £2,811, and which he subsequently compromised for a considerably smaller sum. I am unable to say that this loss was caused by any error. It was caused by Mr. Haseldine entering into an agreement; that agreement was not entered into in error; it was done deliberately by him for the purposes recited in the agreement. He may or may not have appreciated the legal effect of what he was doing, but it is wrong, in my opinion, to say that the loss was occasioned by error. The loss was occasioned by the agreement. The error may have turned the agreement into a criminal, champertous agreement in that he did not know what he was doing, but it seems to me there is no direct causation between the loss and the error, and, in my opinion, on these grounds the appeal should be allowed.

Appeal allowed.

Solicitors: *William Charles Crocker*; *Percy Haseldine & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

G. H. MYERS & CO. *v.* BRENT CROSS SERVICE CO.

[KING'S BENCH DIVISION (Swift and du Parcq, JJ.), October 3, 4, 1933]

[Reported [1934] 1 K.B. 46; 103 L.J.K.B. 123; 150 L.T. 96]

Work and Labour—Duty to supply good materials—Warranty by repairer of fitness of materials used in repair—Reliance on skill and judgment of repairer in selection of material.

A repairer of goods, who contracts to do work and supply materials in the course of carrying out repairs, impliedly warrants that the material supplied shall be of good quality and reasonably fit for the purpose for which it is intended, unless the circumstances of the contract are such as to show that the owner of the goods did not rely on the skill and judgment of the repairer in the selection of the material, as, e.g., if the owner instructs the repairer to get the material from the manufacturers of the goods or some other specified source, or otherwise are such as to exclude any implied warranty of fitness.

Notes. Considered: *Dodd and Dodd* v. *Wilson and McWilliam*, [1946] 2 All E.R. 691; *Stewart* v. *Reavell's Garage*, [1952] 1 All E.R. 1191. Referred to: *Samuels* v. *Davies*, [1943] 2 All E.R. 3; *Ingham* v. *Emes*, [1955] 2 All E.R. 740.

As to warranties implied in a contract for work and labour, see 2 HALSBURY'S LAWS (3rd Edn.) 130–133, and cases there cited.

Cases referred to:

(1) *Francis* v. *Cockrell* (1870), L.R. 5 Q.B. 501; 10 B. & S. 950; 39 L.J.Q.B. 291; 23 L.T. 466; 18 W.R. 1205, Ex. Ch.; 34 Digest 166, *1296*.

(2) *Redhead* v. *Midland Rail Co.* (1869), L.R. 4 Q.B. 379; 38 L.J.Q.B. 169;

9 B. & S. 519; 17 W.R. 737; 20 L.T. 628, Ex. Ch.; 30 Digest (Repl.) 237, *857*.

(3) *Randall* v. *Newson* (1877), 2 Q.B.D. 102; 46 L.J.Q.B. 259; 36 L.T. 164; 25 W.R. 313, C.A.; 39 Digest 440, *694*.

(4) *Cammell Laird & Co., Ltd.* v. *Manganese Bronze and Brass Co., Ltd.*, [1933] 2 K.B. 141; 102 L.J.K.B. 481; 149 L.T. 28; 38 Com. Cas. 175; 49 T.L.R. 267; 45 Ll. L. Rep. 89, C.A.; reversed, [1934] All E.R. Rep. 1; [1934] A.C. 402; 103 L.J.K.B. 289; 151 L.T. 142; 50 T.L.R. 350; 39 Com. Cas. 194, H.L.; Digest Supp.

Appeal by the plaintiffs from an order of His Honour Judge Higgins at Brentford County Court.

The defendants were the proprietors of a motor garage. The plaintiffs owned an Essex motor car which developed certain defects. On Oct. 22, 1932, their representative took the car to the defendants, instructed them to put it in good order, and authorised them to supply any new parts which might be required. The defendants found it necessary to obtain and fit into the car six new connecting rods, which they obtained, as to five of them, from the manufacturers of the car, and as to the sixth, from an authorised agent of the manufacturer. They then completed the repairs and returned the car to the plaintiffs. On Nov. 9, 1932, one of the connecting rods broke and caused damage to the car, and the plaintiffs thereupon brought this action, claiming damages from the defendants, alleging that they had been negligent in not examining and ascertaining the defect in the rod, or, alternatively, for breach of an implied warranty that the rod was reasonably fit for the purpose for which it was supplied. The county court judge found that the defendants had not been negligent and that the defect was a latent one which could not have been detected by any reasonable examination. He held as a matter of law that the contract was one for work and labour to be done and materials to be supplied, and was not a sale of goods to which the implied warranty imposed by s. 14 of the Sale of Goods Act, 1893, applied. He further held that in a contract of this nature there was no implied warranty that the material was reasonably fit for the purpose for which it was intended, and he, accordingly, gave judgment for the defendants.

The plaintiffs appealed and contended, first, that in so far as the contract provided for the supply of material, it was a sale of goods to which the Act of 1893 applied, and, alternatively, that in a contract for work and labour to be done and material to be supplied, there was an implied warranty similar to that enacted by statute in the case of a sale of goods. The defendants submitted that there was no sale of goods, and no implied warranty of fitness in a contract for work and labour. They also said that the manufacturers of the car were the only persons who could supply the connecting rods, and, therefore, that, if there was a sale, it was a sale of an article by its trade name.

The Sale of Goods Act, 1893, s. 14 (1) provides as follows:

> "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose: Provided that in the case of the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose."

Eric Sachs for the plaintiffs.

Wynn Werninck for the defendants.

DU PARCQ, J.—This is an appeal from an order made by His Honour Judge Higgins, and it arises in this way. The defendants, in October of 1932, contracted to do certain repair work to a motor car belonging to the plaintiffs. It was their business to do such repairs as would put a stop to a defect which had developed in the car and which showed itself in the form of "knocking." It became necessary, as part of the work, to supply six connecting rods. On Oct. 12, 1932, when the defendants made their charge for the work which they had done, there was among the items one as follows: "To supplying six re-metalled rods, £2 10s." It turned out, and there is no doubt about this, that in one of the rods there was a defect. The result of that defect was that damage was suffered by the plaintiffs. About that there is also no doubt, and the learned judge, in an endeavour to save time and expense, assessed the damages, although his view was adverse to the plaintiffs' claim. It was also taken to be the fact in that court that it was not established that the defect was known to the defendants; on the contrary, the learned judge came to the conclusion that the defect was one which the defendants could not have discovered by the exercise of reasonable care.

In those circumstances the question which this court has to decide is whether the learned judge was right or wrong in the view he took of the law. The learned judge said:

> "This is not the case of a sale of goods, and, therefore, none of those considerations arises which would arise if it were necessary to decide the case upon the construction of the Sale of Goods Act, or upon common law decisions prior to the Sale of Goods Act, as to the warranties to be implied upon the sale of goods."

The learned judge held, and there is no doubt that he was perfectly right in so holding, that this was a contract for work and labour, and he said, as I understand the judgment, that in a contract of that kind, and certainly in this particular contract, it could not be taken against the person doing the work that he had impliedly warranted that the goods which he supplied, in the sense that he used them to do the work, were of good quality or reasonably fit for the purpose for which he was using them, and that his only obligation was to take reasonable care.

That point has been fully argued before us, and the view which I desire to express for myself, and I think as to the substance of it with the concurrence of my Lord, is this. It is certainly true that to decide this case one must not look at the Sale of Goods Act, because the Sale of Goods Act deals only with the sale of goods, and this is not a contract for the sale of goods. The question may be put in this way: What is, and what was before the Sale of Goods Act was enacted, the contract made by someone who does work and labour, but in the course of doing it supplies goods? The earliest case to which I think I need refer is *Francis* v. *Cockrell* (1). That was a case which went to the Exchequer Chamber, in which an action was brought against the defendant who had contracted to erect a grand-stand for the purpose of viewing some races. That, of course, was a contract to do work and labour. The stand was negligently and improperly constructed, and the plaintiff was one of the persons admitted. The stand fell, and the plaintiff was injured. That, of course, is not a direct authority here at all, because in that case there was negligence, and in this case it is not in dispute that no negligence is proved. But there are certain observations in that case which have their importance, especially in the light of later decisions. Kelly, C.B., said this (L.R. 5 Q.B. at p. 503):

> "I do not hesitate to say that I am clearly of opinion, as a general proposition of law, that when one man engages with another to supply him with a particular article or thing, to be applied to a certain use and purpose, in consideration of a pecuniary payment, he enters into an implied contract that the article or thing shall be reasonably fit for the purpose for which it is to be used and to which it is to be applied."

It is to be observed there that the learned Chief Baron is applying to a contract which was not technically a contract for the sale of goods words which we are all accustomed to hear applied to a contract for the sale of goods.

> "That [says the learned Chief Baron, continuing] I hold to be a general proposition of law applicable to all contracts of this nature and character."

The learned Chief Baron went on to say this: A

> "It is, indeed, subject to a qualification or exception, to which I will hereafter advert, as determined by the case of *Redhead* v. *Midland Rail. Co.* (2), but that qualification extends only to the case of some defect which is unseen and unknown and undiscoverable, not only unknown to the contracting party, but undiscoverable by the exercise of any reasonable skill and diligence, or by any ordinary and reasonable means of inquiry and examination." B

With regard to those latter words one must read them in the light of what was said in the later case, the case decided seven years afterwards in the Court of Appeal, of *Randall* v. *Newson* (3). That was a case of a contract for the supply of a pole for the plaintiff's carriage. The pole broke and the plaintiff was held to be entitled to recover against the defendant, although the defect in the pole was a latent defect. In that case, referring to *Francis* v. *Cockrell* (1), to which I have C just referred, SIR WILLIAM BRETT, J.A., made certain observations. What was decided in *Randall* v. *Newson* (3) was that *Redhead* v. *Midland Rail. Co.* (2), which had been relied upon in the courts below, had no application to a case of the class which the court was considering in *Randall* v. *Newson* (3). *Redhead* v. *Midland Rail. Co.* (2), putting the matter shortly, decided that the carrier of passengers did not warrant the safety of the vehicle absolutely, and was not liable if there was a D latent defect in it which he could not discover by the exercise of reasonable care. The Court of Appeal said that that case had no application in a contract for the sale of goods, and, dealing with *Francis* v. *Cockrell* (1), SIR WILLIAM BRETT said (2 Q.B.D. at p. 110):

> "The case of *Francis* v. *Cockrell* (1) is based upon *Redhead* v. *Midland Rail. Co.* (2), and is, therefore, of itself no more a binding authority on us in this E case than the other. It is true, however, that the Lord Chief Baron, going further than the doubt expressed by MONTAGUE SMITH, J., does recognise the limitation as applicable to contracts of purchase and sale. But the statement of the learned judge was not necessary, and, therefore, is not binding, though, of course, inviting a careful consideration of the older cases. After such consideration, for the reasons before given, we are of opinion that the undertaking F of the present defendant was not restricted by the limitations applied to the contract of carriage in *Redhead* v. *Midland Rail. Co.* (2), and that as long as the verdict in this case stands it imposes a liability on the defendant."

I should add, what is of importance, that after the judgment to which I have just referred had been delivered, KELLY, C.B., who was a member of the court, said G this (2 Q.B.D. at p. 111):

> "KELLY, C.B., in assenting to the judgment of the court, observed, that, if the language imputed to him in *Francis* v. *Cockrell* (1) be correctly reported, he must have expressed himself inaccurately, and he had no intention to apply the doctrine in *Redhead's Case* (2) to a contract for the sale and purchase of an article to be applied to a specific purpose." H

We are, therefore, brought to this view of the law, that in *Francis* v. *Cockrell* (1), it was stated as a general proposition, applicable, as I understand it, to cases where goods were supplied, that the persons supplying them warranted that they were reasonably fit for their purpose, and that certainly so far as contracts for the sale of goods are concerned, there is no limitation whatever of the nature which had I been suggested, that the supplier is not responsible for latent defects.

It is, however, argued that where goods are supplied in the course of a contract to do work and labour, there is no such warranty. I should like to say, first of all, that it would strike one as very surprising if that were so. If one goes into a shop and buys an article the vendor is liable if the case can be brought within the provisions of the section of the Sale of Goods Act as to warranties. It is, indeed, important to notice that s. 14 of the Sale of Goods Act begins with the words,

> "Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows."

Then it goes on that where you buy from a vendor who may be selling, as in a case to which I shall refer in a moment, boilers to be fitted to a ship, and you rely on his skill and judgment, and if the goods are such as in the course of his business he supplies, and if he knows the purpose for which they are to be used, there is a warranty for reasonable fitness, in other circumstances, a warranty of merchantable quality. These circumstances are quite familiar to us here. Perhaps I may refer to a case cited by counsel for the defendants to show the distinction between contracts of sale of goods and contracts of work and labour, because of some of the technical distinctions which for good and proper reasons the law draws between contracts so closely analogous. Supposing somebody instructs makers of boilers to supply and fit boilers to a ship in the course of doing repair work. Then, says counsel, there is no warranty that those boilers are reasonably fit, and no liability for a latent defect. On the other hand, if an order is given for boilers to be supplied for fitting by the ship's engineers, counsel agrees that there is a warranty that the boilers are reasonably fit.

The view to which I have come is that the liability of the person supplying goods in the course of doing work and labour is certainly not less than the liability of the person selling goods, and I wish to refer to a very recent decision in the Court of Appeal where some words were used by Greer, L.J., which seem to me to throw light upon the matter. I refer to *Cammell, Laird & Co., Ltd.* v. *Manganese Bronze and Brass Co., Ltd.* (4). In that case, Greer, L.J., delivered a dissenting judgment. There was a claim for damages which was originally heard before Roche, J., for breach of warranty on the sale of some boilers to be fitted to two ships. It is unnecessary to deal with the facts of the case, but the majority of the Court of Appeal held that in the circumstances it was not shown that the purchaser relied on the skill and judgment of the seller. Greer, L.J., thought that in all the circumstances the defendants were liable upon a warranty such as I have mentioned. Although the words of the learned lord justice are used in a dissenting judgment, and although they amount to a dictum only, they are none the less valuable as showing the view entertained by the learned lord justice about this sort of problem. Greer, L.J., says this ([1933] 2 K.B. at p. 195):

> "The contract we have to consider is not a contract for work and materials. In such a contract it may be right to imply an undertaking that the materials will be of good quality and the workmanship carried out with reasonable skill and care. The contract under consideration is a contract of sale, and the seller gives no undertaking as to the quality of the materials unless the case is brought within one or other of the subsections of s. 14 of the Sale of Goods Act. The only terms relating to quality, if any, must be such as can be implied in a contract of sale."

It will be seen that the learned lord justice there, in drawing a distinction between a contract for work and materials and a contract of sale, seems clearly to be taking the view that in the contract for work and materials the obligation of the person supplying the materials is not less, but rather greater, than that of the person supplying the goods in a contract for the sale of goods; and, although those words are not binding upon this court, I am of opinion that it is a true view to take that the obligation is certainly no less. That is subject to this—it would not be true to say that wherever you find a contract to do work and supply materials it necessarily follows, even apart from special conditions, that the person supplying the materials is liable if some of them are defective by reason of latent defect. That depends upon the terms of the contract, and I think that the true view is that a person contracting to do work and supply materials warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them, unless the circumstances of the contract are such as to exclude any such warranty. There may be circumstances which would clearly exclude it. A man goes to a repairer and says: "Repair my car; get the parts from the makers of the car and fit them." In such a case it is made plain that the person ordering the repairs is not relying upon any warranty except that the parts used will be parts ordered and obtained from the makers. On the other hand, if he says: "Do this work, fit any necessary parts," then he is in no way limiting the person doing the repair work, and the person doing the repair work is, in my view, liable if there is any defect in the materials supplied, even if it was one which reasonable care could not have discovered.

In those circumstances the question is: What ought to be done here? It is said by counsel for the plaintiffs that there was no limitation whatever in the instructions given to the defendants, no limitation whatever to be gathered from the words of the contract. The defendants could have made the parts themselves, or could have used parts obtained from any maker. That being so, it must be taken that the defendants warranted that the parts which they did use were of good quality and fit for the purpose for which they were using them, and the fact that a defect was latent would not excuse them. On the other hand, counsel for the defendants says that it has been, or it can be, established that expressly or impliedly the defendants were instructed to get parts from the makers, or their recognised agents, and to use those parts, not using their own skill and judgment in the matter at all. If that were so, then I think those facts would afford a defence, because that would negative any warranty. In those circumstances, this case should go back to the learned county court judge that he may hear any further evidence which the parties may wish to call, and that upon the whole of the evidence before him he may determine whether the warranty that would arise, apart from some such considerations as I have suggested, is to be implied or not.

SWIFT, J.—I agree, and I do not wish to add anything except that I think the facts must be more fully ascertained in order that the law which has been stated by my brother may be applied to those facts. Here we have an Essex car which was taken in for repair, and we know as a fact that Hudson-Essex Motors, Ltd., supplied the metal rods which were required for the purpose. The learned county court judge will ascertain, when the matter comes before him again, whether the defendants were contracting in such a way as to bind themselves to exercise their own skill and judgment with reference to the selection of the material, or whether they were getting the material from the original manufacturers of the car. The result is that the appeal will be allowed, the judgment will be set aside, and the matter will be sent down for a fresh trial.

New trial ordered.

Solicitors: *Judge & Priestley*; *W. Wallace Harden.*

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

MAPLE FLOCK CO., LTD. *v.* UNIVERSAL FURNITURE PRODUCTS (WEMBLEY), LTD.

[COURT OF APPEAL (Lord Hewart, C.J., Lord Wright and Slesser, L.J.), October 20, 1933]

[Reported [1934] 1 K.B. 148; 103 L.J.K.B. 513; 150 L.T. 69; 50 T.L.R. 58; 39 Com. Cas. 89]

Sale of Goods—Rescission of contract—Delivery by instalments—Defect in one instalment—Circumstances in which buyer entitled to rescind—Sale of Goods Act, 1893 (56 *&* 57 *Vict.*, *c.* 71), *s.* 31 (2).

In a contract for the sale of goods to be delivered by instalments, the main tests to be applied in determining whether a defective delivery of one instalment by the seller is a repudiation of the whole contract are (i) the ratio quantitatively of the defective delivery to the contract as a whole, and (ii) the degree of probability that the breach will be repeated. Where, therefore, in a contract for the sale of 100 tons of goods, a delivery of one instalment of 1½ tons was of defective quality but there was no reasonable probability that future deliveries would be defective,

Held: the buyers were not entitled to treat the contract as having been repudiated by the sellers.

Taylor v. *Oakes, Roncoroni & Co.* (1) (1922), 127 L.T. 267, applied.

Notes. Considered: *Compagnie Primera De Navigaziona Panama* v. *Compània Arrendataria de Monopolio, De Petroleos S.A.*, [1939] 2 All E.R. 240. Referred to: *Smyth & Co.* v. *Bailey, Son & Co.*, [1940] 3 All E.R. 60; *Household Machines, Ltd.* v. *Cosmos Exporters, Ltd.*, [1946] 2 All E.R. 622.

As to repudiation of a contract for the sale of goods by reason of a partial breach, see 29 HALSBURY'S LAWS (2nd Edn.) 136–138, and for cases see 39 DIGEST 570 et seq. For Sale of Goods Act, 1893, see 22 HALSBURY'S STATUTES (2nd Edn.) 985.

Cases referred to:

(1) *Taylor* v. *Oakes, Roncoroni & Co.* (1922), 127 L.T. 267; 38 T.L.R. 517; 66 Sol. Jo. 556; 27 Com. Cas. 261, C.A.; 39 Digest 593, *1923*.

(2) *Mersey Steel and Iron Co., Ltd.* v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; 53 L.J.Q.B. 497; 51 L.T. 637; 32 W.R. 989, H.L.; 12 Digest (Repl.) 378, *2966*.

(3) *Freeth* v. *Burr* (1874), L.R. 9 C.P. 208; 43 L.J.C.P. 91; 29 L.T. 773; 22 W.R. 370; 12 Digest (Repl.) 378, *2970*.

(4) *Hoare* v. *Rennie* (1859), 5 H. & N. 19; 29 L.J.Ex. 73; 1 L.T. 104; 8 W.R. 80; 157 E.R. 1083; 39 Digest 572, *1766*.

(5) *Millar's Karri and Jarrah Co. (1902), Ltd.* v. *Weddel, Turner & Co.* (1908), 100 L.T. 128; 11 Asp.M.L.C. 184; 14 Com. Cas. 25; 39 Digest 572, *1769*.

(6) *Robert A. Munro & Co., Ltd.* v. *Meyer*, [1930] 2 K.B. 312; 99 L.J.K.B. 703; 143 L.T. 565; 35 Com. Cas. 232; Digest Supp.

Appeal by plaintiffs from an order of DU PARCQ, J., dismissing an action for breach of contract.

The contract in question, which was dated March 14, 1932, was for the sale by the plaintiffs (the sellers) to the defendants (the buyers) of 100 tons of black linsey flock at £15 2s. 6d. per ton, to be delivered in three loads a week as required. It was a term of the contract that a guarantee should be given that the flock should conform to the government standard, which had been fixed by regulations made pursuant to the Rag Flock Act, 1911, at not more than thirty parts of chlorine in 100,000 parts of flock. The guarantee was given, and deliveries began of 1½ tons each. The sixteenth delivery, which took place on April 28, 1932, was found on analysis to contain considerably more than thirty parts in 100,000 of chlorine. Two further deliveries were made before this was ascertained by the buyers. The buyers then claimed to rescind the whole contract, but during negotiations which took place they accepted two further instalments. All the instalments, with the exception of that of April 28, were in conformity with the contract. Evidence was given, which the learned judge accepted, that all the flock which the sellers had in stock at the relevant dates was well within the government standard. The judge was satisfied that the sellers' business was well and carefully conducted, but he held that the buyers, as prudent traders, were entitled to say that similar defects might occur again, although he considered the occurrence a very extraordinary thing. He held, therefore, that the buyers were justified in treating the sellers as having repudiated the contract, and in refusing to accept, or pay for, any further instalments. He, therefore, dismissed the action, and the sellers appealed.

Beyfus, *K.C.*, and *Roger Willis* for the sellers.
J. W. Morris for the buyers.

LORD HEWART, C.J., delivered the following judgment of the court.—The sellers are manufacturers of rag flock and the buyers are manufacturers of furniture and bedding for which they use such flock. The action was brought by the sellers for breach by the buyers of a contract in writing dated March 14, 1932, for the sale by the sellers to the buyers of 100 tons black linsey flock at £15 2s. 6d. per ton, to be delivered in three loads a week as required. It was further stipulated that there should be a written guarantee that all flock supplied under the contract should conform to the government standard. The load was 1½ tons, or sixty bags. The government standard was that required under the Rag Flock Act, 1911, which had been fixed by regulation under the Act at not more than thirty parts chlorine in 100,000 parts of flock. The Act made it a penal offence punishable by fine for any person (inter alia) to sell or have in his possession for sale or use or to use flock not conforming to that standard. A person charged under the Act might, however, if he could prove that he bought it from someone resident in the United Kingdom under a warranty that it complied with the government standard, and that he had taken reasonable steps to ascertain, and did in fact believe in, the accuracy of the warranty, bring the seller before the court by information and transfer the burden of the offence to him.

The sellers duly gave the written guarantee required by the contract, and deliveries were commenced and continued of 1½ tons each. The sixteenth of these deliveries was made on April 28, 1932, and according to the buyers' evidence was duly accepted and the stuff put into use. A further delivery was made on April 29, 1932, and another on May 2, 1932. On that latter date the buyers notified the sellers that a sample drawn from the delivery of April 28 had been analysed and showed a contamination of 250 parts of chlorine, instead of the maximum allowed by law of thirty parts. The buyers thereupon claimed to rescind the contract; the sellers protested, and some negotiations took place during which two more deliveries were tendered and taken, each of 1½ tons. Eventually the buyers adhered to their claim, and the writ was issued by the sellers claiming damages on the ground that the refusal of the buyers to take further deliveries was wrongful.

No complaint is made of the fifteen deliveries made before April 28, 1932, or in respect of the four deliveries made after that date. The buyers made no claim to damages in respect of the delivery said to be defective, because it had all been used before the report was received on the sample. The learned judge finds that the sample was taken in the usual way, namely, one handful drawn from one bag of the sixty bags which constituted the delivery, and he held that the buyers were entitled, applying the ordinary rules of probability, to say that such must be the condition of the whole or substantially the whole of that delivery of 1½ tons. On the other hand, the sellers produced analyses of the flock they had in store from time to time, including an analysis dated April 29, 1932, all of which showed percentages of chlorine well below the government maximum, though they could not identify any sample as drawn from the flock actually delivered to the buyers. In their evidence they described the process of manufacture by washing which they used. The learned judge finds that it would be quite wrong to make any general criticisms at all of the way in which the sellers conducted their business; he was very favourably impressed, he said, by the evidence of Mr. Jebb, who gave evidence for them; he seemed to the judge a careful, scrupulous, and honourable man. Mr. Jebb could give no explanation of so gross a degree of contamination and was disposed to think some mistake had been made as to the sample. The learned judge, however, finding that the sample must be taken as a fair test of the delivery, held that the buyers as prudent traders could properly say to themselves, in regard to the defective delivery: "It might happen again." He nowhere finds that it was a reasonable inference that it would happen again. On the contrary, he finds that the occurrence was a very extraordinary thing. We think that on the evidence, and the findings of the learned judge, the true inference of fact is that there was no reasonable probability of any such improper delivery being repeated under the contract.

The decision of this case depends on the true construction and application of s. 31 (2) of the Sale of Goods Act, 1893, which is in the following terms:

> "Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated."

That subsection was based on decisions before the Act, and has been the subject of decisions since the Act. A contract for the sale of goods by instalments is a single contract, not a complex of as many contracts as there are instalments under it. The law might have been determined in the sense that any breach of condition in respect of any one or more instalments would entitle the party aggrieved to claim that the contract has been repudiated as a whole; or, on the other hand, the law as established might have been that any breach, however serious, in respect of one or more instalments, should not have consequences extending beyond the particular instalment or instalments or affecting the contract as a whole. The subsection, however, which deals equally with breaches either by the buyer or by the seller, requires the court to decide on the merits of the particular case what effect (if any) the breach or breaches should have on the contract as a whole. The language of the Act is substantially based on the language used by Lord Selborne in *Mersey Steel and Iron Co., Ltd.* v. *Naylor, Benzon & Co.* (2), where he said (9 App. Cas. at p. 438):

> "I am content to take the rule as stated by Lord Coleridge in *Freeth* v. *Burr* (3) (L.R. 9 C.P. at p. 213), which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part."

In *Freeth* v. *Burr* (3), Lord Coleridge (29 L.T. at p. 775) stated the true question to be:

> "Whether the act and conduct of the party evince an intention no longer to be bound by the contract."

These were both cases of breach by the buyer in not making punctual payment and in each case it was clear that the buyer had some justification for the course he took. The case of breach by the seller in making defective deliveries may raise different questions. Lord Selborne, in the passage above quoted, did not refer to any question of intention, but said that what is to be examined is the conduct of the party. Lord Coleridge, in *Freeth* v. *Burr* (3), citing *Hoare* v. *Rennie* (4) on the question of a seller's breach, states thus one aspect of the rule (L.R. 9 C.P. at p. 214):

> "Where by the non-delivery of part of the thing contracted for the whole object of the contract is frustrated, the party making default renounces on his part all the obligations of the contract."

In other words, the true test will generally be, not the subjective mental state of the defaulting party, but the objective test of the relation in fact of the default to the whole purpose of the contract.

Since the Act the subsection has been discussed by a Divisional Court in *Millar's Karri and Jarrah Co. (1902), Ltd.* v. *Weddel, Turner & Co.* (5), where, the contract being for 1,100 pieces of timber, the first instalment of 750 pieces was rejected by the buyers and an arbitrator awarded

> "that the said shipment was, and is, so far from complying with the requirements of the said contract as to entitle the buyers to repudiate and to rescind the whole contract and to refuse to accept the said shipment, and all further shipments under the said contract."

The court upheld the award. Bigham, J., thus stated what, in his opinion, was the true test (100 L.T. at p. 129):

> "Thus, if a breach is of such a kind as takes place in such circumstances as reasonably to lead to the inference that similar breaches will be committed in relation to subsequent deliveries, the whole contract may there and then be regarded as repudiated and may be rescinded. If, for instance, a buyer fails to pay for one delivery in such circumstances as to lead to the inference that he will not be able to pay for subsequent deliveries; or if a seller delivers goods differing from the requirements of the contract, and does so in such circumstances as to lead to the inference that he cannot, or will not, deliver any other kind of goods in the future, the other contracting party will be under no obligation to wait to see what may happen; he can at once cancel the contract and rid himself of the difficulty."

Walton, J., concurred.

This ruling was more recently applied in *Robert A. Munro & Co., Ltd.* v. *Meyer* (6), where, under a contract for the sale of 1,500 tons of bone meal, 611 tons were delivered which were seriously adulterated. The sellers were middlemen, who relied on their suppliers, the manufacturers, for correct delivery; when the buyers discovered that the deliveries did not conform to the contract they claimed that they were entitled to treat the whole contract as repudiated by the sellers. It was held that they were right in so claiming on the ground that,

> "in such a case as this, where there is a persistent breach, deliberate so far as the manufacturers are concerned, continuing for nearly one-half of the total contract quantity, the buyer, if he ascertains what the position is, ought to be entitled to say that he will not take the risk of having put upon him further deliveries of this character." (See 143 L.T. at p. 569.)

On the other hand, in *Taylor* v. *Oakes, Roncoroni & Co.* (1), Greer, J., and the Court of Appeal refused to hold that the buyers were entitled to refuse to go on with the contract, but held that the breach was a severable breach, as it was a case where the instalment delivered failed in a slight but appreciable degree to come up to the standard required by the contract description.

With the help of these authorities we deduce that the main tests to be considered in applying the subsection to the present case, are, first, the ratio quantitatively which the breach bears to the contract as a whole, and secondly, the degree of probability or improbability that such a breach will be repeated. On the first point the delivery complained of amounts to no more than 1½ tons

A out of a contract for 100 tons. On the second point, our conclusion is that the chance of the breach being repeated is practically negligible. We assume that the sample found defective fairly represents the bulk; but bearing in mind the judge's finding that the breach was extraordinary and that the sellers' business was carefully conducted, bearing in mind also that the sellers were warned, and that the delivery complained of was an isolated instance out of twenty satisfactory deliveries
B actually made both before and after the instalment objected to, we hold that it cannot reasonably be inferred that similar breaches would occur in regard to subsequent deliveries. Indeed, we do not understand that the learned judge came to any different conclusion. He seems, however, to have decided against the sellers on a third and separate ground—that is, that a delivery not satisfying the government requirements would or might lead to the buyers being prosecuted
C under the Act. Though we think he exaggerates the likelihood of the buyers in such a case being held responsible, we do not wish to underrate the gravity to the buyers of their being even prosecuted. But we cannot follow the judge's reasoning that the bare possibility, however remote, of this happening would justify the buyers in rescinding in this case. There may, indeed, be such cases, as also cases where the consequences of a single breach of contract may be so serious as to
D involve a frustration of the contract and justify rescission, or, furthermore, the contract might contain an express condition that a breach would justify rescission, in which case effect would be given to such a condition by the court. But none of these circumstances can be predicated of this case. We think the deciding factor here is the extreme improbability of the breach being repeated, and on that ground, and on the isolated and limited character of the breach complained of,
E there was, in our judgment, no sufficient justification to entitle the respondents to refuse further deliveries as they did.

The appeal must, accordingly, be allowed and judgment entered for the appellants, with costs here and below, for damages for the respondents' breach of contract in refusing further deliveries.

Solicitors: *Edward D. K. Busby*; *Churchill, Clapham & Co.*

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[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

R. *v.* HENDON RURAL DISTRICT COUNCIL. Ex parte CHORLEY

[King's Bench Division (Lord Hewart, C.J., Avory and Humphreys, JJ.), May 18, 19, 1933]

[Reported [1933] 2 K.B. 696; 102 L.J.K.B. 658; 149 L.T. 535; 97 J.P. 210; 49 T.L.R. 482; 31 L.G.R. 332]

Town and Country Planning—Application for permission to build—Approval by council—Bias of councillor present at meeting—Certiorari—Town Planning Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 16), *ss.* 2, 4, 10.

A draft town planning scheme had been prepared for a certain area, and the Minister of Health had made an interim development order. Persons were, accordingly, entitled to apply to the local council for permission to build, and such permission, if granted, would safeguard the applicants' right to compensation under s. 10 of the Town Planning Act, 1925. A notice-board belonging to a firm of which the sole member was one C., who was also a member of the Plans and Highways Committee of the council, advertised certain premises as to let or for sale, and a provisional contract for the purchase of the site was negotiated between C., as agent for the vendor, and the agent of A., the prospective purchaser. An application for permission to build was submitted on behalf of A., and at a meeting of the council, at which C. was present and voted, it was resolved that the permission applied for be granted.

Held: (i) as the decision of the council was sufficiently near a judicial proceeding, in that it gave a contingent legal right to compensation and thereby affected the rights of subjects, a writ of certiorari would lie, calling on the council to show cause why their decision should not be quashed; and (ii), as Councillor C. clearly had an interest in the matter on which he had voted, he was to be regarded as biased, and the rule should be made absolute.

Notes. The law with regard to Town and Country Planning is now to be found in the Town and Country Planning Act, 1947, and the decisions thereunder, for which see Digest Supps. The Town Planning Act, 1925, was repealed by the Town and Country Planning Act, 1932, itself repealed by the Act of 1947.

Referred to: *Hanily* v. *Minister of Local Government and Planning*, [1952] 1 All E.R. 1293.

As to bias as a ground for the issue of certiorari, see 11 Halsbury's Laws (3rd Edn.) 67 et seq., and for cases see 16 Digest 412 et seq.

Cases referred to:

(1) *R.* v. *Electricity Comrs., Ex parte London Electricity Joint Committee Co. (1920), Ltd.*, [1924] 1 K.B. 171; 93 L.J.K.B. 390; 130 L.T. 164; 88 J.P. 13; 39 T.L.R. 715; 68 Sol. Jo. 188; 21 L.G.R. 719, C.A.; Digest Supp.

(2) *R.* v. *Dublin Corpn.* (1878), L.R.Ir. 2 C.L. 371.

(3) *R.* v. *Local Government Board for Ireland*, [1902] 2 I.R. 349; 35 I.L.T. 87; 16 Digest 414, *k*.

(4) *R.* v. *Woodhouse, Ex parte Ryder*, [1906] 2 K.B. 501; 75 L.J.K.B. 745; 95 L.T. 367, 399; 70 J.P. 485; 22 T.L.R. 603, C.A.; reversed sub nom. *Leeds Corpn.* v. *Ryder*, [1907] A.C. 420, H.L.

(5) *Everett* v. *Griffiths*, [1924] 1 K.B. 941; 93 L.J.K.B. 583; 131 L.T. 405; 88 J.P. 93; 40 T.L.R. 477; 68 Sol. Jo. 562; 22 L.G.R. 330; 30 Digest (Repl.) 176, *252*.

Rule Nisi for certiorari.

In July, 1929, one Chorley purchased premises known as The Rookery, Hendon, as a residence for himself and his family. Almost opposite these premises were premises known as the Old Brewery Stables. Resolutions for the preparation of a town-planning scheme to cover an area including both premises had been passed by the Hendon Rural District Council in 1915 and 1918, and on Aug. 28, 1923, a "preliminary statement" relating to the scheme was adopted by the council. In this "preliminary statement" both the Rookery and the Old Brewery Stables were shown as being in the residential zone, in which the only buildings which might be erected without the council's consent were the dwelling-houses and residential buildings. On Nov. 6, 1925, this "preliminary statement" was confirmed by the Minister of Health, who on that date made the Hendon Rural Town Planning Scheme (Interior Development) Order, 1925, under which persons might apply to the council for permission to build. This permission, if granted, would safeguard the applicant's right to compensation under s. 10 of the Town Planning Act, 1925. In September, 1932, a notice board belonging to a firm of which the sole member was one Cross, who was also a member of the Plans and Highways Committee of the Hendon Rural District Council, advertised that the Old Brewery Stables were to let or for sale; and early in October, 1932, plans were submitted to the council for the conversion of the Old Brewery Stables into a garage, petrol-filling station, &c., on behalf of one Archer, whose only interest in the land was a provisional contract of purchase negotiated between one Whitehead as his agent and Cross as agent for the vendor. Chorley and adjoining owners protested against the proposed development, submitting their objections to the Plans and Highways Committee. This committee passed a resolution recommending to the council that the plans submitted on behalf of Archer be approved and the permission granted. On Dec. 1, 1932, the application and plans were considered at a meeting of the council, at which Cross was present. It was proposed and seconded by two other councillors that the plans be approved, and a permit granted. The resolution was unanimously accepted without comment. On Jan. 19, 1933, at another meeting of the council at which Cross was again present, a motion for the rescission of the resolution was defeated. A rule nisi was granted at the instance of Chorley calling on the council to show cause why their decision embodied in the resolution of Dec. 1, 1932, should not be quashed on the grounds: (i) That Councillor F. H. Cross, who took part and voted (a) on the decision of the council to grant the said permission, and (b) on the motion to rescind that decision, was biased, and (or) had such an interest in the matter as to disqualify him from taking part or voting; and (ii) that the applicant for the permission, Mr. T. Archer, had no interest in the land so as to entitle him to make the application or the council to grant it.

By s. 2 of the Town Planning Act, 1925, local authorities were empowered to prepare town-planning schemes. By sub-s. (2) of that section:

> "A town-planning scheme prepared or adopted by a local authority shall not have effect unless it is approved by order of the Minister. . . ."

By sub-s. (4):

> "The Minister may by special or general order provide that where a resolution to prepare or adopt a town-planning scheme has been passed . . . the development of estates and building operations may be permitted to proceed pending the preparation, adoption, or making and approval of the town-planning scheme, subject to such conditions as may be prescribed by the order."

Section 10 provides:

> "(1) Any persons whose property is injuriously affected by the making of a town-planning scheme shall . . . be entitled to obtain compensation in respect thereof from the responsible authority. (2) A person shall not be entitled to obtain compensation under this section on account of any building erected on, or contract made or other thing done with respect to land included in a scheme, after the date of the resolution of the local authority to prepare or adopt the scheme. . . . Provided that . . . (b) this provision shall not apply as respects any building erected, contract made, or other thing done in accordance with a permission granted in pursuance of an order of the Minister allowing the development of estates and building operations to proceed pending the prepara-

> tion, adoption, or making and approval of the scheme, and the carrying out of works so permitted shall not prejudice any claim of any person to compensation in respect of property injuriously affected by the making of the scheme."

Trustram Eve showed cause.

John Hodson, in support of the rule, referred to *R.* v. *Electricity Comrs., Ex parte London Electricity Joint Committee Co.* (1), *R.* v. *Dublin Corpn.* (2), *R.* v. *Local Government Board for Ireland* (3), and *R.* v. *Woodhouse, Ex parte Ryder* (4).

LORD HEWART, C.J.—I think that the rule ought to be made absolute. It seems to me to be quite clear that Councillor F. H. Cross was biased on the grounds stated in the affidavits, and that he was undoubtedly present at the making of the resolution dated Dec. 1, 1932, and I think the true conclusion is that he voted. The question remains whether that proceeding was sufficiently near a judicial proceeding to be the subject of certiorari, and upon that point I will refer only to the words of ATKIN, L.J., as he then was, in *R.* v. *Electricity Comrs.* (1) ([1924] 1 K.B. at p. 205):

> "It is to be noted that both writs [the writ of prohibition and the writ of certiorari] deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a court of justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognised as, courts of justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

I think it is clear from the affidavits that the hearing of this resolution was advertised, objections were invited and objections were considered, and further the decision at which the Hendon Rural District Council arrived was a decision which conferred, contingently at any rate, a legal right, and affected the rights of subjects. Reference has usefully been made to the earlier cases of *R.* v. *Dublin Corpn.* (2), *R.* v. *Local Government Board for Ireland* (3), and *R.* v. *Woodhouse, Ex parte Ryder* (4). I do not read the passages which were cited, and very properly cited to us, by counsel supporting the rule. They seem to me to be very much in point, and are really summed up in the passage which I have read from the judgment of ATKIN, L.J. I think, therefore, that this rule for a writ of certiorari ought to be made absolute.

AVORY, J.—I am of the same opinion, and upon the same grounds, namely, that the application for the rule succeeds on the first ground upon which it was moved, namely, that Councillor F. H. Cross who took a part and voted on the decision of the council to grant the permission in question and on the motion to rescind the said decision was biased, or had such an interest in the matter as to disqualify him from taking part in that voting.

I do not think that the application succeeds so far as the second ground is concerned, namely, that the applicant for the said permission has no interest in the land so as to entitle him to make the application, or the council to grant it. If it were necessary to show that the applicant for the said permission had an interest in the land, I think there was sufficient evidence that he had.

Upon the first ground there is really no dispute that Councillor F. H. Cross was, in fact, biased in the sense that he had such an interest in the matter as to disqualify him from taking part or voting, and that he did vote in the sense in which that term is understood I think there is no question. It was suggested by Mr. Trustram Eve that neither he nor anyone else present, in fact, voted, but, as was pointed out in one of the authorities, if that is so, then nobody voted, and no resolution was passed, but it is clear that the resolution was passed, and it can only have been passed by the votes of those who were present. The fact that the

A votes were given silently and not by any oral expression of sound seems to me to make no difference, and as he, in fact, took part and voted, the only remaining question, as my Lord has said, is whether this proceeding, the passing of this resolution, was of such a nature as to be the subject of a writ of certiorari. I think we ought to apply the principle which was laid down many years ago by BRETT, L.J., in *R.* v. *Local Government Board* (3), where he said that the jurisdic-
B tion of the court ought to be exercised liberally when dealing with matters which are not perhaps strictly judicial, but in which the rights and obligations of persons may be affected, and the quotation from the judgment in *R.* v. *Electricity Comrs.* (1) ([1924] 1 K.B. at p. 205) is, I think, sufficient to show that in this case a right of a subject was involved. In other words, I accept Mr. Hodson's argument that the effect of the resolution which was passed, and which is the subject of this rule,
C was to confer upon the applicant or the man who was then applying for the permission, namely, Archer, a right in certain events to compensation, and as the council were, therefore, dealing with a matter which affected the rights of an individual, I think the case comes within the principles laid down in the case of *R.* v. *Electricity Comrs.* (1).

For these reasons I think the rule ought to be made absolute upon the first
D ground.

HUMPHREYS, J.—I am of the same opinion. I think upon the question, whether Mr. Cross must be taken to have voted on the decision of the council to grant the permission asked for, the case of *Everett* v. *Griffiths* (5), although it is not binding upon this court, is a clear and accurate indication of the course which
E ought to be taken where it is found that in truth there was no calling by the chairman for votes on either side, but merely, as in this case, that the persons present who had the right to vote indicated either by words or conduct that they approved of the proposal that was made. I agree entirely with the judgment of McCARDIE, J., in that case.

I also agree that the rule ought not to be made absolute upon the second ground,
F and I desire to add nothing to what has been said by my brother AVORY on that matter.

With regard to the difficult question, whether the proceedings of this council on this occasion were proceedings which can be questioned by certiorari, many observations are to be found in different cases by many learned judges who have endeavoured to express the particular circumstances in which a body admittedly
G exercising not the jurisdiction of a court, but a discretion of some sort or other, should be regarded as proceedings which can be dealt with by this court by a writ of certiorari. The passage which my Lord has read from the judgment of ATKIN, L.J., in *R.* v. *Electricity Comrs.* (1) ([1924] 1 K.B. at p. 205), leaves unexplained to some extent the meaning of the words "to act judicially."

> "Wherever any body of persons having legal authority to determine questions
> H affecting the rights of subjects, and having the duty to act judicially,"—says ATKIN, L.J.—"act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division."

I think some assistance is to be obtained as to the meaning of the words "acting judicially," from the judgment of FLETCHER MOULTON, L.J., in the case of *R.* v. *Woodhouse, Ex parte Ryder* (4) ([1906] 2 K.B. at p. 535), where the learned lord
I justice said:

> "There must be the exercise of some right or duty to decide in order to provide scope for a writ of certiorari at common law."

I think it is not uninteresting to see the view which this council themselves took of the application which was made to them under s. 4 of the Town Planning Act. They thought, as appears from the affidavit of Mr. Willis, who is the clerk to the district council, evidently, that in order to do justice in this particular case so much might the rights of neighbouring persons be affected that they ought to have the application advertised in the local papers, so that if persons had any objections A to the scheme they might come forward and be heard. That was their own view. The result was that they required that the applicant should advertise at his own expense, and should state in such advertisement that any objections addressed to the council in writing would be considered by the council, and, accordingly, as Mr. Willis goes on to tell us, objections were received to the granting of this order, including, amongst others, an objection from the person who is the applicant for B the rule in this case; the application and the objections were all considered together by the Highways and Plans Committee, and then finally the matter came before the council. It is quite true that the Act of Parliament under which the council were considering this application does not require that there should be any advertisement or notice of the application or an opportunity for objections being made, or that if made they should be considered, but it seems to me to be impos- C sible to say in this case that the district council were not acting in a quasi-judicial manner in hearing and determining the application and the objections which were made for and against the request that was made by the applicant for the order.

I, therefore, agree that in this case it has been sufficiently shown that the discretion which was exercised by the members of the rural district council was a judicial discretion to justify the issue of a writ of certiorari, and it appears to me D to be beyond question that Mr. Cross, one of the persons who, as I am satisfied, did vote upon that matter, was a person with regard to whom it is right to say that he was biased.

For these reasons I agree that the rule should be made absolute.

Rule absolute.

E

Solicitors: *Chas. Rogers, Sons, & Abbott*; *Joynson-Hicks & Co.*

[*Reported by* T. R. F. Butler, Esq., *Barrister-at-Law.*]

F

COHEN *v.* WEST HAM CORPORATION

[Court of Appeal (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), May 5, 1933] G

[Reported [1933] Ch. 814; 102 L.J.Ch. 305; 141 L.T. 271; 97 J.P. 155; 31 L.G.R. 205]

Housing—House unfit for human habitation—Possibility of rendering fit at reasonable expense—Duty of local authority—Housing Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 39), *s.* 17 (1), *s.* 22. H

The medical officer of health of a borough made a report under s. 17 of the Housing Act, 1930, and under sub-s. (1) of that section he stated that seven houses in the borough were in certain respects unfit for human habitation and capable at a reasonable expense of being rendered fit. The housing committee of the borough council stated they had considered the report and recommended I that notices under s. 17 should be served on the landlord of the houses requiring him to render the houses fit for human habitation within a reasonable time. The council resolved that the housing committee's report be adopted, and the notices were served. The landlord claimed that the notices were invalid, as under that section the notices could only be valid where the local authority had considered an official representation or a report from any of their officers or other information in their possession, and had had regard to the cost of the works necessary to be done.

Held: s. 17 was wide in its terms, and did not require from the local authority a close examination or even a hearing before the authority acted; they were not bound, under s. 17 (4), to have a certificate from a surveyor and valuer before they could decide that the houses could be rendered fit for human habitation at a reasonable expense, but could themselves consider the probable cost of the outlay required and whether, after such outlay, it would be possible to let the house and get a return for the total expenditure upon the premises; the plaintiff had a right of appeal under s. 22 (1) (a), but had not exercised it; the notices were, therefore, bad and he was not entitled to the declarations claimed.

Notes. Sections 17 and 22 of the Housing Act, 1930, were repealed by the Housing Act, 1936, and re-enacted by ss. 9 and 15 of that Act. The 1936 Act was repealed by the Housing Act, 1957. See now ss. 9, 11 and 20 of the 1957 Act.

Applied: *Bacon* v. *Grimsby Corpn.*, [1949] 2 All E.R. 875.

As to repair of houses which are unfit for human habitation, see 26 HALSBURY'S LAWS (2nd Edn.) 550 et seq., and for cases see 38 DIGEST 212 et seq.

Appeal from a decision of MAUGHAM, J.

The plaintiff, Mark Cohen, was the owner of four houses, Nos. 4, 10, 12 and 14, Myra Street, West Ham. Before he became the owner under a contract dated Sept. 8, 1932, there was served on Messrs. Herapath Bros., the persons "having control of" the four houses in question, within the meaning of s. 17 (2) of the Housing Act, 1930, four notices given by the council requiring certain works to be done on those four houses. The plaintiff purchased the houses with knowledge that those notices had been served. Certain works were done on the houses and the plaintiff contended that those works were a sufficient compliance with the notices. The council did not accede to that view and the plaintiff claimed declarations that the notices were invalid and that the council were not entitled to enter upon Nos. 4, 10, 12 and 14, Myra Street, or to pull down the walls or take off the roofs thereof. He also claimed an injunction to give effect to these declarations and further or other relief.

MAUGHAM, J., held that the point that the notices were bad was not open to the plaintiff because, under s. 22 (1) (a) of the Act of 1930 he had had a right of appeal to the county court which he had not exercised, and the notices were now final and conclusive. His Lordship decided that the plaintiff was entitled to come to the High Court and seek to establish that the notices had been complied with, and he referred to a special referee for inquiry and report whether the four notices, or some of them, had been complied with. The plaintiff appealed.

Lionel Cohen, K.C., and *P. Quass* for the appellant.

R. M. Montgomery, K.C., and *Maurice Fitzgerald* for the respondents.

LORD HANWORTH, M.R.—This appeal fails and must be dismissed.

The appeal is taken from the judgment of MAUGHAM, J., who held that the notices which had been issued under s. 17 of the Housing Act, 1930, were valid, and he made an order, part of which stands in its terms. It is from that portion of the order which declared that the notices are valid that the appeal is taken, and it is asked in the notice of appeal that it may be declared "That the notices referred to in the statement of claim in this action are invalid."

The notices that are so referred to are notices in respect of seven houses—Nos. 2 to 14, of Myra Street, within the borough of West Ham. From the materials before us it appears that a report was made by the medical officer of health under s. 17 of the Housing Act, 1930, and he reported in his report of April 1, 1932, under cl. (d):

> "Under s. 17 of the Housing Act, 1930, I report the following houses as being in certain respects unfit for human habitation and capable at a reasonable expense of being rendered fit."

Under that clause you will find the numbers which I have specified in Myra Street, West Ham. Upon that the committee,

> "having considered the representation contained in cl. (d), with reference to the dwelling-houses referred to therein, recommend that notices under s. 17 of the Housing Act, 1930, be served upon the landlords requiring them within reasonable time, not being less than twenty-one days, to execute such works as will render the houses fit for human habitation."

That report came before the council on April 26, and it was resolved that the report of the housing committee be received and adopted and its recommendations be carried into effect. Consequently, on April 28, notices were served. It is said that those notices were invalid, and the ground on which that is said is that there is no sufficient proof that the council had considered what it was necessary for them to consider before ever the notices had been issued.

The simple point that is before this court is whether those notices were valid or invalid. We have come to the conclusion that they were valid. Consideration must be given to ss. 17, 18 and 19 of the Housing Act, and s. 22, which enables an appeal to be made to the county court, but makes it impossible to appeal after the lapse of twenty-one days from the date of the service of the notice. In the present case there was no appeal to the county court within the twenty-one days of the service of the notice, and the result is that it stands good in its terms if it is a valid notice under s. 17.

Section 17 would appear, at first sight, to be somewhat curiously drawn, because it contains the phrase "unless they"—that is the local authority—"are satisfied that it"—that is the dwelling-house—"is not capable at a reasonable expense of being rendered so fit." At first sight, it would seem a curious way of introducing a condition, but it must be borne in mind that s. 19 gives power to a local authority to order the demolition of an insanitary house, and "an insanitary house" is such a house as is incapable of being restored as suitable for occupation by persons of the working classes except at an expenditure which makes it impossible or impracticable to let the house after those repairs on anything like economic terms. That word "unless," that I have referred to, indicates that there are two courses before the council, either to serve a notice requiring the repair of an insanitary house on the basis that the repairs can be carried into effect on an economic basis, or to issue a demolition order under s. 19, where there can be no repair of the house on an economic basis. It appears to me that s. 17 is intended to be a wide section, giving the local authority power to act. It does not require that there shall be a close examination, or, indeed, a hearing, before the initiative is taken by the local authority, and the terms of the section make that plain. Where a local authority (a) upon consideration of an official representation, or (b) a report from any of their officers, or (c) other information in their possession, are satisfied that the house is unfit for human habitation, but can be repaired within the limits of expense on an economic basis, then they can serve the notice. By sub-s. (4) they are to have regard to the estimated cost of the works necessary to render it so fit, and the value which it is estimated that the dwelling-house will have when the works are completed. That word "regard" is intended to be a loose and indefinite term, and I think it enables the local authority to take into account not merely an accurate estimate made by a surveyor or an estate agent with a schedule of dilapidations, but to take into account what would probably be the cost of the outlay required, and to consider whether, after that outlay had been incurred, it would be possible to let the house and get a return for the total expenditure upon the premises. I am, therefore, of opinion that what has been done here is abundantly sufficient to justify the notice being served under s. 17, and taking the initiative under that section and not under s. 19, which is to apply where it is not possible to repair the house within the limits that I have specified.

Then comes s. 18, which provides that if a notice has been served under s. 17,

> "then, after the expiration of the time specified in the notice or, if an appeal

A has been made against the notice and upon that appeal the notice has been confirmed,"

and so on. That clearly indicates or contemplates that there may be an appeal after the notice has been served under s. 17 and that will be explicitly confirmed under s. 22, where a person who is aggrieved by "a notice under this part of this B Act requiring the execution of works" is empowered within twenty-one days after the service of the notice to appeal to the county court within the jurisdiction of which the premises to which the notice or order relates are situate, and to carry the matter as to whether or not the repairs are required or ought to be effected or can be economically carried out, before the county court. That being so, the notice that is indicated by s. 17 is one that can be questioned under the system laid C down which gives the approach to the county court (s. 18 and s. 22), but is the commencement of the proceedings which are to have the effect of repairing insanitary houses and give sufficient right to persons who are required to do that work to put their case before the appropriate authority. In the present case it appears that there was no appeal. The notice was issued and served; it was served after there had been information in the possession of the council. There is D no indication that they did not give proper regard to the proper costs of the works necessary, and it appears to me that upon the point which is now appealed to the court MAUGHAM, J., was right, and the appeal must be dismissed with costs.

LAWRENCE, L.J.—I agree, and will only add a few words. In my judgment, the learned judge was right in holding that the notices served by the council were E notices given pursuant to s. 17 of the Act of 1930, and therefore came within the purview of ss. 18 and 22 of the Act, with the result that, not having been appealed against, they are valid notices whether or not the council complied strictly with the requirements of sub-s. (4) of s. 17. But, speaking for myself, and assuming that under sub-s. (4) a duty was cast upon the council to estimate the cost of the works necessary to render the dwelling-house fit for human habitation and the F value which that dwelling-house would have after the works were completed, I decline, in the absence of evidence to the contrary, to hold that the council did not discharge its duty in that respect. As my Lord has pointed out, the phrase that "regard shall be had" to the estimated cost and the estimated value of the property, does not imply that the council is bound to have a certificate from a surveyor and a valuer before it can come to the requisite conclusion. In a G populous district like the one now under consideration, matters relating to insanitary dwellings must crop up very frequently, and I decline to assume that the ladies and gentlemen who compose the council would not discharge their duty and would cause notice to be served under s. 17 without satisfying themselves as to the estimated amount of the cost of the necessary repairs and as to the estimated value of the property after the work had been completed. It is obvious that before deciding to serve the notices they must take these matters into consideration, as H it would be their duty, if they were satisfied that the work could not be carried out at a reasonable expense, to make a demolition order under s. 19. Be that as it may, however, even if the council has in some way neglected its duty in the present case, I am clearly of opinion that the notices were given by the council under s. 17, and, therefore, if the owner desired to dispute the notices on the ground that they were improperly given, his proper course was to appeal against I them under s. 22.

ROMER, L.J.—I agree that this appeal fails. It was admitted by counsel for the plaintiff that it necessarily does so fail unless he can satisfy us that the notices served on his client on April 28, 1932, were not notices "under this part of this Act requiring the execution of works" within the meaning of s. 22 (1) (a) of the Housing Act, 1930. It was argued on behalf of the appellant that the notices were not notices within that paragraph because, it is alleged, the housing committee of the council merely acted upon a report of the medical officer of health and did not themselves consider the question, either as to whether the houses were unfit for A human habitation or whether they could be rendered fit for human habitation by the expenditure of a reasonable sum, that is to say, "at a reasonable expense." The report of the medical officer was that certain houses, which included the houses in question in this action, were in certain respects unfit for human habitation and were capable at a reasonable expense of being rendered fit. It appears from the minutes of the meeting of the housing committee at which it was recommended B that notices under s. 17 should be served in respect of these houses, that the representations contained in that report were considered. By the word "considered," I understand that the housing committee considered whether the representations were well founded or not. So that, there being no evidence to the contrary, I assume that the housing committee did the duty which was imposed upon them by the Act, and themselves formed an opinion upon both the points C that had been referred to.

For these reasons, it appears to me that this appeal fails, and I do not myself find it necessary, in the circumstances, therefore, to express any view upon the question of whether, supposing the housing committee had failed in their duty of considering these questions, the notice would have ceased to be a notice under s. 22 (1), or whether, indeed, when a matter arises under s. 17 of the Act, the D housing committee are obliged, in the absence of evidence pointing one way or the other, to form any opinion as to whether the houses could be rendered fit for human habitation at a reasonable expense.

Appeal dismissed.

Solicitors: *Davies, Arnold & Co.*; *George F. Thompson*, Town Clerk, West Ham. E

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

F

WHEELER AND ANOTHER *v.* NEW MERTON BOARD MILLS, LTD.

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), July 18, 1933] G

[Reported [1933] 2 K.B. 669; 103 L.J.K.B. 17; 149 L.T. 587; 49 T.L.R. 574; 26 B.W.C.C. 230]

Negligence—Defence—Volenti non fit injuria—Breach of statutory duty.

The defence of volenti non fit injuria is not applicable to a claim in respect of damage caused by breach of a statutory duty, e.g., the duty placed on the H occupier of a factory to fence dangerous machinery therein.

Baddeley v. *Earl Granville* (1) (1887), 19 Q.B.D. 423 approved.

Notes. The Factory and Workshop Act, 1901, was repealed by the Factories Act, 1937, s. 14, s. 16, and s. 131 of which correspond to s. 10 (c) and (d) and s. 135 of the Act of 1901.

The common law rule that contributory negligence (mentioned in this report) I was a complete defence to an action for negligence was abolished by the Law Reform (Contributory Negligence) Act, 1945, which provided for reduction of the damages having regard to the extent of the plaintiff's share in the responsibility for the damage.

Referred to: *Flower* v. *Ebbw Vale Steel, Iron and Coal Co.*, [1934] 2 K.B. 132; *Speed* v. *Thomas Swift & Co., Ltd.*, [1943] 1 All E.R. 539.

As to the defence of volenti non fit injuria, see 23 HALSBURY'S LAWS (2nd Edn.) 715 et seq., and for cases see 36 DIGEST (Repl.) 150 et seq.

Cases referred to:

(1) *Baddeley* v. *Earl Granville* (1887), 19 Q.B.D. 423; 56 L.J.Q.B. 501; 57 L.T. 268; 51 J.P. 822; 36 W.R. 63; 3 T.L.R. 759; 36 Digest (Repl.) 158, *834*.

(2) *Smith* v. *Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 40 W.R. 392; 7 T.L.R. 679, H.L.; 36 Digest (Repl.) 154, *812*.

(3) *Groves* v. *Lord Wimborne*, [1898] 2 Q.B. 402; 67 L.J.Q.B. 862; 79 L.T. 284; 47 W.R. 87; 14 T.L.R. 493; 42 Sol. Jo. 633, C.A.; 34 Digest 218, *1815*.

(4) *Priestley* v. *Fowler* (1837), 3 M. & W. 1; Murp. & H. 305; 7 L.J.Ex 42; 1 Jur. 987; 150 E.R. 1030; 34 Digest 71, *479*.

Appeal from the verdict and judgment for £1,586 damages for the infant plaintiff, aged eighteen, and £8 15s. 6d. for his father, in an action tried before Talbot, J., and a common jury.

The infant plaintiff was employed in the defendants' factory at a machine for cutting cardboard by sharp knives rapidly revolving. The machine was not fenced. On Dec. 23, 1931, coming back from another machine, he saw cardboard getting twisted round the knives in the machine. Without stopping the machine by means of the lever provided, he tried to pull the cardboard out. His hand was pulled under, and his arm was cut off between the elbow and the wrist.

The plaintiffs claimed from the defendants, the owners of the factory, damages for negligence and breach of statutory duty in not fencing dangerous machinery as required by s. 10 of the Factory and Workshop Act, 1901. The defendants denied negligence and breach of statutory duty, and pleaded contributory negligence, "common employment" and volenti non fit injuria. The following questions were asked of the jury, and they returned the following answers: (i) Was the machine unguarded dangerous?—Yes. (ii) Did the defendant company intend their employees to use this machine?—Yes. (iii) Were the defendant company negligent (a) in their system of instruction upon the use of the machine; (b) in causing or allowing the machine to be used in the condition in which it was on the day of the accident?—No evidence that the defendant company was negligent, but we agree that foreman was negligent. (iv) Did the matters mentioned in (i), (ii) and (iii) (a) and (b) cause the accident?—Yes. (v) Did the plaintiff undertake the work knowing the danger and taking the risk?—Yes. No question was asked or finding made on the issue of contributory negligence.

Talbot, J., after argument on these findings, gave judgment for the plaintiffs for the damages awarded, on the ground that the injury was caused by the defendants' breach of statutory duty. He held that the defendants could not upon this issue rely upon the defences of either "common employment" or of volenti non fit injuria.

The defendants appealed. Their sole contention was that the decision of the Divisional Court in *Baddeley* v. *Earl Granville* (1) that the defence of volenti non fit injuria was not applicable to a claim based on breach of absolute statutory duty, was erroneous. There was also a cross-appeal by the plaintiffs against the finding of the jury in answer to question (v).

By the Factory and Workshop Act, 1901:

> Section 10: "(1) With respect to the fencing of machinery in a factory the following provisions shall have effect: . . . (c) All dangerous parts of the machinery and every part of the mill gearings must either be securely fenced or be in such position or of such construction as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced; and (d) All fencing must be constantly maintained in an efficient state while the parts required to be fenced are in motion or use, except where they are under repair or under examination in connection with repair, or are necessarily exposed for the purpose of cleaning or lubricating or for altering the gearing or arrangements of the parts of the machine. (2) A factory in which there is a contravention of this section shall be deemed not to be kept in conformity with this Act."

Section 135: "(1) If a factory or workshop is not kept in conformity with this Act, the occupier thereof shall be liable to a fine not exceeding ten pounds and, in the case of a second or subsequent conviction in relation to a factory within two years from the last conviction for the same offence, not less than one pound for each offence." A

E. W. Cave, K.C., and *G. J. Paull* for the defendants. B
Malcolm Hilbery, K.C., and *N. R. Fox-Andrews* for the plaintiffs.

SCRUTTON, L.J.—I cannot say that this is a very satisfactory case. It arises in this way. A boy of eighteen years of age at the time of the accident was employed as what is called a "shavings boy" in a factory. There is a machine which cuts cardboard, and in doing so makes shavings, and some of the shavings C fall about the floor, and other shavings stick in the knives of the machine, and it is desirable to have them cleared out. The machine can easily be stopped by a lever, and the boy knew within a week of his employment that it could be stopped by a lever, but he says the foreman never told him to stop it. However, he knew it could be stopped by a lever, and he went on for three months taking shavings out of the knives while the machine was working, and by good luck he escaped for D three months from having his fingers cut off, but at last the evil day came when he lost his hand. He thereupon sued his employers for damages, alleging: "There is a statutory obligation on you to fence this dangerous machine. I have been injured by your not fencing it. I am a private person who has been injured by your breach of a public obligation. I claim damages." Certain questions were left to the jury. I do not understand why the question of contributory negligence E was not gone into. I am speaking after the event, and nothing that I say on this issue will have any effect on the result, but I should have thought it was one of the clearest cases of contributory negligence I have ever seen. But for some reason it was not argued and no question was left to the jury about it, and, consequently, it is much too late to say to the defendant company: "If you had run this case upon another line you would probably have won it." F

First of all, there was a question left to the jury whether the machine was dangerous. I have always had some trouble in seeing, when inspectors of factories have visited a factory over a long period and have never said a machine is dangerous, and have never prosecuted, why a jury should be asked to say it was dangerous. However, the jury have found that this machine was dangerous. Then they were asked (inter alia): "Did the plaintiff undertake the work, knowing the danger and G taking the risk?" which is another way of putting the maxim which sometimes appears in Latin, volenti non fit injuria. This question has been held by the House of Lords in *Smith* v. *Baker* (2) to be a question not of law, as it was once thought to be, but a question of fact. This question of fact was left to the jury, who answered it in the affirmative, and TALBOT, J., who tried the case most carefully, and gave a very careful and able judgment, said that he entirely agreed with the finding of H the jury on that point. I am unable to say that there were no materials upon which the jury reasonably could have come to that finding. So I approach the case with the view that it has been very unsatisfactorily tried below as to contributory negligence and so I cannot go into the question of contributory negligence. Also, I must take the view that the finding of the jury in answer to question (v) must stand, and that, therefore, the cross-appeal must be dismissed with the I ordinary consequences in the matter of costs.

Then I am confronted with this problem. If there is a breach of the statute in that a dangerous machine is not fenced, is it a defence for the employer to say: "You, the plaintiff, the workman, took the risk." I will use the exact words of the jury. "Did the plaintiff undertake the work knowing the danger and taking the risk?" Answer: "Yes." Is that a good defence for the employers? The immediate authority we have to consider in relation to that is a case which was tried fifty years ago, *Baddeley* v. *Earl Granville* (1), which was followed in 1898 by *Groves* v. *Lord Wimborne* (3), in which VAUGHAN WILLIAMS, L.J., said ([1898] 2 Q.B. at p. 415):

> "It cannot be doubted that, where a statute provides for the performance by certain persons of a particular duty, and someone belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, primâ facie and, if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty."

VAUGHAN WILLIAMS, L.J., goes on at a later stage of the judgment to say that one of the matters that excuse the employer from the charge that he has not performed his statutory duty is that there was contributory negligence on the part of the plaintiff. Counsel for the plaintiff agrees, and I do not think he could take any other position, that it is a good defence to a defendant charged with a breach of a statutory duty that the accident was caused by the contributory negligence of the plaintiff.

There remains the question whether, though contributory negligence is a satisfactory defence, is a finding that the plaintiff knew and took the risk a defence? VAUGHAN WILLIAMS, L.J., does not mention it, because he said ([1898] 2 Q.B. at p. 417):

> "I do not care whether the view of LORD ABINGER, C.B., in *Priestley* v. *Fowler* (4) (3 M. & W. 1) be taken, and the defence be based on the maxim volenti non fit injuria, or the view expressed in later cases be taken, and the defence based on an implied contract between the master and servant that the latter will take the risk of an injury caused by the negligence of a fellow servant. In either case the defence seems to me to be a defence, because it is an answer to a claim for damages by the servant and for no other reason."

He is there dealing with the question of "common employment" rather than with the simple case of volenti without any regard to the negligence of a fellow servant; and though VAUGHAN WILLIAMS, L.J., does say that contributory negligence would be a defence, I do not find that he says that volenti proved by itself would be a defence.

Turning to the earlier case of *Baddeley* v. *Earl Granville* (1), by which TALBOT, J., said that he was bound, the question is: Are we prepared to overrule a case which has stood for fifty years and has, no doubt, been the basis of many transactions? The facts in *Baddeley* v. *Earl Granville* (1) were these. The rules made under the Coal Mines Regulation Act, 1872, required the banksman to be constantly present at the mouth of the pit when men were going up and down the shaft. In that particular mine for years that rule had been broken; no banksman was present when the men went up and down the shaft. A man who was killed, the husband of the plaintiff, was aware of the fact that there was no banksman, but he continued going up and down the shaft, and when going up the shaft one night a boy aged fourteen called out an order to the engine man which, being acted on, resulted in the plaintiff's husband being killed. The question in *Baddeley's Case* (1) undoubtedly was: Is it a defence to an action against an employer for the results of a breach of statutory duty to say that the man who was injured or killed knew all about it? In *Baddeley's Case* (1) the Divisional Court held that it was not a good defence. I confess that I should have been happier if I had understood why they did so, because I cannot make out from the judgment of WILLS, J., whether he was deciding the case on the ground that it is contrary to public policy that where there is a statutory obligation on the employer, the workman should contract out of it, or whether he was deciding it on some ground which I do not understand. He in form does not hold as a matter of law that the agreement would be illegal as being against public policy, but though I do not understand the ground upon which the case proceeded, it is a case which has stood for fifty years, and it fits in with the decision in *Groves* v. *Lord Wimborne* (3). Though as I have said, I am not satisfied with the way in which this case has been tried, I am satisfied that it is too late to interfere with the decision in *Baddeley's Case* (1) which has stood in A the books for fifty years, and that disposes of the defendant company's appeal.

GREER, L.J.—I take the same view. I am satisfied that the learned judge who tried the action with a jury was right in his view that there was ample evidence for the jury, if they chose to act upon it, to answer question (v) in the way they did, namely, that the plaintiff did undertake the work knowing the B danger, and took the risk of that danger.

The cause of action here is for a breach of the term of the Factory Acts which requires dangerous machinery to be fenced, and the question for this court on the defendant company's appeal is whether the defence of volenti non fit injuria is available. If it is a good defence to the action, it was made out in the present case, and has been so found by the jury. There was a time when it was in doubt C whether, where a statute like this created an obligation enforceable by proceedings in the police court for a penalty, the obligation thereby created became a duty on the part of the employer, the person owing the obligation, to his servant, but it was decided in *Groves* v. *Lord Wimborne* (3) that that was the effect of the Factory and Workshop Act, 1878, which imposed on the employer the duty to fence dangerous machinery where injury resulted to the workman from a failure of that D duty. It does not seem to me necessarily to follow from that case that the duty so created by statute could not be met by the same kind of defences as are available in the case of a duty from one individual to another created by the common law, and if the argument which counsel for the employers has put forward in this appeal had been addressed to the court forty years ago, I should have thought there would have been a good deal to be said for the view that they ought to take a different E view of the law from that taken by the Divisional Court in *Baddeley* v. *Earl Granville* (1), which was decided in 1887, over forty-six years ago. What has happened since then? There have been innumerable contracts of employment between workmen and factory owners. There have been innumerable actions for damages in respect of accidents which happened in factories. There must have been any number of cases in which insurance premiums have been fixed on the F basis that the employer is liable to his workpeople for breach of this duty imposed by the Factory Act, and the defence of volenti non fit injuria is no answer to the claim of a workman made in respect of such a breach of duty. In these circumstances, I do not think that a decision of this respectable antiquity, although it is not as old possibly as some members of the Bench, ought now to be overruled. I think if it is to be overruled, the duty of doing so should be undertaken by the G House of Lords, and not by this court. I agree that both appeals should be dismissed with costs.

SLESSER, L.J.—I agree that this appeal fails. It was decided in 1887, in *Baddeley* v. *Earl Granville* (1), that the defence arising under the maxim volenti non fit injuria was not applicable to cases where the injury arose from a breach of a statutory duty on the part of an employer, and if that case is still good law H counsel for the employers concedes that he must fail in this appeal. This appeal in effect has become a re-hearing of *Baddeley* v. *Earl Granville* (1), and counsel asks this court to say that that authority should not be now accepted. Certainly it is not necessarily binding on us, but I agree with what my Lords have said as to the inexpediency of our disturbing a decision which has been acted on for so many years. I

Speaking for myself, apart altogether from that consideration, in my view, the principle which is there established has been accepted by this court in *Groves* v. *Lord Wimborne* (3) in 1898. I say that for the following reason. Two matters came before the court in *Groves* v. *Lord Wimborne* (3). There was a claim for damages following on the breach of a statutory duty imposed by the Factory and Workshop Act, 1878, and one question was concerned with the right of the person injured to sue in civil proceedings for damages for the injury sustained as the result of that accident caused by the failure to comply with the obligations of the

Factory Act by the employer, but the second question arose thus. It was argued that the accident arose, in effect, through the negligence of a fellow servant, and the defence of "common employment" was there urged. The Court of Appeal held that where there was a breach of a statutory duty of this sort the doctrine of common employment could not successfully be relied upon, and all three of the judges then composing this court expressed their opinion on that point.

It seems to me on principle, that if the doctrine of "common employment" could not be relied upon by reason of the absolute obligation imposed by the statute, neither can the doctrine of volenti non fit injuria. It must be remembered that the doctrine of "common employment" in its earlier stages was treated, particularly in *Priestley* v. *Fowler* (4), by Abinger, C.B., as a branch of the more general principle of volenti non fit injuria. The Chief Baron said (3 M. & W. at p. 6):

> "The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master."

The particular danger which was there dealt with, and on which the action was based, was that the plaintiff had suffered an injury by reason of the negligence of a fellow servant. Later on, as Vaughan Williams, L.J., pointed out in *Groves* v. *Lord Wimborne* (3) ([1898] 2 Q.B. at p. 418), the defence was based on the implied contract between the master and servant that the latter would take the risk of injury caused by the negligence of a fellow servant. Therefore the matter stood thus, as I see it. In *Groves* v. *Lord Wimborne* (3) it was decided that the statutory obligation to comply with the Factory Acts was such that the defence of "common employment" was not open to the employer. As Rigby, L.J., said ([1898] 2 Q.B. at p. 412):

> "Where an absolute duty is imposed upon a person by statute, it is not necessary, in order to make him liable for breach of that duty, to show negligence. Whether there be negligence or not, he is responsible quacunque via for the non-performance of the duty,"

and, therefore, whether there be negligence or not, it follows that once the duty be established, and a breach of it, the doctrine of "common employment" cannot be a defence. Volenti non fit injuria, which is not "common employment," rests, as I say, upon the same principles. "Common employment" may at least be argued as a kind of volenti non fit injuria, but any other kind of obligation which the workman takes upon himself cannot be used as a defence, if, in fact, there is a breach of the statutory duty. I, therefore, find in that case an approval of what is laid down in *Baddeley's Case* (1).

I would only add this. Counsel for the employers has asked us to say why it is (asking the question rhetorically) that in the case of contributory negligence it has been decided that the defence will lie notwithstanding that there has been a breach of the statute. The difference seems to me to be this. Where contributory negligence is found, that is a finding that the essential cause of the accident is the negligence of the plaintiff himself, and, therefore, he fails for that reason. That is not the case either in "common employment" or where the doctrine of volenti non fit injuria is set up. I agree with what has been said by counsel for the respondents as to the distinction, because in the one case there is a further intervening cause, that is the negligence of the plaintiff, which does not arise in the case of volenti non fit injuria or "common employment." I would add that I agree with what has been said by my Lords as to the cross-appeal.

Appeal and cross-appeal dismissed.

Solicitors: *Cole & Matthews*; *F. J. Stewart.*

[*Reported by* C. G. Moran, Esq., *Barrister-at-Law.*]

MILLER *v.* PILL
PILL *v.* FURSE
PILL *v.* J. MUTTON & SON

[King's Bench Division (Lord Hewart, C.J., Avory and Humphreys, JJ.), May 2, 3, 1933]

[Reported [1933] 2 K.B. 308; 102 L.J.K.B. 713; 149 L.T. 404; 97 J.P. 197; 49 T.L.R. 437; 77 Sol. Jo. 372; 31 L.G.R. 236; 29 Cox, C.C. 643]

Road Traffic—Express carriage—"Special occasion"—Annual summer trip—Weekly market—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 61 (2) *proviso.*

A party of eight persons, including the driver, was taken to the seaside on a summer outing on a Sunday in a vehicle which on weekdays was licensed to run as a stage carriage. A similar party, comprising seven of the same people, had been taken on a similar outing during each of the previous four years. All the passengers were charged separate fares.

Held: there was evidence on which it could be held that the occasion was not a "special occasion" within the meaning of the proviso to s. 61 (2) of the Road Traffic Act, 1930.

An occasion which regularly and frequently occurs cannot be a special occasion within the above proviso, and, therefore, a weekly market and a cattle market held at regular intervals are not to be regarded as "special occasions" within the meaning of the section.

Notes. The Road Traffic Act, 1930, s. 61 (2) was repealed by the Road Traffic Act, 1956. As to the use of express carriages for special occasions, see now s. 40 of and Sched. 6, Part I to the 1956 Act.

Considered: *Browning* v. *J. W. K. Watson* (*Rochester*), *Ltd.*, [1953] 2 All E.R. 775. Applied: *Wurzall* v. *Dowker*, [1953] 2 All E.R. 88.

As to the use of a public service vehicle on a special occasion, see 31 Halsbury's Laws (2nd Edn.) 731, and for cases see Digest Supps., tit. Street and Aerial Traffic, case 76q et seq. For the Road Traffic Act, 1956, s. 40 and Sched. 6, see 36 Halsbury's Statutes (2nd Edn.) 843, 862.

Cases referred to:

(1) *Birmingham & Midland Motor Omnibus Co., Ltd.* v. *Nelson*, [1933] 1 K.B. 188; 102 L.J.K.B. 47; 147 L.T. 435; 96 J.P. 385; 48 T.L.R. 620; 30 L.G.R. 390; 29 Cox, C.C. 529, D.C.; Digest Supp.

(2) *Osborne* v. *Richards*, [1933] 1 K.B. 283; [1932] W.N. Pt. I 189; 102 L.J.K.B. 44; 147 L.T. 419; 96 J.P. 377; 48 T.L.R. 622; 30 L.G.R. 385; 29 Cox, C.C. 524, D.C.; Digest Supp.

(3) *R.* v. *Inglis, Ex parte Cole-Hamilton* (1921), 90 L.J.K.B. 770; 124 L.T. 704; 85 J.P. 114; 37 T.L.R. 359, D.C.; 30 Digest (Repl.) 80, *617*.

(4) *R.* v. *Butt, Ex parte Brooke* (1922), 38 T.L.R. 537, D.C.; 30 Digest (Repl.) 80, *618*.

(5) *Devine* v. *Keeling* (1886), 50 J.P. 551; 34 W.R. 718; 2 T.L.R. 692; 30 Digest (Repl.) 79, *612*.

(6) *M'Dougall* v. *Edmund and Paterson*, 1933 S.C.(J.) 39; 1933 S.L.T. 372; Digest Supp.

Miller v. Pill

Case Stated by Cornwall justices.

An information was preferred by William Morley Pill, a superintendent of the Cornwall Police (hereinafter called the respondent), under the Road Traffic Act, 1930, against E. F. Miller, trading as E. F. Miller & Son (hereinafter called the appellant), for that he on Aug. 7, 1932, between Looe and Launceston in the county of Cornwall did unlawfully permit a public service vehicle to be used as an express carriage, he not being the holder of a road service licence authorising such services, contrary to s. 72 of the Road Traffic Act, 1930.

The following facts were proved or admitted on the hearing of the information:

The appellant was at all material times the owner of a motor omnibus for which he held a licence from the Traffic Commissioners as a stage carriage for eight passengers to run only in the Borough of Launceston as a station omnibus. The driver of the omnibus was a man called John Sandercock. The omnibus was not used as a stage carriage on Sundays as there were no Sunday trains, and the driver normally had the day off.

On Aug. 5, 1932, one John Herbert Wilfred Rowe, of Launceston, asked Sandercock if he could hire the omnibus to go to Looe with a party the following Sunday. Sandercock asked the appellant's son and manager, William Ernest Miller, who gave permission for the omnibus to be so used provided the sum of £1 12s. was paid to the appellant therefor.

Mr. Rowe collected a party which comprised eight persons. Mr. Rowe had for each of the last four years arranged a similar party comprising seven of the same people for a trip to Looe in the summer, and on this occasion he saw the people and made all the arrangements, and told the omnibus driver to pick them all up together at Westgate Street corner, Launceston.

As a result of Rowe's request, Sandercock booked the omnibus to go to Looe on Aug. 7, after receiving the consent of the appellant, and the omnibus duly went to Looe on that date, and the eight passengers were picked up at Westgate Street corner. Each of them paid 4s. 6d. to Sandercock for his or her fare. He paid to the appellant £1 12s. and retained 4s. for driving the omnibus in his time off.

The appellant authorised Sandercock to take the omnibus with Mr. Rowe's party to Looe on Sunday, Aug. 7, on payment of £1 12s.

The omnibus was stopped by a police constable at Landue Bridge, which is four miles outside Launceston, on Aug. 7 at about 9.20 p.m. In reply to questions from the constable, Sandercock stated that he had been to Looe with the passengers, who had all been charged 4s. 6d. each. Two of the passengers were not related and were not members of any party. Sandercock stated to the constable that Rowe obtained the load, and that he had gone round to see them and that the passengers paid him, the driver.

On the part of the appellant it was contended that the omnibus was not an "express carriage," as by virtue of s. 61 (2) of the Road Traffic Act, 1930, it was provided that a vehicle used on a special occasion for the conveyance of a private party does not require a road service licence, and that the omnibus on this occasion was a contract carriage as defined by s. 61 (1) of the Act; and that the appellant had only authorised its use on this occasion as a contract carriage and for use on a special occasion for conveyance of a private party; that s. 67 of the Road Traffic Act, 1930, authorises a public service vehicle licensed as a stage carriage to be used as a contract carriage; that the mere fact that the driver collected 4s. 6d. per head from the passengers did not take the case out of the proviso in s. 61 (2), and that on the evidence the occasion was clearly a special occasion and the passengers a private party.

On the part of the respondent it was contended that the appellant was guilty of the offence, and that the case came outside the exemption in s. 61 (2) of the Road Traffic Act, 1930; that there was nothing special about the occasion, and nothing private about the party; that two of the passengers themselves had admitted to the constable at the time that they were not all together in any party and that the other passengers by their silence had acquiesced in this statement; that the "load" had been collected together from one small part of a country town and that it was not surprising in the circumstances to find that the passengers, when so collected together, were in some cases friends and in other cases relatives of each other.

The justices' attention was directed to the following decisions: *Birmingham and Midland Motor Omnibus Co.* v. *Nelson* (1), *Osborne* v. *Richards* (2).

The justices, by a majority, being of opinion that, in so far as it was a question of fact for their decision, the passengers (by reason of the fact that separate fares were charged) did not comprise a private party nor was the occasion a special occasion, held that the offence charged had been committed, and they fined the appellant £1 with one guinea advocate's fee, but agreed to state a Case. A

The question on which the opinion of the court was desired was whether on the above statement of facts the justices came to a correct determination and decision in point of law. B

John Horridge for the appellant.

The Solicitor-General (*Sir Boyd Merriman, K.C.*) and *Wilfrid Lewis* for the respondent.

PILL *v.* FURSE

Case Stated by Cornwall justices.

An information was preferred by William Morley Pill, superintendent of police (hereinafter called "the appellant"), under the Road Traffic Act, 1930, against Percival James Furse (hereinafter called "the respondent"), charging him that he on Aug. 27, 1932, did unlawfully use a motor vehicle as an express carriage at Broad Street, Launceston, he not being the holder of a road service licence authorising such use, contrary to s. 72 of the Road Traffic Act, 1930. C

On the hearing of the information the following facts were proved or admitted. D

The respondent was at all material times the owner of a motor vehicle which, on Aug. 27, 1932, at Broad Street, Launceston, he permitted to be used for the purpose of carrying passengers for reward at separate fares.

There were four passengers who paid separate fares, and were being conveyed from Yeolmbridge to Launceston and back.

The respondent was not the holder of a road service licence authorising such use, as required by s. 72 of the Road Traffic Act, 1930. E

August 27 was a Saturday, on which day a regular weekly market is held at Launceston.

On the part of the appellant it was contended that the respondent had used the vehicle as an "express carriage" within the meaning of s. 61 of the Road Traffic Act, 1930, and that, therefore, he required a road service licence authorising him to use the vehicle in that manner; that the Saturday weekly market held at Launceston was not a "public gathering" or "other like special occasion" within the meaning of the proviso to s. 61 (1) of the Act, and that the vehicle concerned did not come within that or any other exception contained in the Act; and that the respondent was guilty of the offence charged. F

On the part of the respondent it was contended that he collected passengers chiefly from routes where other omnibus services did not operate; that he was ignorant of the law until the day in question; that the vehicle was used on a special occasion, and should not, therefore, be deemed to be an "express carriage," as it came within the proviso to s. 61 (1) of the Act. G

The justices were of opinion that the market was a public gathering or other like special occasion within the meaning of the Act, and dismissed the information. H

The question upon which the opinion of the court was desired was whether upon the above statement of facts the justices came to a correct determination and decision in point of law.

The Solicitor-General (*Sir Boyd Merriman, K.C.*) and *Wilfrid Lewis* for the appellant.

The respondent did not appear. I

PILL *v.* J. MUTTON & SON

Case Stated by Cornwall justices.

An information was preferred by William Morley Pill, superintendent of police (hereinafter called "the appellant"), under the Road Traffic Act, 1930, against J. Mutton & Son (hereinafter called "the respondents"), charging them that they on Aug. 30, 1930, did unlawfully permit a motor vehicle to be used as an express carriage at Broad Street, Launceston, they not being the holders of a road service licence authorising such use, contrary to s. 72 of the Road Traffic Act, 1930.

A Upon the hearing of the information the following facts were proved or admitted.

The respondents were at all material times the owners of a motor vehicle, which, on Aug. 30, 1932, at Broad Street, Launceston, they permitted to be used for the purpose of carrying passengers for reward at separate fares.

On that date there were six passengers who paid separate fares and were being conveyed from Five Lanes, Altarnum, to Launceston and back.

B The respondents were not the holders of a road service licence authorising such use as required by s. 72 of the Road Traffic Act, 1930.

August 30 was a Tuesday, on which day a regular cattle market is held at Launceston. The market is held on the second, fourth, and fifth (if any) Tuesday in every month.

On the part of the appellant it was contended that the respondents had used the C vehicle as an "express carriage" within the meaning of s. 61 of the Road Traffic Act, 1930, and that, therefore, they required a road service licence authorising them to use the vehicle in that manner; that the regular cattle market was not a "public gathering" or "other like special occasion" within the meaning of the proviso to s. 61 (1) of the Act, and that the vehicle concerned did not come within that or any other exception contained in the Act; and that the respondents were D guilty of the offence charged.

On the part of the respondents it was contended that the Act provided that a race meeting was a special occasion, that a cattle market was much more of a special occasion than a race meeting, and that the vehicle was, therefore, used on a special occasion, and should not be deemed to be an "express carriage," as it came within the proviso to s. 61 (1) of the Act.

E The justices were of opinion that the market was a public gathering or other like special occasion within the meaning of the Act, and dismissed the information.

The question upon which the opinion of the court was desired was whether upon the above statement of facts the justices came to a correct determination and decision in point of law.

The Solicitor-General (*Sir Boyd Merriman, K.C.*) and *Wilfrid Lewis* for the F appellant.

The respondent did not appear.

By the Road Traffic Act, 1930, s. 61 (1) public service vehicles are divided into "stage carriages," "express carriages" (the essential feature of both of which is the carrying of passengers for hire or reward at separate fares), and "contract G carriages," which are defined as

> "motor vehicles carrying passengers for hire or reward under a contract express or implied for the use of the vehicle as a whole at or for a fixed or agreed rate or sum: Provided that a motor vehicle adapted to carry less than eight passengers shall not be deemed to be a stage carriage or an express carriage by reason only that on occasions of race meeting, public gatherings, H and other like special occasions it is used to carry passengers at separate fares."

By sub-s. (2):

> "It is hereby declared that where persons are carried in a motor vehicle for any journey in consideration of separate payments made by them, whether to the owner of the vehicle or to any other person, the vehicle in which they are carried shall be deemed to be a vehicle carrying passengers for hire or reward I at separate fares, whether the payments are solely in respect of the journey or not: Provided that a vehicle used on a special occasion for the conveyance of a private party shall not be deemed to be a vehicle carrying passengers for hire or reward at separate fares by reason only that the members of the party have made separate payments which cover their conveyance by that vehicle on that occasion."

LORD HEWART, C.J.—This is a group of cases by no means free from difficulty which arise under Part IV of the Road Traffic Act, 1930, the subject-matter of that

Part being the classification of public service vehicles. Section 61 of the Act provides for the division of the vehicles into certain classes, and s. 67 renders it necessary for a public service vehicle to be licensed and for its user accordingly.

Miller v. Pill

It has been urged by the Solicitor-General in this case that, in considering the meaning of the words "special occasion" in the proviso to s. 61 (2) of the Act, it is reasonable to look at the way in which the same expression is used in the proviso to s. 61 (1). There the phrase is "on the occasion of race meetings, public gatherings, and other like special occasions." In my opinion, although the matter is by no means free from doubt, there is great force in that argument. I think that it would be wrong and misleading if the term "special occasion" were used in two different senses in the space of a few lines in the same section of the same Act of Parliament. The justices found as a fact that the occasion was not a special occasion, and, although there may be much to be said to the opposite effect, I have come to the conclusion that the argument for the appellant is unsuccessful and that this appeal must be dismissed. It is true that the justices also found that the passengers in the vehicle did not comprise a "private party" and that they found that for a reason which was clearly wrong, namely, because separate fares were charged, but that, I think, is immaterial.

Pill v. Furse
Pill v. Mutton & Son

In these two cases the question is very much simpler. In the first case a regular weekly market was held to be a "special occasion" within the proviso to s. 61 (1), and in the second a regularly held cattle market was also so held. In my opinion, the Solicitor-General is again right when he contends that an occasion which regularly and frequently recurs cannot be a "special occasion" within the proviso. That argument derives strength from *R.* v. *Inglis, Ex parte Cole-Hamilton* (3) and *R.* v. *Butt, Ex parte Brooke* (4). I think that these appeals ought to be allowed and that the cases should be remitted to the justices to find the charges proved and to adjudicate thereon.

AVORY, J.—In the first case of

Miller v. Pill,

I have, with some difficulty, come to the same conclusion as that expressed by my Lord. I have no doubt that the justices were wrong in holding that the passengers in the vehicle did not comprise a "private party" within the meaning of the proviso to s. 61 (2). Quite apart from the fact that they came to that decision on an erroneous ground, there was no evidence on which they could come to any conclusion other than that it was a "private party" within the meaning of the proviso. In view particularly of the judgment of Lord Coleridge, C.J., in *Devine* v. *Keeling* (5) the question whether the occasion was a "special occasion" within the meaning of the proviso appears to be so largely a question of fact that I am not prepared to differ from the finding of the justices that this annual visit to Looe was not a "special occasion." I entertain considerable doubt in arriving at the conclusion that the expression "special occasion" in the proviso to sub-s. (2) is to be read in precisely the same sense as when it occurs in the proviso to sub-s. (1). Certainly it is entirely contrary to the usual practice that the same words should be used in two different senses in the same section of an Act of Parliament, but so many things are found in Acts of Parliament that I am not satisfied that that is a conclusive answer. My inclination at one time was to think that the words "special occasion" in sub-s. (2) might have a different and more extended meaning than when they are used in sub-s. (1) and that the occasion under consideration should be regarded quoad the purpose of the private party to ascertain whether it was a "special occasion" within the proviso to the subsection. I am not, however, prepared to differ from the view that primâ facie the words ought to be read in the same sense in the two subsections. I am satisfied to decide this case on the ground that there is no sufficient reason for differing from the finding of fact by the justices that the occasion was not a "special occasion." I have some doubt whether this decision can be reconciled with the Scottish decision in *M'Dougall* v. *Edmund and Paterson* (6), but it is to be observed that the question as to what constitutes a "special occasion" in the proviso to sub-s. (2) was not argued in that case, and that there was no discussion with regard to the question whether there was any difference in the meaning of the words when used in sub-s. (2) and when they appear in sub-s. (1).

Pill *v.* Furse
Pill *v.* Mutton & Son

With regard to these two cases I entirely agree that the findings that the respective markets were "special occasions" cannot be reconciled with the authorities that have been cited, and that the appeals should be allowed.

HUMPHREYS, J.—In the two cases of

Pill *v.* Furse
Pill *v.* Mutton & Son

I desire to say nothing except that I agree entirely with the result arrived at by the other members of the court, and with their reasons therefor.

Miller *v.* Pill

In this case I think that the point as to the meaning to be given to the words "special occasion" in the proviso to sub-s. (2) is one of very great difficulty. As Talbot, J., observed in his judgment in *Birmingham and Midland Omnibus Co.* v. *Nelson* (1) ([1933] 1 K.B. at p. 197) it is obvious that it may be very difficult to decide in particular cases whether a vehicle is used "on a special occasion for the conveyance of a private party." So far as "private party" is concerned, if it was necessary to decide that question, I should find the greatest possible difficulty because I cannot understand the case which the justices have stated. It appears to me to be contradictory of itself and the only conclusion that I can arrive at is that the justices, for some reason or other, intended to decide that the party was not a "private party." For that they give a reason so wrong that I doubt if it could be the reason which actuated them. The conclusion, however, at which I have arrived regarding the meaning of the words "special occasion" renders it unnecessary for me to decide whether or not this party was a "private party," although, on the bare facts stated, I agree that it appears to have all the necessary elements of a "private party." On the point whether the occasion was a "special occasion" within the proviso to s. 61 (2), if I were dealing with that proviso alone I should come to the conclusion that the expression "special occasion" refers to something more than the views and intentions of the members of the party and points to that which can be described as a special occasion in the locality which was the object of the journey being undertaken. And when I turn to the proviso to sub-s. (1) of the same section and find there the same expression as part of the phrase "on occasions of race meetings, public gatherings, and other like special occasions," it appears to me to be a strong indication that the view which I have expressed is right and that the words in sub-s. (2) should be accorded the same meaning as in sub-s. (1) from which they are separated by only a few lines of print. Accordingly, I agree that a "special occasion" within the meaning of sub-s. (2) must be a special occasion occurring at the place which is the object of the excursion, or, in other words, something of the same nature as the kind of occasion referred to in the proviso to sub-s. (1), and that it is not enough that it should be a special occasion from the point of view of the persons forming the private party. I agree that the matter is by no means free from difficulty, but in the result I agree with the other members of the court.

Orders accordingly.

Solicitors: *Hedley, Norris & Co.*, for *Peter, Peter & Sons*, Launceston; *Treasury Solicitor.*

[*Reported by* T. R. F. Butler, Esq., *Barrister-at-Law.*]

NEWTON *v.* HARDY AND ANOTHER

[KING'S BENCH DIVISION (Swift, J.), June 21, 22, 23, 26, 1933]

[Reported 149 L.T. 165; 49 T.L.R. 522; 77 Sol. Jo. 523]

Husband and Wife—Consortium of husband—Right to consortium—Action by wife for loss of consortium of husband—Evidence required to maintain action.

A married woman has a legal right to the consortium of her husband and has a cause of action for damages against a third party who, without justification, destroys that consortium.

Dictum of SCRUTTON, L.J., in *Place* v. *Searle* (1) [1932] 2 K.B. at p. 512 applied.

To sustain such a cause of action it is not enough for the plaintiff to prove that the third party has made the plaintiff's husband leave her or has alienated his affection from her, or even that the third party has committed adultery with him. The plaintiff must prove that the third party caused, procured, induced, or enticed the husband to cease from cohabiting and consorting with the plaintiff as opposed to proving merely that the husband voluntarily associated with the third party.

Notes. Considered: *Best* v. *Samuel Fox & Co., Ltd.*, [1951] 2 All E.R. 116.

As to the right of action by a wife for loss of her husband's consortium, see 19 HALSBURY'S LAWS (3rd Edn.) 821, and for cases see 27 DIGEST (Repl.) 88 et seq.

Cases referred to:

(1) *Place* v. *Searle*, [1932] 2 K.B. 497; 101 L.J.K.B. 465; 147 L.T. 188; 48 T.L.R. 428, C.A.; Digest Supp.

(2) *Gray* v. *Gee* (1923), 39 T.L.R. 429; 27 Digest (Repl.) 90, *681*.

(3) *Lynch* v. *Knight* (1861), 9 H.L.Cas. 577; 5 L.T. 291; 8 Jur.N.S. 724; 11 E.R. 854, H.L.; 27 Digest (Repl.) 90, *680*.

(4) *Butterworth* v. *Butterworth and Englefield*, [1920] P. 126; 89 L.J.P. 151; 122 L.T. 804; 36 T.L.R. 265; 27 Digest (Repl.) 545, *4936*.

(5) *Wright* v. *Cedzich* (1930), 43 C.L.R. 493; 36 A.L.R. 105; 3 A.L.J. 437; V.L.R. 141.

Action tried by SWIFT, J., without a jury.

The plaintiff, a married woman, claimed damages against the defendants, Mr. and Mrs. Hardy, for the alleged enticing away of the plaintiff's husband by the female defendant. She alleged that from the time of her marriage in 1917 she lived happily with her husband until 1932, when the female defendant enticed him to leave her and alienated his affections from her. She alleged that Mrs. Hardy frequently invited her (the plaintiff's) husband to visit her at her house, that she invited him to go away with her for a week, that she displayed her wealth and valuable jewellery to him, and that she used her sex attractions in his presence for the purpose of enticing him away. The plaintiff complained that as the result of the female defendant's enticement her husband left her, and she was deprived of his consortium, and to a great extent of his financial support. The defendants denied all the allegations of fact, and also contended that in law the action would not lie.

Doughty, K.C., and *Beney* for the plaintiff.

H. I. P. Hallett for the defendants.

SWIFT, J.—On June 1, 1932, Mr. Cyril Ramon Newton was introduced to Mrs. Pat Hardy. He was the conductor of a band performing at Scarborough Spa, and she was a lady living at Cloughton, about five-and-a-half miles from Scarborough. They were both married. Mr. Newton's wife resided at their common home in Newcastle, with their three children, and Mrs. Hardy resided at Glenharton, in Cloughton, with her husband. From the moment of their introduction events appear to have moved with considerable rapidity. Mrs. Hardy has told me that very shortly after they met Mr. Newton began to make love to her. He paid her attention and appeared to be interested in her, and she did her best, so she says, to repress his interest. In July Mrs. Newton went from Newcastle to Scarborough to stay with her husband for a week, and on the day of her arrival she was introduced to Mr. and Mrs. Hardy, whom she met in the street immediately after her arrival. Mrs. Newton and Mrs. Hardy appear to have become friendly, but the former's visit was short, and there is no evidence before me that any feminine confidences were exchanged between them. On Aug. 2 Mrs. Newton returned to Scarborough, accompanied by her children and a nurse, and went to live at a flat which had been rented by her husband for the month of August. Her evidence is —and I accept it as true—that on her arrival in Scarborough she thought that her husband's manner towards her had changed, and she gradually became suspicious that some other woman was engaging his affection. At the end of August her suspicion had crystallised into a determination that an illicit intrigue was proceeding between Mr. Newton and Mrs. Hardy. Some recriminations took place between Mrs. Newton and Mrs. Hardy, and, more particularly, between Mrs. Newton and her husband, with regard to this matter, and Mrs. Newton and her children returned to Newcastle on Aug. 30, the day before they need have done, because of the differences which had arisen. Mr. Newton's engagement at the Spa did not terminate until Sept. 15. The day after his wife left with her children for their joint home in Newcastle he went to stay with Mr. and Mrs. Hardy at their cottage at Cloughton. He remained there until Sept. 23, when he and Mrs. Hardy, together with her daughter and a friend of the daughter's, went to Southampton in order to see the daughter and her friend off on a pleasure cruise. Having started Mrs. Hardy's daughter and her friend on that cruise, Mr. Newton and Mrs. Hardy returned together to London and stayed together at the Waldorf Hotel. It is admitted by them both that for a week thereafter they occupied the same bedroom and that adulterous intercourse took place.

On Sept. 28 Mr. Newton returned to his wife at Newcastle and Mrs. Hardy returned to her husband at Cloughton. When Mr. Newton arrived at home his wife, not unnaturally, charged him with impropriety and demanded to know whether he was in love with Mrs. Hardy. He said that he was, and thereupon a scene of some violence took place. Mrs. Newton tells me—and I can quite believe it—"I saw red and I took up the poker and I tried to hit him over the head, but he held my arms until I fainted." Notwithstanding this scene they apparently lived together for five or six more days, when it was mutually agreed that he should go and find another lodging, and on Oct. 8 he left the common home and went to the Turk's Head. On Dec. 2 he took a furnished house at 45, Highbury, Jesmond, near Newcastle. From Oct. 8 to the first week in December he and Mrs. Hardy met upon two occasions, when he went to London to see her. According to the testimony of them both, no letter passed between them, but they were in telephonic communication constantly, if not daily. In the first week of December Mr. Newton, who was in his house alone, contracted influenza, and he telephoned asking Mrs. Hardy to go and see him. She did and stayed with him three or four days, and then returned to her husband at Cloughton. A few days afterwards she returned to Newcastle, since when she and Mr. Newton have been living together, and it is now admitted before me that they have been doing so ever since.

That is a brief outline of the facts, about which there is no dispute.

On April 1 in this year, about ten months after Mr. Newton and Mrs. Hardy first met, the writ in this action was issued, Mrs. Florence Austin Newton claiming damages against Pat Hardy, a married woman, and Harold John Hardy, for wrongfully enticing away the plaintiff's husband, and the first question which arises in this case is: Does such an action lie? Can a married woman sue in this court some other woman whom she has alleged has enticed her husband away? The point is a very interesting and a very difficult one. So far as I know, it has only once before arisen for practical discussion in our courts, and that was in *Gray* v. *Gee* (2), when DARLING, J., held that such an action would lie. A question which is relevant, but not exactly the same, had arisen before in *Lynch* v. *Knight* (3), and different opinions about the point had been expressed by Lord Campbell and by Lord Wensleydale, but when Darling, J., had to consider *Gray* v. *Gee* (2) he was practically unlimited by authority. The point was discussed again before McCardie, J., in *Butterworth* v. *Butterworth* (4), and McCardie, J., expressed the view that the action would not lie. It has been discussed in the High Court of Australia in *Wright* v. *Cedzich* (5), where it was held that the action would not lie.

I have been very much impressed by the argument which has been advanced in this case by counsel for the defendants, and at one time I was of opinion in the course of this case that he was right and that this action would not lie. By his argument this morning, however, counsel for the plaintiff has convinced me that I was taking a wrong view, and my own impression is that this action will lie, and that, if a wife can prove that her husband has been enticed, procured, persuaded to leave the consortium which is common between husband and wife, she is entitled to recover damages against the enticer. Had I not formed that opinion for myself, I should, sitting in this court, have held that it was the law of England, because in *Place* v. *Searle* (1) Scrutton, L.J., giving his judgment, said ([1932] 2 K.B. at p. 512):

> "It seems to be clear that at the present day a husband has a right to the consortium of his wife, and the wife to the consortium of her husband, and that each has a cause of action against a third party who, without justification, destroys that consortium."

Had I not arrived for myself, after the extremely full and able argument which has been put before me, at that same conclusion, I should have felt bound to follow the dictum of Scrutton, L.J., in that case. It is perfectly true that that was a case in which a husband was suing for the loss of consortium of his wife, and it is perfectly true that there are different arguments to be advanced according to whether it is a husband or a wife who is suing, but I cannot for myself think that now, as Lord Campbell said in *Lynch* v. *Knight* (3), the right to sue for damaging the consortium is limited to the husband. It is a mutual right of husband and wife, and, if anybody breaks into it and violates it, then either of them, in my view, is entitled to sue for damages in respect of that wrong. Slesser, L.J., expressed a similar view, and although Greer, L.J., did not mention the point, I cannot think that if he had differed from them he would not have expressed his view in the very careful and fully considered judgment which he gave.

In my view, therefore, this action lies, and, provided that she can prove her case, the plaintiff is entitled to succeed—provided she can prove her case.

Counsel, in opening the defence in this case, I will not say tried to intimidate me, because I am quite sure that he would not do anything which was not perfectly proper, but he warned me of the danger which would result if I opened the floodgates of undesirable litigation by finding in favour of the plaintiff. I am undismayed by that prospect, and quite uninfluenced by any such statement or proposition. I have not got to think of the future or of what may happen as a result of my judgment. All that I have got to do is to deal with the facts of this case, and, having held that there is a cause of action, to determine what it is and what evidence is required to prove it, and then to determine whether the evidence which has been given has or has not sustained that cause of action.

The cause of action is properly stated on the writ as being a claim for damages "for wrongfully enticing away the plaintiff's husband." That is the proper method of giving a short title to such a cause of action. When we want to see what it really means we must turn to the statement of claim, and the statement of claim says this:

> "In or about the months of August, September and October, 1932, the female defendant wrongfully, knowing the said Cyril Ramon Newton to be the lawful husband of the plaintiff, . . . procured or enticed him to cease from cohabiting and consorting with the plaintiff and alienated his affections from the plaintiff.

> The said procurement and enticement was by act and word and took place throughout the said months at and in the vicinity of Scarborough, at Newcastle-on-Tyne, and in London."

"Procured or enticed him to" what? Not to commit adultery with her, which admittedly he did, not to go and stay with her at her cottage in Cloughton or in the Waldorf Hotel in London, but to "cease from cohabiting and consorting with the plaintiff."

My attention has been called to the precedent of a declaration before 1863 which is to be found in the 3rd Edn. of Bullen and Leake. It is a declaration by a husband for enticing away his wife, and it states:

> "C.B. was and is the wife of the plaintiff, and the defendant, well knowing the same, wrongfully enticed and procured the said C.B. unlawfully and without the consent and against the will of the plaintiff to depart and remain absent from the house and society of the plaintiff."

In the present case it seems to me that the allegation against the defendant is and must be that she enticed him, not to make love to her, not to commit adultery with her, not to go and stay with her, but to give up cohabitation with his wife and to abandon the consortium to which the wife was entitled. What it is necessary to prove, in order to establish that, is, I think, laid down by Greer, L.J., in the report of *Searle's Case* (1), where he says ([1932] 2 K.B. at p. 517):

> "I agree that there is no room for dispute as to the law to be applied. It is accurately stated in the words quoted by Scrutton, L.J., from Lush on Husband and Wife, although I should like to make one or two verbal alterations in the proposition there stated. At the foot of p. 3 of that work it is said that: 'Corresponding to the husband's dominion over the person of his wife is the duty of the wife to reside and consort with her husband. This is a duty which she owes to him, and a person who tempts or entices her to violate this duty commits a wrong towards the husband for which he is entitled to recover damages; unless the person who harboured her acted from "principles of humanity." ' I think it would verbally be more accurate, if, instead of using the words 'tempts or entices her,' it were said 'procures, entices, or persuades,' and then, instead of the word 'harboured,' were substituted 'procured, enticed, or persuaded' her, the statement then continuing as in the text."

Does the evidence in this case satisfy me that Mrs. Hardy procured, enticed or persuaded Mr. Newton to break up the consortium, to cease from cohabiting and consorting with the plaintiff, and alienated his affections from the plaintiff? It is with a view to determining that that I must now fill in some of the incidents between the dates with which I opened my judgment.

On June 1, Mr. Newton and Mrs. Hardy met. I have no evidence as to their relations until July, in the first week or the second week in July. I have no evidence whatever as to their relations except their own, and that evidence amounts to this, that Mr. Newton very quickly fell in love with Mrs. Hardy and very quickly started to make love to her. There is no evidence that she did anything at all to induce him to do that. She may have been a quite willing party to have attentions paid to herself, but that is quite a different matter from what has been called by somebody in the course of this case "setting her cap" at a man.

The first evidence, apart from their own, as to what happened in June and July is given by the plaintiff, Mrs. Newton, who arrived at Scarborough for a week's holiday in July and was introduced to Mrs. Hardy. As far as I remember—I invite correction upon this point if I am wrong—she made no complaint of Mrs. Hardy's conduct during the week's visit, nor did she make any complaint of her husband's conduct. It is obvious to anybody who has heard this story that in July her husband's affections were beginning to wander. Whether they were going of their own volition or whether they were being induced and enticed to stray, they were certainly going, and when Mrs. Newton came back again in August she tells me that immediately after her arrival she realised that her husband's manner had changed towards her. His affections had gone, and throughout the month of August he was no longer the attentive and devoted husband that he had been up to her leaving in July. Obviously his feelings were estranged. Where is the evidence before me of any impropriety of an active character on the part of Mrs. Hardy during June and July? There is none. There is no evidence of any inducement to him to make love to her. I think that counsel for the defendants, in his address to me, was right when he said: "These things happen. You do not induce a person to fall in love with you and you are not persuaded to fall in love with him. These things just happen. You drift into a situation until in a moment or two when you, perhaps, least expect it the lady finds herself being violently protested to by the gentleman as to the depth of his affections." It seems to me clear that that was what really happened in this case. I have heard a good deal about Mr. Newton. I should think he has very great difficulty, from what I am told, in refraining from looking after—to put it in its mildest form—a good-looking woman. I have heard a good deal about Mrs. Hardy, and she is obviously an attractive person, and it is greatly to be deplored, but it is not a matter to be surprised at, when one finds that, with two people meeting in the circumstances in which they were meeting, one being away from his wife and family altogether for a long period, and the other living with a husband whose main interest was in tunny fish and who took, apparently, little interest in his wife or her pursuits—I say it is to be deplored, but one is not surprised when one finds that they drifted into an illicit, improper, immoral affection for each other which had the effect of alienating his affection from his wife. But Mrs. Hardy is not to pay damages for that. There is no evidence before me that she enticed him into that situation any more than that he seduced her into it. I cannot say which I think is more to blame. Morally, I suppose, they are equally to blame, and I see no reason for saying that legally she enticed him any more than that he enticed her.

But the matter, of course, does not end there. If it ended there, this action could not have been brought, for it is not enough for a woman to make another woman's husband love her or even to alienate the affection of a husband from his wife. Before there can be a cause of action she must go further, and, in the words of the statement of claim, she must "procure or entice him to cease from cohabiting and consorting with the plaintiff," and there is no doubt that long after all this Mr. Newton and his wife were cohabiting and were consorting, and, although I do not suggest that what was happening with the love making which was going on may not have a bearing upon and indeed be leading up to what happened afterwards, in that love making of itself there is certainly nothing which supports or proves this cause of action.

By the end of August, as I said in my summary of the dates, Mrs. Newton's suspicions had crystallised into the certainty that Mrs. Hardy and her husband were carrying on an improper intrigue, and she taxed them both with it, and Mrs. Hardy denied it, and their denials seem to have carried as much weight with Mrs. Newton as they deserved. She did not believe them; they were not true, and she left Scarborough and went back with her children to Newcastle. Then a very suspicious circumstance in this case happened. Mr. Newton went and stayed at Mr. and Mrs. Hardy's house. Mr. Hardy allowed his wife to invite a man who was a comparative stranger to him to their common home, and, undoubtedly, he left them for a considerable amount of time daily together. Mrs. Newton was asked whether she had any complaint to make against Mr. Hardy, and she said: No, she had not. I had to point out to her the fact that Mr. Hardy had allowed Mr. Newton to come and stay in his house with his wife at this time, and that, indeed, she might well say that she had a complaint and a serious complaint against him.

I have emphasised the fact that this action does not lie on the part of Mrs. Newton merely because Mrs. Hardy has committed adultery with her husband. She must satisfy me—it is a very difficult situation for her, but she must satisfy

A me—before I can give her a judgment, that it was Mrs. Hardy who induced the situation, and I cannot say that. How can I say that Mrs. Hardy enticed Newton any more than that Newton seduced Mrs. Hardy? They both swore to me that it was his suggestion that he should go to Southampton, that it was his suggestion that they should go and stay in London together, that it was his suggestion that they should take the bedroom in common, and, according to Mrs. Hardy, the B reason they took a bedroom together was in order that they might talk things over, and their talking things over was that she might try and persuade Mr. Newton to go back again to his wife. It is no use saying that I cannot believe that, that I must be very credulous if I do believe it, and that common sense and a knowledge of human nature acquired in this court or in the Divorce Division prevents me allowing myself to believe such a thing. But the answer is, it is the only evidence C that I have got. It is the plaintiff who has got to prove that it was Mrs. Hardy who enticed Mr. Newton, and the only evidence I have got of it is that it was he who seduced her, and I cannot say that she enticed him.

Nobody who has heard this case can help but be dreadfully sorry for Mrs. Newton, terribly sorry for her, when he got back to Newcastle. It must have been a dreadful business for her, and I have the greatest sympathy with her when D she says: "I saw red"—the greatest sympathy. A few days afterwards he left the house. How can I, on this evidence, say that there is any evidence that Mrs. Hardy persuaded him or counselled him to leave the house? The statement of claim, giving particulars as to the enticement, alleges that

> "She took a furnished house at No. 45, Highbury, Jesmond, near Newcastle, and invited the said Cyril Ramon Newton to live there with her."

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But she did not. I have got the lease. I have got them both swearing she had nothing whatever to do with taking the said house. I have here the lease showing that he took it. It is in his name, and he took it, and he was living in it for some days before she came and joined him at it.

This cause of action must be based upon what happened on Oct. 8, when he left F his wife's house. He must have been enticed to leave it or procured to leave it. The enticement and the procurement may have been going on for a long time before, but in order that this case may succeed I must be satisfied that his leaving the house on Oct. 8 was in consequence of some advice, some persuasion, some enticement by Mrs. Hardy. It is not enough that Mrs. Hardy has committed adultery with him. It is not enough if Mrs. Hardy were to say: "If you like to G come and see me in London we will repeat the experiences of the Waldorf Hotel." It is not enough that Mrs. Hardy says: "I love you very much; come and be with me at Cloughton for a week, or let us have a week together in London." In order that this case may succeed the plaintiff must prove that his finally leaving her house and breaking off consortium on Oct. 8 was caused or procured, or induced by some action of Mrs. Hardy's as opposed to his own voluntary going in his H pursuit of Mrs. Hardy. It comes to this, she must prove that he was enticed rather than that he was the seducer, and, to my mind, she has not proved that. Sorry as I am—and indeed I am sorry for her—badly as she has been treated, wicked as the conduct of her husband and his paramour has been, I cannot find in Mrs. Newton's favour. I cannot hold that this cause of action has been made out. My relief is to know, and her gratification will be to know, that in another I court there is ample machinery for making proper allowances for her and her children, and if there are means out of which they can be paid she will be paid.

My judgment must be for the defendants with costs.

Solicitors: *Horner & Horner*; *King, Wigg, & Brightman*, for *Frank J. Lambert*, Gateshead.

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

KARFLEX, LTD. *v.* POOLE

[KING'S BENCH DIVISION (Acton and Goddard, JJ.), March 14, 1933]

[Reported [1933] 2 K.B. 251; 102 L.J.K.B. 475; 149 L.T. 140; 49 T.L.R. 418]

Hire-Purchase—Condition of agreement—Ownership of goods by "owner"—Bailment—Right of hirer to deny owner's title.

Per GODDARD, J.: The common law rule that a bailee is estopped from denying his bailor's title does not apply to hire-purchase agreements, which are not mere bailments, but bailments coupled with an option to purchase.

By a hire-purchase agreement the plaintiffs, who described themselves as the owners of a motor car, agreed to hire it to a hirer on the terms that in consideration of an initial payment of £95 the hirer should have the option of purchasing it at any time during the currency of the agreement on making certain agreed payments. On the hirer falling into arrears with his monthly payments, the plaintiffs re-took possession of the motor car and commenced this action to recover agreed compensation. Before the action was tried the hirer ascertained that at the date of the agreement the plaintiffs were not in fact the owners of the motor car, it having been sold to them by a person who had no title to it. He thereupon counter-claimed for repayment of the £95 paid by him on entering into the agreement.

Held: it was a condition of the agreement that the persons describing themselves as owners were in fact the owners of the motor car and were capable of giving a good title to it to the hirer whenever he might choose to exercise his option to purchase, that this condition went to the root of the contract, and, accordingly, that the plaintiffs were not entitled to recover any damages and the defendant was entitled to recover the amount already paid by him.

Notes. The decision in this case as to the effect of the condition must now be regarded as replaced by s. 8 (1) (b) of the Hire-Purchase Act, 1938, which provides that "in every hire-purchase agreement there shall be . . . an implied condition on the part of the owner that he shall have a right to sell the goods *at the time when the property is to pass*," but it is submitted that the decision remains as an authority as regards the consequences of a breach of the condition, and the dictum of GODDARD, J., has not been questioned.

Explained and Distinguished: *Mercantile Union Guarantee Corpn., Ltd.* v. *Wheatley*, [1937] 4 All E.R. 713. Referred to: *Warman* v. *Southern Counties Car Finance Corpn., Ltd.*, [1949] 1 All E.R. 711.

For Hire-Purchase Act, 1938, see 22 HALSBURY'S STATUTES (2nd Edn.) 1020.

Cases referred to:

(1) *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909; 1 Com. 133; 92 E.R. 107; 12 Digest (Repl.) 250, *1935*.

(2) *Helby* v. *Matthews and others*, [1895] A.C. 471; 64 L.J.Q.B. 465; 72 L.T. 841; 60 J.P. 20; 43 W.R. 561; 11 T.L.R. 446; 11 R. 232, H.L.; 3 Digest 93, *245*.

(3) *Biddle* v. *Bond* (1865), 6 B. & S. 225; 5 New Rep. 485; 34 L.J.Q.B. 137; 12 L.T. 178; 29 J.P. 565; 11 Jur.N.S. 425; 13 W.R. 561; 122 E.R. 1179; 3 Digest 101, *287*.

Appeal by plaintiffs from a decision of the Mayor's Court of London.

The plaintiffs entered into a hire-purchase agreement with the defendant, dated Nov. 12, 1931, whereby they agreed to hire to him a Riley motor car on the terms that he would pay £95 forthwith and monthly instalments of £11 18s. 1d. until the total price of £309 5s. 6d. had been paid. The agreement conferred on the defendant, in consideration of the payment of the said sum of £95, an option to purchase the car at any time during the currency of the agreement on paying to the plaintiffs such sum as should, together with the sums previously paid, make up the total of

£309 5s. 6d. It further provided that, if the defendant fell into arrears with his payments, the plaintiffs could re-take possession of the car and recover from the defendant an agreed sum as compensation for depreciation of its value. In this agreement the plaintiffs were described as the owners of the car. The defendant paid the sum of £95 as agreed, but failed to pay the first monthly instalment, due on Dec. 12, 1931. On Dec. 28, 1931, the plaintiffs re-took possession of the car, and in January, 1932, they commenced this action to recover the agreed compensation, which they reduced to £100 to give jurisdiction to the court. Before the action came on for trial, it was ascertained that the plaintiffs had purchased the car from a man who had obtained it from its true owner by fraudulent means. It therefore, had never become their property, and they could not have given the defendant a good title if he had exercised his option to purchase. The defendant thereupon counter-claimed for the return of the £95 paid on Nov. 12, 1931, alleging a total failure of consideration. JUDGE SHEWELL COOPER, in the Mayor's Court, dismissed the claim and gave judgment for the defendant on the counter-claim, and the plaintiffs appealed.

The Earl of Halsbury, *K.C.*, and *Cyril Asquith* for the plaintiffs.

Beyfus, *K.C.*, and *F. C. Laurence* for the defendant.

ACTON, J.—The plaintiffs purchased this car from a man named King, who held himself out as being, and was, apparently, reputed to be, the owner of the car, and, having done that, they entered into this agreement, which is in a sufficiently familiar form, between themselves and the defendant. To my mind, as soon as the agreement is considered, this case is really at an end.

The agreement is expressed to be made between Karflex, Ltd., hereinafter called the owners, which term shall include their successors and assigns, and Gerard Francis Poole, of an address stated, thereinafter called the hirer, which term shall include his executors and administrators. Then it recites that the owners have agreed to let to the hirer this car, which is described as a Riley Nine Saloon car, with its accessories and so forth, and that agreement is made "subject to the following terms and conditions."

All the terms and conditions which follow are of importance in considering and determining that which has to be determined in this case, that is to say, what the intention of the parties as expressed in this document was at the time the contract was made, but the salient clauses are, first, clause No. 1, which is as follows:

> "The hirer agrees to pay to the owners the sum of £95 on signing this agreement in consideration of the option of purchase hereinafter contained (which option is the subject of paras. 12 and 15 (b) hereof) and for which amount credit will only be given in the event of a purchase being effected by the hirer, or compensation for depreciation paid under cl. 6 hereof. The said sum hereinbefore mentioned shall become the absolute property of the owners."

By cl. 6:

> "The hirer agrees to pay, should he return the motor under cl. 15 (a) hereof or the owners give notice terminating the hire, or re-take the motor under cl. 8 hereof before the expiration of fifteen months from the date hereof, such further sum (in addition to any sum payable under cl. 8 hereof) as, with the total amount previously paid under cls. 1 and 2 hereof, will equal the sum of £235 by way of compensation for depreciation of the said motor . . ."

Those qualifying words "by way of compensation," &c., are the words to be emphasised in this clause. Clause No. 8 I pass over because I do not think it is necessary to read it at length, but it must be taken as read.

Clause 11 is another clause of salient importance:

> "The owners shall be at liberty to place their name plates or any words or numbers to identify the motor as their property upon any part thereof, and the hirer shall not during the currency of this agreement remove, deface, or in any way interfere with the said name plates, words, or numbers, and the

> owners shall at all times be permitted to remove the said name plates, words, or numbers, and replace it or them by another or others of similar character for a similar purpose, and any breach of this clause shall forthwith determine the owners' consent to the hirer's possession of the motor."

At the conclusion of the agreement there follow cl. 15 (a) and (b), which bind the owners:

> "The owners agree that (a) the hirer may terminate the hiring at any time by returning the motor to the owners at such address as they may direct at his own risk, cost and expense, but the hirer shall remain liable for rent up to the date of such return (including apportioned rent for any broken period) and damages, if any, for any breach of this agreement, compensation, if any, under cl. 6 hereof, and also any other moneys payable under this agreement. (b) Provided all the terms and conditions of this agreement shall have been strictly performed and observed by the hirer, the hirer may at any time during the hiring become the purchaser of the motor by paying the owners the difference between the sum of £309 5s. 6d. and the amount previously paid under cls. 1 and 2 hereof, together with all other sums (if any) which may then be due under this agreement; or if the hirer continues the hiring strictly in accordance with all the terms and conditions hereof until a total sum of £309 5s. 6d. shall have been paid under cls. 1 and 2 hereof and all other sums (if any) due under this agreement have been paid, the hirer shall become the purchaser of the motor, which shall thereupon become his sole property. But unless and until such purchase has been so effected, the motor shall be and remain the sole and absolute property of the owners, and the hirer a mere bailee thereof."

The reference to cl. 2 in s. (b) of cl. 15 leads one to observe that, with regard to the instalments, cl. 2 provides that the hirer shall pay

> "the monthly rent of £11 18s. 1d. for the hire of the motor, the first payment to be made on the 12th day of December next, and so on, month by month on the 12th of each month so long as the hirer sees fit to continue to hire."

The deposit of £95 was paid, as I understand, by Mr. Poole, the defendant, not to the plaintiffs, but to Mr. King.

The agreement having been executed, there was a default by the defendant in the payment of the first instalment, which fell due on Dec. 12, and on Dec. 28 the plaintiffs took possession of the car. On Jan. 18 they launched this action. It appeared, after the date when this action was begun, that King had never been the owner of this motor at all, but that he had come by it, it is suggested and apparently not disputed, by some fraudulent or dishonest means, and that the car was in fact the property of the Lincoln Wagon Co. who, on learning of the facts, put in a claim for it. The plaintiffs, we are told, settled with the Lincoln Wagon Co. on the basis that the Lincoln Wagon Co. had the property in the car, but there is no suggestion that they settled on the terms that they agreed with the Lincoln Wagon Co. any claim which the Wagon Co. might have against Poole for trespass in the car or depreciation to the car, their property, by reason of the user which he had been making of it.

When the action came on for trial upon these facts before the learned judge, it was contended on behalf of the defendant that this contract expressed, or implied, a condition that the plaintiffs were what they expressed themselves to be, the owners of the car, i.e., the true owners of the car, who were in a position to give an option to the hirer, which would be in existence throughout the continuance of the agreement, to become the owner himself in certain events by purchase of the car. It was contended that there was a breach of that condition, and that, by reason of the breach, not only ought the plaintiffs to fail in the claim which they had made against the defendant, but the defendant was entitled to succeed on his counter-claim against them for the return of the deposit of £95.

Cases have been referred to in some detail and with some elaboration which deal with the principles applicable to what I may describe as ordinary cases of bailment, e.g., cases of bailment to which no special or exceptional conditions or warranties expressed or implied attach. I think that counsel for the defendant is right in saying that those cases are not relevant to the decision of the present case, because, as he urges, all that should be looked at is the true meaning, according to its fair and proper construction, of this agreement of Nov. 12, 1931. He says that, if due regard be had to the express terms of that agreement, it becomes apparent that it must, according to the intention of the parties, have been a condition that the owners, as they describe themselves, were in fact the owners, and that that condition attached to the contract from the beginning and went to the root of the contract, so that upon a breach of the condition liability on the part of the defendant came to an end. In my view, that, which in substance is the view taken and expressed by the learned judge, is the correct view to take.

With regard to the claim, it is to be observed, as counsel for the defendant pointed out, that this claim is in substance a claim for the balance of money, abandoning the excess, which is expressed by cl. 6 of this agreement in certain events to become payable by way of compensation for depreciation of the motor. Therefore, apart from the existence of the condition as to the true ownership of this vehicle, we are face to face at the outset with the fact that this claim is made for depreciation of the motor in question, although it in fact is not and was not the property of the plaintiffs at the time when this contract was entered into, and that the claim is quite different from the claim which is commonly present in cases where the consideration of bailment is concerned, e.g., cases where the action is either for conversion or theft. Here it is an action upon the contract, and an action for compensation for depreciation to a motor car which was not, at the time the contract was entered into, the property of the persons who held themselves out to be the owners of it. The agreement throughout seems to me to be designed to express that the plaintiffs hold themselves out to be and are in fact the owners of this vehicle, and, in my view, it is impossible to resist the conclusion that, according to the true intention of the parties, the whole agreement was conditional upon the plaintiffs being the owners of this vehicle. I think the learned judge was right in the conclusion at which he arrived upon the proper construction of the agreement, and that, so far as the claim is concerned, the appeal against his judgment ought to be dismissed.

With regard to the appeal on the counter-claim, I confess that at some stages of the argument I felt the matter to be one of greater difficulty, but I have arrived at the conclusion that here again the judgment delivered by the learned judge was right and that the defendant was entitled to recover his £95. That seems to me to depend upon cl. 1 of the agreement, by which

> "the hirer agrees to pay to the owners the sum of £95 on signing this agreement in consideration of the option of purchase hereinafter contained."

That, according to the way in which this agreement is expressed, is contrasted with payments which are to be made for the hire of the vehicle. The payment of the £95 is there in express terms stated to be in consideration of an option of purchase which, upon the known facts of this case, the plaintiffs were never in a position to give to the defendant when they entered into the agreement or up to the time when they had in fact resumed possession of the car upon default of the payment of the first instalment. I think again, upon a true construction of this agreement, that it must be a condition that, at the time the agreement is entered into, the owners are to be in a position to give the option of purchase which may be exercisable at any moment after the agreement comes into existence and in consideration of which the agreement says the £95 is to be paid. As that was not so, in my view, there was a breach of this condition, and upon the breach of that condition, as the learned judge has held, the defendant is entitled to claim the

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return of the £95. At the time of the signing of this agreement there was no legal right or power in the plaintiffs to grant any option of purchase whatever.

I am, therefore, of opinion that the judgment of the learned judge ought to be upheld alike upon the claim and counter-claim, and the appeal is dismissed.

GODDARD, J.—I agree that the appeal fails. The case is one, especially in view of the argument addressed to us on behalf of the plaintiffs, which I think is of general importance. I think that the judgment, both as to the claim and counter-claim, can, in the particular circumstances of this case, be supported as a matter of mere construction of the agreement. That, of course, is not a point of general application, but in this agreement the plaintiffs, who have no title to this car, are described throughout as the owners of the car. Provisions are made for their being at liberty to place their name-plates and identifying numbers on the car as their property, and they undertake in the agreement an obligation to pass the property in the car to the hirer at any moment after the signing of the agreement when he chooses to pay the full amount of the purchase price, whether by means of instalments or by a lump sum, which he has an option of doing.

In those circumstances it seems to me that there is an express condition in this contract that the plaintiffs are the owners of the car. It is not a matter of warranty, it is a matter of a condition. It must be, in my judgment, a condition that they are the owners of the car which they purport to deal with in this manner by hire-purchase. That would be sufficient to deal with the claim but, having listened to the argument of counsel for the plaintiffs, I think it desirable to say that where a person is letting out furniture or goods of any description on hire-purchase he does thereby impliedly warrant, not that he will at some time become possessed of that property during the currency of the agreement, but that he is the owner of the property at the time when he lets it out.

Counsel for the plaintiffs has contended that the doctrine is perfectly well known that a bailee is estopped from denying his bailor's title to the goods, except when evicted by title paramount, and that that applies to a case of hire-purchase equally with any other contract. In my judgment, that is not so. The doctrine to which he refers is a very old doctrine. It appears to have been evolved somewhere about the year 1602, and counsel says that, if the court takes the contrary view, they are not only entrenching upon that well-known doctrine, but also upon the classical decision on bailees laid down by LORD COKE in *Coggs* v. *Bernard* (1) Be it so, it must be remembered that hire-purchase is a very modern development in commercial life, and surely it is a commonplace in commercial law that, if one finds commercial men inventing new paths of business and using documents which are, perhaps, unfamiliar when they are first brought into use but are invented to meet the requirements of a particular time or peculiar circumstances, the law has to be moulded and developed to meet the commercial developments which are taking place. It does not seem to me by any means to follow that the doctrines which were applied to ordinary simple bailments in bygone days apply to this modern class of bailment which has in it, not only the element of bailment, but also the element of sale. I say the element of sale, because, of course, it is well known, since the leading case of *Helby* v. *Matthews and others* (2), that the hire-purchase agreement, as drawn at present, is not a true contract of sale, but an option of sale. Therefore, it is a contract between the parties partly giving an option of sale and partly conferring a bailment, and I think one has only to consider that for a moment to see how fallacious it would be to try to fuse that with the hard and fast rules with regard to bailment which were laid down before any contract of hire-purchase was contemplated.

I think we may satisfy ourselves by adopting these words of BLACKBURN, J., in *Biddle* v. *Bond* (3) (6 B. & S. at p. 232):

> "The position of an ordinary bailee, where there has been no special contract or representation on his part, is very analogous to that of a tenant who, having accepted the possession of land from another, is estopped from denying his

A landlord's title, but whose estoppel ceases when he is evicted by title paramount."

The learned judge there refers to an ordinary bailee and to a case where there is no special contract or representation. Those words seem to me to be equally applicable and must be applicable to an ordinary bailor. The ordinary bailor, B where there has been no special contract or representation, is doubtless in the position of a landlord whose tenant is not able to dispute the landlord's title until evicted by title paramount, but I do not think that hire-purchase is an ordinary contract of bailment. The bailor who lets out the goods is not an ordinary bailor, nor is the customer, who agrees to pay these instalments with the hope and intention of becoming the full owner, an ordinary bailee. There are special contracts C and special representations in such an agreement, and I cannot doubt that one special representation is that the bailor is the owner of the goods at the time that he delivers them.

As was pointed out in the argument, if that were not the case, the hotel keeper who furnishes his hotel on the hire-purchase system, as so many hotel keepers do —in fact it has been recognised in bankruptcy in the "order and position" clause, D because it is so well known that hotel keepers do furnish their hotels on the hire-purchase system, that the clause does not apply to furniture—might find himself in the position, while his business was going on and he was regularly keeping up the instalments, of having the whole of the furniture swept out of his hotel by somebody coming in with a title. It is said that he would have a cause of action against the person who sold it to him, but it seems to me that no man in his E senses would enter into such a position as that except upon the condition that the person who is letting the furniture to him is, at the time he lets, the owner of the property.

Reliance was placed upon s. 12 of the Sale of Goods Act, 1893, under which in the case of an agreement of sale which contemplates a future transfer of the property, the only implied condition is a condition that the seller, when the time F arrives for the transfer of the property, will have a right to sell at that time, and it was said that there was a similar implied condition here. Section 12, however, applies only to cases where in themselves the circumstances of the contract are not such as to show a different intention. In my view, the circumstances of this contract certainly show a different intention, apart from the express clause contained in the agreement.

G There is only one other matter upon which I have a word to say, and that is the counter-claim. Like my Lord, until I considered with care cl. 1, I felt some difficulty in regard to the counter-claim, and apart from the condition in cl. 1, I am expressing no opinion as to what might be the position if a person who was not the owner, but honestly believed he was the owner, of the property let out on hire-purchase, was faced with a counter-claim by a hirer, who had enjoyed the use H of the property, we will say for half the time that the hire-purchase agreement was contemplated to run, to recover all the money he had paid without making some allowance for the use of the chattel. It will be time enough to decide that when the question arises, but in this case of a counter-claim dealing with the £95 paid on the signing of the agreement in pursuance of the option of purchase hereinafter contained, it is perfectly clear that at the time there was no option I of purchase possible, and I agree that the appeal here fails in respect of the counter-claim also.

Appeal dismissed.

Solicitors: *Speechly, Mumford, & Craig*, for *Jones & Son*, Colchester; *James & Charles Dodd.*

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

A

BARRAS v. ABERDEEN STEAM TRAWLING AND FISHING CO., LTD.

[HOUSE OF LORDS (Lord Buckmaster, Lord Blanesburgh, Lord Warrington, Lord Russell and Lord Macmillan), November 28, 29, 1932, March 17, 1933] B

[Reported [1933] A.C. 402; 102 L.J.P.C. 33; 149 L.T. 169; 49 T.L.R. 391; 77 Sol. Jo. 215; 38 Com. Cas. 279; 18 Asp.M.L.C. 384]

Shipping—Seaman—Wages—"Wreck"—Termination of service—Meaning of "wreck"—Merchant Shipping (International Labour Conventions) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 42), *s.* 1 (1). C

By the Merchant Shipping (International Labour Conventions) Act, 1925, s. 1 (1), it is provided: "Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall, notwithstanding anything in s. 158 of the Merchant Shipping Act, 1894, but subject to the provisions of this section, be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date." D

"Wreck" in this subsection means any accident occasioned by a peril of the sea which renders the ship incapable of carrying out the maritime adventure in respect of which the seaman's contract was entered into. E

The Olympic (1), [1913] P. 92, approved.

So **Held** by LORDS BUCKMASTER, WARRINGTON, RUSSELL and MACMILLAN, LORD BLANESBURGH dissentiente.

Where once certain words in an Act of Parliament have received a judicial construction in one of the superior courts, and the legislature has repeated them without any alteration in a subsequent statute, the legislature must be taken to have used them according to the meaning which a court of competent jurisdiction has given to them. F

Dictum of JAMES, L.J., in *Re Cathcart, Ex parte Campbell* (2) (1870), 5 Ch. App. 706, approved.

Per LORD MACMILLAN: This rule of interpretation affords only a valuable presumption as to the meaning of the language employed in a statute. Where a judicial interpretation is well settled and well recognised the rule ought, doubtless, to receive effect, but it must be a question of circumstances whether Parliament is to be presumed to have tacitly given statutory authority, say, to a single judgment of a competent court so as to render that judgment, however obviously wrong, unexaminable in this House. G

H

Notes. Distinguished: *Robinson Bros.* v. *Houghton Assessment Committee*, [1938] 2 All E.R. 79. Not followed: *Royal Crown Derby Porcelain Co., Ltd.* v. *Russell*, [1949] 1 All E.R. 749.

As to seamen's wages, see 30 HALSBURY'S LAWS (2nd Edn.) 216 et seq., and for cases see 41 DIGEST 228 et seq.

Cases referred to: I

(1) *The Olympic*, [1913] P. 92; 82 L.J.P. 41; 108 L.T. 592; 29 T.L.R. 335; 12 Asp.M.L.C. 318; sub nom. *Fraser and Weller* v. *Oceanic Steam Navigation Co.* (*No. 2*), 57 Sol. Jo. 388, C.A.; 41 Digest 229, *680*.

(2) *Re Cathcart, Ex parte Campbell* (1870), 5 Ch. App. 703; 23 L.T. 289; 18 W.R. 1056, L.J.; 22 Digest (Repl.) 406, *4370*.

(3) *Horlock* v. *Beal*, [1916] 1 A.C. 486; 85 L.J.K.B. 602; 114 L.T. 193; 32 T.L.R. 251; 60 Sol. Jo. 236; 13 Asp.M.L.C. 250; 21 Com. Cas. 201, H.L.; 12 Digest (Repl.) 433, *3322*.

A (4) *Webb* v. *Outtrim*, [1907] A.C. 81; 76 L.J.P.C. 25; 95 L.T. 850; 23 T.L.R. 147, P.C.; 8 Digest (Repl.) 830, *831*.

(5) *The Elizabeth* (1819), 2 Dods. 403; 165 E.R. 1527; 41 Digest 252, *939*.

(6) *The Florence* (1852), 19 L.T.O.S. 304; 16 Jur. 572; 41 Digest 846, *7091*.

(7) *Ellerman Lines, Ltd.* v. *Murray, White Star Line of Royal and United States Mail Steamers Oceanic Steam Navigation Co., Ltd.* v. *Comerford*, B [1931] A.C. 126; 36 Com. Cas. 159; sub nom. *The Croxteth Hall, The Celtic*, 100 L.J.P. 25; 144 L.T. 441; 47 T.L.R. 147; 18 Asp.M.L.C. 184, H.L.; Digest Supp.

(8) *Young & Co.* v. *Leamington Corpn.* (1883), 8 App. Cas. 517; 52 L.J.Q.B. 713; 49 L.T. 1; 31 W.R. 925; 47 J.P. 660, H.L.

(9) *Colonial Bank* v. *Whinney* (1886), 11 App. Cas. 426; 56 L.J.Ch. 43; 55 L.T. C 362; 34 W.R. 705; 2 T.L.R. 747; 3 Morr. 207, H.L.; 8 Digest (Repl.) 543, *1*.

(10) *Re Jackson, Ex parte Union Bank of Manchester* (1871), L.R. 12 Eq. 354; 40 L.J.Bcy. 57; 24 L.T. 951; 19 W.R. 872; 5 Digest 749, *6463*.

(11) *Re Thin and Flett, Ex parte Alexander* (1863), 1 De G., J. & S. 311.

(12) *Re Ehrenstrom, Ex parte Vogel* (1818), 2 B. & Ald. 219; 106 E.R. 347; 5 Digest 618, *5562*.

D (13) *Barlow* v. *Teal* (1885), 15 Q.B.D. 403; 53 L.T. 52; 54 L.J.Q.B. 400; 49 J.P. 423; 1 T.L.R. 491, D.C.; 42 Digest 642, *460*.; affirmed 15 Q.B.D. 501; 54 L.J.Q.B. 564; 54 L.T. 63; 50 J.P. 100; 34 W.R. 54, C.A.; 2 Digest 9, *24*.

(14) *North British Rail. Co.* v. *Budhill Coal and Sandstone Co.*, [1910] A.C. 116; 79 L.J.P.C. 31; 101 L.T. 609; 26 T.L.R. 79, H.L.; 42 Digest 631, *340*.

(15) *Stevens* v. *Bishop* (1888), 20 Q.B.D. 442; 57 L.J.Q.B. 283; 58 L.T. 669; 52 E J.P. 548; 36 W.R. 421; 4 T.L.R. 325; 2 Tax Cas. 249, C.A.; 28 Digest 9, *45*.

(16) *Greaves* v. *Tofield* (1880), 14 Ch.D. 563; 50 L.J.Ch. 118; 43 L.T. 100; 28 W.R. 840, C.A.; 42 Digest 669, *796*.

Appeal from an interlocutor dated Feb. 5, 1932, of the First Division of the Court of Session (LORD BLACKBURN and LORD MORISON; the Lord President dis- F senting) allowing an appeal from interlocutors of the sheriff and sheriff-substitute allowing the claim of the appellant as pursuer in the action.

The appellant was chief engineer of the steam trawler *Strathclova*, the property of the respondents. His service was to be on board the *Strathclova* to be employed "fishing trawl North Sea, Shetland, West Coast, and Faroe," from July 4, 1930, until the last day of December, 1930, or, if the boat should be at sea on that date, G until the first return to the United Kingdom thereafter. It was agreed that subject to the above stipulation the agreement might be terminated at any time before that date at the discretion of the owner. On Sept. 25, 1930, the *Strathclova*, when at a distance of one mile to one mile and a half from her home port, the harbour of Aberdeen, came into collision with another steam trawler and was considerably damaged. She was, however, able to make the harbour of Aberdeen under her H own steam, was moored near the Fish Quay, and discharged her cargo there on Sept. 26. She was then dry-docked for the purpose of effecting the repairs rendered necessary by the collision. In the meantime, on Sept. 26, the crew, including the appellant, were paid off, being told that the ship would be laid up until the repairs were completed. In the interval the appellant was unemployed. The repairs were completed at the cost of £265 on Oct. 10, and on Oct. 11 the appellant was I re-engaged and resumed his employment.

The appellant claimed under s. 1 (1) of the Merchant Shipping (International Labour Conventions) Act, 1925, the sum of £9 16s. as being the amount of wages for the fourteen days during which the *Strathclova* was under repair. By that section:

> "Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall, notwithstanding anything in s. 158 of the Merchant Shipping Act, 1894, but subject to the provisions of this section, be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date

> of the termination of the service, to receive wages at the rate to which he was entitled at that date."

The Court of Session held (the Lord President dissenting) that the damage sustained by the ship did not constitute a "wreck" within the meaning of s. 1 (1) of the Act of 1925 in respect that the period required for repairs was not so prolonged as to render the ship unable to continue within a reasonable time the adventure contemplated in the agreement with the appellant. The appellant appealed.

John A. Lillie, K.C. (of the Scottish Bar), and *Charles A. Settle* for the appellant.
T. M. Cooper, K.C., and *W. A. Murray* (both of the Scottish Bar) for the respondents.

The House took time for consideration.

March 17. **LORD BUCKMASTER** (read by LORD RUSSELL).—This is an appeal from the First Division of the Court of Session, recalling an interlocutor of the sheriff that awarded to the appellant the sum of £9 16s. as the amount of wages claimed by him under s. 1 of the Merchant Shipping (International Labour Conventions) Act, 1925. The appellant claims the benefit of that section in the following circumstances.

He is a marine engineer and the chief engineer of the steam trawler *Strathclova*, the property of the respondents. His engagement was in terms of an agreement under which he was engaged from July 4, 1930, to Dec. 30, 1930, subject to a provision that the agreement might be terminated at any time before that date at the discretion of the owner. It is common ground that it was not so terminated. On Sept. 25, while returning to Aberdeen, a collision occurred between the *Strathclova* and another steam trawler, which, though a fairly severe one, did not prevent the *Strathclova* from returning to the port of Aberdeen under her own steam on Sept. 25. The crew, including the appellant, were paid off on Sept. 26, and told that the ship would be laid up until the repairs were completed. The repairs were not completed until Oct. 20, and on the 21st the appellant resumed his duties. The amount claimed is the amount of wages for the fourteen days during which the *Strathclova* was under repair, and no question arises as to the amount. The claim is resisted by the respondents upon the ground that the *Strathclova* was not a wreck within the meaning of the Act of 1925, and that on no consideration can the phrase "wreck" or "loss" within the meaning of the Act be made to apply to the facts of the present case.

The question as to the meaning of the word "wreck" in the Merchant Shipping Act, 1894, where in s. 158 it occurs in the same context and to provide for similar conditions as those covered by the later statute, was the subject of judicial consideration in *The Olympic* (1). In that case a vessel of the White Star Line, on leaving Southampton for New York, came into collision with H.M.S. *Hawke*. She returned to Southampton, and proceeded under her own steam to Belfast, where she was fully repaired, and after nine weeks resumed her place in the Atlantic service. The Court of Appeal, from whose judgment KENNEDY, L.J., dissented, decided that in these circumstances the vessel was a wreck within the meaning of s. 158. Both VAUGHAN WILLIAMS, L.J., and LORD WRENBURY, who was then in the Court of Appeal, decided the question by considering the word "wreck" in relation to the service of the seamen, and, in the words of the last-named judge ([1913] P. at p. 107):

> "the wreck of the ship in this context, I think, is anything happening to the ship which renders her incapable of carrying out the maritime adventure in respect of which the seaman's contract was entered into."

The marked contrast between this and the ordinary maritime conception of a wreck is best illustrated in a sentence of KENNEDY, L.J., who said ([1913] P. at p. 115):

> "In my view 'wreck' means such disaster caused by collision with some external object, be it stationary, such as a rock, or moving, e.g., another ship or some substance floating in the waves, as destroys her character as a ship, and reduces her practically to the condition which, speaking from memory, I think has been judicially described in the case of a wooden ship, as 'a congeries of planks.' "

This case was referred to later in the opinions given in this House in *Horlock* v. *Beal* (3) without any expression of disapproval though without expressed assent.

The respondents here have based the main part of their case, as explained in the reasons they have given, upon the ground that *The Olympic* (1) was wrongly decided, and that the limited and relative meaning there attributed to the word "wreck" is not the true interpretation of the phrase. I do not think that the consideration of that question is open to this House. It has long been a well-established principle to be applied in the consideration of Acts of Parliament that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context, must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it. JAMES, L.J., in *Re Cathcart, Ex parte Campbell* (2) (5 Ch. App. at p. 706), expresses this rule in the following terms:

> "Where once certain words in an Act of Parliament have received a judicial construction in one of the superior courts, and the legislature has repeated them without alteration in a subsequent statute, I conceive that the legislature must be taken to have used them according to the meaning which a court of competent jurisdiction has given to them."

This opinion was expressed in a case where the learned lord justice himself said it was difficult to bring the interpretation within the words of the Act. The same opinion was expressed by LORD HALSBURY in delivering the judgment of the Judicial Committee in *Webb* v. *Outtrim* (*Attorney-General for Australia intervening*) (4), and I know of no authority that has in any way weakened the effect of this pronouncement. It is, in my opinion, a salutary rule and one necessary to confer upon Acts of Parliament that certainty which, though it is often lacking, is always to be desired.

It is, indeed, argued that in the Act of 1925 this rule need not apply, because it was an Act whose stated purpose was to give effect to a draft international convention scheduled to the statute which, by art. 2, had provided that the indemnity against unemployment to the seamen arose only where such unemployment resulted from "the loss or foundering" of the vessel, and that the words in s. 1 must be construed as the equivalent of the phrase in the convention which the statute was designed to confirm. To my mind, the answer to this is clear. At the time of the passing of the later Act, rights were enjoyed by the seamen under the Act of 1894, which, according to the judicial interpretation of the statute, conferred upon them wider and more extended rights than those contemplated by the convention, and I think the conclusion is plain, that the Act, while intending to embody the convention, did not intend to restrict or limit the rights which our seamen already possessed under the earlier statute of 1894. It does not follow that because the convention had agreed to something less than that which our seamen enjoyed, therefore we should reduce their rights down to the lower level. I am very clearly of opinion that the word "wreck" must be construed in the Act of 1925 as it was construed in the Act of 1894.

There remains the question whether the facts of this case bring it within the principle of *The Olympic* (1). In other words, whether the damage had been such as to cause such an injury that the ship cannot continue "the maritime adventure in respect of which the seamen's contract was entered into," notwithstanding that after repair she could perhaps perform some other adventure. In that case the adventure was a voyage to New York and home, if so desired, by a series of calls at ports in the South Atlantic, and she resumed her place in nine weeks. In this case the fishing trip lasts from five to fourteen days, and the ship generally sailed out after a day and a half in harbour. It was for such an adventure, lasting six months unless terminated, that the appellant was employed, and the point that arises is, was that adventure frustrated? It is impossible to establish any standard by which such a question can be tested, and this case illustrates the difficulty of deciding on which side of the line the facts cause the case to fall. Upon the whole I cannot find sufficient grounds for saying that the opinion of the majority of the Court of Session was wrong, but I think LORD MORISON was in error when he thought that the defenders had terminated the contract in exercise of their rights in this respect under the contract. It was not so terminated. Had it been, this question would not have arisen. For these reasons I think this appeal should be dismissed.

LORD BLANESBURGH (read by LORD MACMILLAN).—This cause, the details of which are before the House, was instituted in the Sheriff Court of Aberdeen really for the purpose of having the question settled by the order of your Lordships whether or not *The Olympic* (1) was rightly decided by the majority judgment of the Court of Appeal. The parties, having reached this House, find themselves confronted with the objection that that question is no longer open to discussion in any court. The decision, it is suggested, must be taken to have received the approval of the legislature in the Merchant Shipping Act, 1925. Upon that suggestion, while fully conscious of the difficulty created by competing considerations, I have reached the conclusion that the correctness or otherwise of the decision still remains a matter fully open to discussion in this House, and I am persuaded that it was wrong. I proceed at once to examine it, reserving, in the interest of convenient arrangement, until I have completed that task, the statement of my reasons for holding that the question whether it was right or wrong is still at large here.

The *Olympic*, one of the greater ocean-going liners of her day, sailed from Southampton on her voyage to New York in the forenoon of Sept. 20, 1911. Shortly after leaving port she came into collision off Cowes with H.M.S. *Hawke*, and sustained damage to her hull at a point on her starboard side 80 ft. from her stern. After the collision she dropped anchor in Cowes Roads, where she remained during the night, returning to Southampton next day under her own steam. Her damage was local, but so far serious that she could not set out again on an Atlantic voyage without some permanent repairs. After receiving temporary repairs at Southampton she proceeded, again under her own steam, to Belfast, where she remained while the permanent repairs were being executed. On Nov. 29, some nine weeks after the collision, she resumed her place on her owners' Atlantic service. That is the whole story of the disaster, set forth here in detail that it may be compared with the account of the stranding of the *Elizabeth*, to be given presently. The plaintiffs in the action were a fireman and seaman of the *Olympic* serving at the time of the collision under articles for what, in substance, was a voyage from Southampton to New York and back. On the vessel's premature return to Southampton on Sept. 22 they were discharged, with the rest of the crew, and were paid their wages to that date, but no more, the defendants contending that the payment of these wages was the measure of their liability under s. 158 of the Merchant Shipping Act, 1894, which in their view applied to the case. The plaintiffs, on the other hand, contending that s. 158 had nothing to do with them, as there had, in their view, been no wreck of the *Olympic* within the meaning of that section, claimed compensation, under s. 162 of the Act, for their wrongful discharge. That was the issue between the parties—the seamen on the one side, the owners on the other. Did s. 158 apply to the case, as the owners contended, or did it not? If it did the defendants were right. If it did not the plaintiffs, under s. 162, were entitled to recover the sum agreed.

Before the case finished a now well-known divergence of judicial view disclosed itself. But there were some fundamentals with reference to which there was never any question. It is convenient to recall these now.

The issue turned upon the introductory words of s. 158:

> "Where the service of a seaman terminates before the date contemplated by the agreement by reason of the wreck or loss of the ship . . ."

and it was never in judicial debate that the section was operative only in a case to which these words applied. Again, with reference to the words themselves, it was not in debate that the position of a seaman as regarded the termination of his service must be ascertained according to the law as at the passing of the Merchant Shipping Act, 1894, in which, as s. 185, the enactment first appeared. The legislature, said KENNEDY, L.J. ([1913] P. at p. 109):

> "is referring to two events—wreck and loss—which it regarded as being, at the time of the passing of the Act, recognised causes of termination, namely, the termination by 'wreck' and the termination by 'loss.' "

Nor, again, was it in contest that in 1894, and, perhaps, for generations before, a wreck of a ship resulting in her total loss did bring about the termination of a seaman's agreement. "A total loss by wreck happens. This operates a total loss of wages": *The Elizabeth* (5) (2 Dods. at p. 408). But clearly there had been no such total loss by wreck in the case of *The Olympic* (1). "Would anyone," KENNEDY, L.J., asks ([1913] P. at p. 115):

> "sailor or layman, say that the *Olympic*, as she lay at anchor in the Solent after the collision, or when afterwards she was navigating the waters of the Solent under steam on her way back to Southampton, was a 'wrecked' ship or describe the disaster as the 'wreck of the *Olympic*'?"

The problem to be solved, therefore, was whether in 1894 anything short of a total loss by wreck—whether in particular such a disaster as had happened to the *Olympic*—would have been recognised as a "wreck of the ship" which brought about a termination of her seamen's agreements.

Here, again, on this question it was agreed that direct authority was confined to one decision. BUCKLEY, L.J., said ([1913] P. at p. 105):

> "The one authority which deals with the meaning of 'wreck' in the sense of casualty to the vessel is *The Elizabeth* (5) . . . a decision of LORD STOWELL's, and accepted on all sides as of unimpeachable authority."

Indeed, the final difference of opinion amongst the learned judges is so directly traceable to their divergent views as to what LORD STOWELL actually decided in that case that I asked learned counsel for the appellant in the course of his argument whether the correctness or otherwise of *The Olympic* (1) decision might not definitely be ascertained by the test whether the view of *The Elizabeth* (5) taken by BUCKLEY, L.J., or that taken by KENNEDY, L.J., was correct. I understood him to agree that it might. But, whether so or not, I believe it to be a sure test, as I hope now to show. What *The Elizabeth* (5) actually decided is a matter so completely in difference between BUCKLEY, L.J., and KENNEDY, L.J., that I have thought it desirable to examine the report of the case critically. That examination, while it has disclosed the existence of expressions open, perhaps, to some ambiguity, makes, to my mind, the whole judgment, on the presently essential question, so clear as to cause surprise that it should ever have been understood in more than one sense.

The *Elizabeth*, a brig, sailed from London in June, 1818, on a voyage to St. Petersburg and back to Portsmouth. She arrived in due course at St. Petersburg, and, having loaded a cargo of hemp and deals, she sailed thence on her return voyage to England on Sept. 25. On Sept. 27, "without the default of any person," she ran on to a reef of rocks near the island of Gothland. With local assistance and the help of the crew her cargo was unloaded and the brig got off the rocks, and she was brought to Ostergam, where she was laid on shore for the purpose of being examined. Her situation was thus summed up by Lord Stowell in his judgment (2 Dods. at p. 407):

> "Here was a ship which had encountered what the law might call a semi-naufragium—full of water, as they themselves" [that is, the seamen] "state, so that they could not live on board. She is put into the hands of foreign carpenters for the course (a protracted course) of necessary repairs. It was doubtful whether she could at all receive such repairs as would restore her to a navigable state. It was by no means doubtful that she could not receive such repairs as would enable her to proceed till after the approach of spring in that climate had restored the seas to a navigable state, so as to allow her a passage."

She was ultimately found to be repairable, and in April, 1819, she arrived in England under the care of a Swedish crew picked up in Gothland. In Gothland on Oct. 21, 1818, that is nearly four weeks after the stranding, the crew had been discharged by the master. He justified his action on the ground that the *Elizabeth* could not be repaired before the Baltic was blocked with ice, and that their discharge was necessary to avoid the expense of maintaining them in idleness for the whole winter. Their wages up to that date were tendered to them and they went, or were sent, to Elsinore and there they embarked for England, where they arrived in January, 1819.

The suit was by Brokershaw, one of the seamen, but it clearly was, in effect, a test action. The plaintiff claimed his wages under his agreement up to the date of the *Elizabeth's* actual arrival in England in April, 1819, with the expenses of his journey home. That the owners were liable for these expenses was not contested, and this matter need not be further referred to. The main, indeed the only pleaded, defence of the owners was that the men had accepted their discharge at the time it was made, and on the terms offered, namely, their wages to date. On this issue Lord Stowell found against the owners; there had been no acceptance by the men. He then proceeded to deal with a further question which had not been pleaded, but which in a Court of Admiralty he felt it to be his duty to entertain and decide. Speaking of the *Elizabeth* and of the discharge of the seamen by the master, he says (2 Dods. at p. 406):

> "If . . . the master had a right to dismiss the mariners upon proper conditions, and with a due responsibility for the performance of such conditions, the want of consent on the part of mariners could not invalidate his act of authority if he possessed it. The only real question in this case is, did he possess such an authority?"

The form of this question is a little ambiguous and has, I suspect, been a source of misunderstanding. What Lord Stowell meant by it, however, appears from his answer, which was that in the circumstances the termination of the services of the men by the act of the master was in a business sense reasonable as touching the interests of both sides under the agreement, but that the discharge could only be justified as against the men if it carried with it an obligation on the part of the owners to pay proper compensation to them for their loss of wages sustained through the refusal of the owners any longer to be bound by the obligations of the agreements. In Lord Stowell's view the owners' submission that the plaintiff was only entitled to wages up to the moment of discharge by the master was as entirely inadequate as was the plaintiff's counter-contention extravagant that he was entitled to wages up to the actual date of the *Elizabeth's* arrival in England with another crew months after the only voyage ever in contemplation would have ended. Medio tutissimus ibis. The proper compensation to be paid to the plaintiff was that, with a free passage to England, he should receive the equivalent of his wages up to the date of his own arrival there in January, 1819, and Lord Stowell explained how that measure of compensation would secure for the plaintiff all that he would have received under his agreement had it been carried out as contemplated by both parties at the time it was entered into.

In order to enable a judgment to be formed upon the divergent views as to Lord Stowell's actual decision it may be well to ascertain from his judgment its ratio decidendi. It may, I think, be put thus. Where a seaman has been wrongly discharged, sans cause valable, upon idle or false pretences he has in most countries a right to his wages up to the time of the return of the vessel to her original port. But to Lord Stowell it did not seem that that result could be extended to a case where the discharge was occasioned by misfortune approaching to almost a necessity. He said:

> "I confess, it appears to me that the circumstances in which this vessel was placed did vest in (the master) an authority to discharge his crew upon proper conditions."

The "authority" with which, as I understand it, Lord Stowell treated the master as being vested was not only one conferred by the owners, but was an authority derived from the proper implications of the agreements themselves, for, as he says, it seemed hardly just, where the disaster had arisen from a vis major, an act of God, in contemplation of neither party at the date of their agreement, that the whole of the inconveniences should fall upon one party whilst a new and unexpected benefit for the other was to arise from this common calamity—the benefit of living in ease and safety on shore at his owner's expense. He said:

> "This can hardly be the true rule applicable to such a case, under all possible circumstances that the seaman can insist upon staying with the ship, be the prospect of its return ever so distant, and the most just terms offered for a return to this country. . . . I know and feel the partiality which the maritime law entertains for this class of men, but it must not override all consideration of justice to other classes, particularly to merchants, their employers; for what is oppressive to the merchant cannot but be injurious to the mariner."

Had Lord Stowell been sitting in a court of equity he might perhaps have described the result in this way. The plaintiff had shown no case for specific relief, but he had shown a right to compensation for the actual loss sustained by him through the determination of his agreement without legal justification This is the keynote of the judgment. It was never suggested, even by the owners, that the plaintiff's agreement had terminated by reason of the disaster to the *Elizabeth*. It had been determined by the master discharging him four weeks later. The owners always acknowledged liability for his wages up to the date of that discharge. It was because the discharge by the master, while, in Lord Stowell's opinion, impliedly justified in the circumstances, was only sub modo so justified that the plaintiff was held entitled to the compensation awarded him.

The substance and effect of the judgment are thus explained with, as I believe, perfect accuracy by Kennedy, L.J., in *The Olympic* (1) ([1913] P. at p 113):

> ". . . while [Lord Stowell] held that it was . . . in the interests of the shipowners 'reasonable' for the master to discharge the crew, the contract with the seamen was not dissolved—did not (to use the language of s. 158) 'terminate' upon the happening of the disaster to the ship; and that if their services were terminated by the master's act, the owner thereupon became liable to pay compensation to the seaman for the loss of the wages which he could have earned on the voyage for which he had contracted to serve. That is, in principle, exactly what the plaintiffs claim to be their right in the present case; it is the right which the law has recognised in s. 162 (where there is a limitation) that the seaman's compensation shall not exceed one month's wages. Lord Stowell, not being fettered by any such statutory limitation, awarded the plaintiffs in the case of *The Elizabeth* (5) wages up to the time of their being landed in their own country, and this was in effect, though not in intention, giving them wages for the whole of the period for which the homeward voyage of the *Elizabeth* would have lasted if she had not been damaged.

> . . . The damage to the *Elizabeth*, be it observed, was incomparably greater than that suffered by the *Olympic* in the present case. . . . It was indeed very doubtful, in the case of the *Elizabeth*, whether the vessel could ever be repaired . . . and yet in his judgment Lord Stowell would not describe even the case of the *Elizabeth* as naufragium, 'wreck,' but as semi-naufragium, a 'half-wreck,' and, as I have said, would not hold that the services of the seamen serving on her 'terminated' by the disaster, but held them to be terminable by the owner subject to the right, in Lord Stowell's time not a statutory but an equitable right, to be compensated for the loss by being paid wages as and for the period which I have stated from the report."

It is convenient at this point to compare the disaster to the *Olympic* with that to the *Elizabeth*. There must, I think, be complete agreement with Kennedy, L.J., that the mishap to the *Elizabeth* was incomparably the greater of the two. Further, in the case of *The Elizabeth* (5), "the wreck of the adventure," so much in *The Olympic Case* (1) insisted on by Buckley, L.J., was overwhelming. Its completeness in contrast with the similar "wreck" in the case of *The Olympic* (1) is as remarkable as is the fact that quite clearly in Lord Stowell's view it had no effect upon the situation one way or the other. He never even refers to it.

Now, if Lord Stowell, on the facts stated by himself, had held that the semi-naufragium to the *Elizabeth* worked a termination of her seamen's agreements, experience in this present case shows that it would have remained a serious question whether any justification for a similar finding in the case of *The Olympic* (1) was thereby disclosed. I do not, however, propose to discuss the decision from that point of view, because it is not too much to say that if Kennedy, L.J.'s interpretation of *The Elizabeth* (5) judgment be correct, the final decision in *The Olympic* (1) by a court which recognised the authority of *The Elizabeth* (5) was impossible. How, then, was it reached? This brings us to the view taken of Lord Stowell's decision by Buckley, L.J., whose judgment alone deals in detail with it. The lord justice says ([1913] P. at p. 105):

> "The result of Sir William Scott's judgment in *The Elizabeth* (5), so far as it bears upon the question here to be decided is, I think, that, inasmuch as the vessel had encountered what he called a semi-naufragium (which, as a matter of fact, means that she was full of water and required necessary repairs to restore her to a navigable state), the seaman's contract had terminated. The judgment goes on to decide what it was that under those circumstances the seaman was entitled to receive—this was held to be gratuitous conveyance home . . . and payment of his wages until he returned home. The decision is that the misfortune had arisen from vis major, the act of God, which neither party had in contemplation at the time of the contract, and that the circumstances vested in the master all authority to discharge the crew under proper conditions. The consequences of termination are now supplied by s. 158 of the Act of 1894 . . ."

I have set forth at, I fear, excessive length from the report itself both the facts in relation to the *Elizabeth* and Lord Stowell's judgment upon them in order that within the four corners of this judgment it may be made apparent that, in attributing to Lord Stowell a decision that the agreements of the *Elizabeth's* seamen had terminated as a result of her semi-naufragium, the lord justice paid no heed to any of the following reasons to the contrary:

(i) That, as already stated, it was never suggested, even by the owners, that the agreements of the seamen terminated in consequence of the disaster to the *Elizabeth*, or otherwise than as a result of the seamen's discharge from service by the master four weeks later.

(ii) That if Lord Stowell had held the agreements terminated as a result of the disaster he could not have awarded any compensation after its date. The semi-naufragium would have operated in his own words "as a total loss of wages."

(iii) That the compensation awarded the plaintiff could not have been Lord

A STOWELL's substitute for that now provided by s. 158 of the Act of 1894. The forerunner of s. 158 was passed in order to remedy the injustice under the common law in LORD STOWELL's day, that if his vessel were wrecked or lost in the course of a voyage the sailor had no right to any wages at all.

(iv) That, very clearly, the whole judgment turned on the propriety and effect of the master's discharge of the seamen four weeks after the semi-naufragium. B If that disaster had been regarded by LORD STOWELL as one terminating their agreements, there was nothing left for the master's discharge to operate upon.

(v) That so soon as it is shown from his judgment that this discharge was in LORD STOWELL's mind the critical thing, it follows that the compensation he awarded is now represented by the limited statutory provision made by s. 162 of the Act, a section which becomes operative in a case where the conditions of s. 158 C have not been fulfilled.

In the result it is, I suggest, established that the lord justice's statement of the position just set forth cannot stand in the presence of the explanation of LORD STOWELL's judgment given by KENNEDY, L.J.

But this view of *The Elizabeth* (5), which, I suggest, is not to be supported, was the foundation upon which the whole of the majority judgment in *The* D *Olympic* (1) was erected.

(i) It enabled the lord justice to treat a semi-naufragium as a proper foundation for the application of s. 158. It enabled him to disregard DR. LUSHINGTON's judgment in *The Florence* (6), where he said:

> "In shipwreck the contract continues so long as a plank can be saved,"

E and it enabled him to make a statement for which, apart from his own view of *The Elizabeth* (5), there is, so far as I have been able to find, no authority anywhere. He says:

> "The question is not whether the vessel had been so injured and damaged that she ceased to be a ship of any service to the owners, but a smaller question, namely, whether she had been so injured and damaged that she F ceased to be a ship of service for the purposes of the adventure, the subject of the seaman's contract."

But (ii), the most important of all, it opened the way for the lord justice to treat the disaster to the ship as being little more than an accident in relation to what was the essential thing," "the wreck of the adventure," a consequence to which, as I have shown, LORD STOWELL attached no relevance at all.

G Accordingly, I reach the clear conclusion that the decision in *The Olympic* (1) was fundamentally wrong, that the opposing view of KENNEDY, L.J., was right, and that if a case in which the true meaning to be attached to the words "wreck of the ship" in s. 158 had before 1925 come before this House, *The Olympic* (1) decision upon that question must have been overruled.

Here is the beginning of the second question raised by this appeal. Is there H anything in the Act of 1925 which precludes that question under s. 158 of the Act of 1894 being raised as freely now as it could have been before the later Act was passed?

Before proceeding to deal with that question I would draw the attention of the House to an observation of the learned sheriff-substitute which at more points than one is not without its relevance in relation to it. With the traditional judicial I leaning in favour of the seaman, the learned judge expresses his preference for *The Olympic* (1) decision on the ground that the construction which was thereby placed upon the word "wreck" gives to it a far more extensive and beneficial operation, so far as seamen are concerned, than does a construction which would treat "wreck" as merely a special variety of "loss." I do not know whether the sheriff-substitute in saying this had it in mind that it was on the narrow, and not on the extended, construction of "wreck" that s. 158, in a statute containing also s. 162, became a seaman's section. Up to the passing of the Act of 1925, it was invariably the owners, and never the seamen, who pressed for the extended construction. It was for the narrower view that the seamen fought in *The Olympic Case* (1) and the seaman's wife in *Horlock* v. *Beal* (3) presently to be discussed. That it was to the interest of seamen so to do is shown both by the result in *The Elizabeth* (5) before the Act of 1854 and by their claim in *The Olympic* (1) after it. It was the Act of 1925 which effected, as an entirely unforeseen by-product I suspect, the bouleversement now apparently complete when each side is found repudiating the claims formerly made on its behalf, and embracing those always previously resisted.

With all this in mind, I proceed to a consideration of the second question, and I apprehend that before it can be ascertained whether, as a result of the Act of 1925, the decision in *The Olympic* (1) has been given legislative force, it is necessary to discover what was the precise effect of that decision as pronounced, how far in that sense it had been recognised and acted upon, how far its authority was at any time undoubted, and whether that authority, such as it had been, remained intact at the date of the passing of the Act of 1925.

By the extended meaning it attached to the word "wreck" the effect of the decision was to eliminate from the essential connotation of the term any physical destruction of the ship. Where there had been no "loss" it was, of course, on construction essential, if the section was to apply at all, that "a wreck of the ship" terminating the seamen's agreements had in some sense occurred. It had occurred, in the view of VAUGHAN WILLIAMS, L.J. (108 L.T. at p. 595), if the vessel by reason of her injuries were made

> "unseaworthy for so long a time as to make the continuance of the voyage useless as a commercial venture";

it had occurred in the view of BUCKLEY, L.J. ([1913] P. at p. 106), if she had "ceased to be a ship of service for the purposes of the adventure." BUCKLEY, L.J., could not decide whether any injury, other than injury to the hull, would suffice. It was not necessary to do so in that case. But the trifling sufficiency of the injury he had in view to constitute a "wreck" is shown by the illustration which, with a great liner in his mind, he gave ([1913] P. at p. 108):

> "If, for instance, the injury be such as could be repaired within, say, twenty-four hours, it does not follow that the ship cannot perform the contemplated adventure."

VAUGHAN WILLIAMS, L.J., by making unseaworthiness the test, introduced no such reservations, and it must be presumed, I take it, that in his view any engine trouble, any broken propeller or broken engine shaft, provided only the time required for repair was sufficiently prolonged, must have been a "wreck" within the meaning of the section, entitling the owners of the ship to treat the seamen's agreements as terminated. Now, when the traditional principle is recalled—conceived, be it remembered, for the safety of ships—that a seaman's contract is not lightly dissolved either on his side or on that of the owner, it will, I think, be agreed that these are extreme views. They were, of course, vigorously dissented from at the time by KENNEDY, L.J. Did they survive up to 1925? I suggest to your Lordships that in their extreme form they had no existence after *Horlock* v. *Beal* (3).

In that case a British ship in the course of a voyage for which a British seaman had signed articles was in the port of Hamburg when war was declared against Germany on Aug. 4, 1914. She was detained by the German authorities; some months later the crew were imprisoned in Ruhleben. In 1916 the ship was still being detained. The action was by the wife of one of the seamen against the owners on an allotment note for his wages. The first question to be decided was whether there had been a "loss of the ship" within the meaning of s. 158. There was no evidence that any physical harm had befallen her, but it was suggested in the Court of Appeal by PHILLIMORE, L.J., that, in considering the meaning of the word "loss," similar considerations touching the adventure might be imported as had in *The Olympic* (1) been applied in the case of "wreck." And an argument to that effect was addressed to this House. It failed; the "loss" of the section was physical loss only. Although *The Olympic* (1) was not directly in point, the decision was referred to by Lord Loreburn, by Lord Wrenbury and by Lord Atkinson. Lord Loreburn says ([1916] 1 A.C. at p. 493):

> "We were referred to s. 158 of the Merchant Shipping Act. That section tells us what is to be done in regard to wages if there is a wreck or loss of the ship. In my opinion these words refer to physical loss. . . . If I am right in thinking that both the words used in this section, namely, 'wreck' and 'loss,' refer to the ship herself and to her physical condition, then they have no bearing on this case. I will merely add that the Court of Appeal in *The Olympic* (1) did not decide anything inconsistent with this view. They merely used the frustration of the voyage as a test by which to determine whether or not the physical injury inflicted amounted to a wreck."

Lord Wrenbury's words are not less significant. He says ([1916] 1 A.C. at p. 524):

> "I may dispose of the question upon s. 158 in a few words. It was decided in *The Olympic* (1) that there is a 'wreck of the ship' within the section where the vessel has suffered physical damage by a casualty in the nature of wreck as that she has ceased to be in a seaworthy condition to continue within a reasonable time the adventure as a commercial adventure. The same, I think, is true of the word 'loss' in the section. If there have been such a loss as that the adventure has failed as a commercial venture, the section, I think, applies. But it remains to determine the meaning of the word 'loss.' It is confined, I think, to physical loss. The wreck and the loss referred to in the section I understand to be a physical injury if it be a wreck, and a physical loss if it be a loss."

To my mind, the result of these two statements is of first importance in the present connection. First of all I take Lord Loreburn to mean that, in his opinion in order to satisfy s. 158 there must be a physical "wreck" just as there must be a physical "loss." He sees no inconsistency in *The Olympic* (1) only because "frustration"—he uses, it will be noticed, a strong word—he regards as having been invoked there merely as a test of its completeness, but in no way dispensing with the duty of proving that there had been in fact a physical wreck. His words suggest to me that, had he thought the decision went further, he would have disagreed with it.

From Lord Wrenbury we have an authoritative interpretation by its principal author of the decision itself. He has stated what was meant by it; and it must now be understood, as I take it, that Vaughan Williams, L.J.'s unseaworthiness test is not to be understood too literally; that the lord justice's own reservation that something other than hull damage might constitute a wreck is no longer operative; while there must have been a casualty "in the nature of wreck," an entirely new expression. The wreck, too, like the loss, must be physical. It is true that Lord Wrenbury considers that the figurative wreck of the commercial adventure may be a consideration applicable to "loss" as to "wreck." I can, however, find no suggestion to this effect in Lord Loreburn's statement, and if "loss" in the section is physical loss, and that only, it is not quite apparent how there can be room for any such reservation. The adventure must surely disappear with the physical loss of the vessel by means of which it was being carried out.

Lord Atkinson also refers to *The Olympic* (1) and he accepts the decision as correct. But, unfortunately, his acceptance is based exclusively upon a misapprehension in a most vital particular of Lord Stowell's decision in *The Elizabeth* (5). Speaking of that decision, Lord Atkinson says ([1916] 1 A.C. at p. 503).

> "The plaintiff sued for wages up to the time of the return of the ship to the home port. It was held that he was only entitled to his wages up to the date of his discharge [by the master]."

Now, as has already been seen, the decisive point in Lord Stowell's judgment was just that the plaintiff had awarded him his wages, not up to his discharge, but up to his arrival in England three months later. And the mistake on Lord Atkinson's part is vital, because, following his reasoning, it seems clear that, if the true facts in that respect had been present to his mind, he must have disagreed with the majority decision in *The Olympic* (1) and have accepted that of Kennedy, L.J. Clearly, he was of opinion that in *The Elizabeth* (5) the plaintiff's agreement was not held to have been terminated by the semi-naufragium, as Buckley, L.J., had supposed, but by his subsequent discharge by the master.

How, then, in 1925 did the *Olympic* decision stand? How must the draftsman of the Act of 1925 have regarded it?—its existence, as I assume, being known to him. First of all, on the report of the case itself, he must have been impressed by the force of Kennedy, L.J.'s dissenting judgment, which, on further inquiry, he would have found had been accepted, even here, as authoritative on subjects outside this case. Again, after the observations in this House in *Horlock* v. *Beal* (3), he must have felt assured that the decision in its original form could no longer be relied on as of permanent authority, nor, indeed, as authentic, except in a sense which no reader of the judgment would attach to it, while so far as it was reached on any distinction between "wreck" and "loss" it was in the gravest danger of extinction on the first effective occasion. But another circumstance must have struck him. There seems to be no recorded instance of owners having subsequently sought to utilise *The Olympic* (1) decision in their favour. For all that appears in the reports or textbooks it had become a dead letter. And, indeed, the liability under s. 162, from which, where it was applicable, the decision relieved the shipowners, must have been in most cases too trifling to worry about. Not without warrant was the draftsman if he concluded that in the new Act he might use the words "wreck" or "loss of the ship" in confidence that they would have attributed to them no other than the narrow meaning for which the seamen had always contended. The recent recrudescence of *The Olympic* (1) decision in the northern fishing fleets, and changed attitude towards it by each side, is doubtless due to the discovery now made that the decision, although originally strongly resisted by them, has placed in the hands of the seamen there a valuable aid in support of claims under the new Act competent to them now for the first time. One must not deny omniscience to a government draftsman, but it was in Aberdeen, I suspect, that this chance was first seen and taken.

This brings me to the Act of 1925 itself. In relation to the problem now being discussed the Act is helpful in a way which I have not found parallelled in any similar case. Its purpose is proclaimed. Not only is it intituled "an Act to give effect to certain draft conventions relating . . . to an unemployment indemnity for seamen in the case of loss or foundering of their ship," but these words are repeated in the preamble of the Act, the convention is scheduled to the Act, and in its art. 2 it is again the words "loss or foundering" that are used. Then in the preamble it is recited that it is expedient "for the purpose of giving effect to such draft conventions that such provision should be made as is contained in this Act." Its purpose is, accordingly, insistently expressed. There can be no question as to the intent of this Act whatever may be the case with most statutes. As I observed in *The Croxteth Hall, The Celtic* (7) ([1931] A.C. at p. 133), the method adopted by the Act, to achieve its purpose, is not, as it might have been, to transfer the international language of the convention to the body of the statute, but is to translate that language into the phraseology of the Merchant Shipping Acts and to direct that the Act is to become part of and be construed as one with the other Acts of that code.

In s. 1 of the Act, the translation of the convention words "loss or foundering" is "wreck or loss," words already found in the same connection in s. 158 of the Act of 1894, and the first question is whether the meaning attributable to the words in each of these sections is to be the same. If I am not debarred from an expression of that view by *The Croxteth Hall, The Celtic* (7), in which the House con-

A strued the word "wages" in s. 1 as a word apart and without reference to its meaning, either in s. 158 or anywhere else in the Acts, then I say that the meaning to be attached to the words in s. 1

> "where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement"

is the same as is the meaning to be attributed to the words in s. 158:

> B "Where the service of a seaman terminates before the date contemplated in the agreement by reason of the wreck or loss of the ship."

In the one case too, as in the other, the question whether the service terminated or not is to be ascertained by reference to the law as it stood at the passing of the Merchant Shipping Act, 1854. It seems to me clear that the condition on which C each section is to become operative is the same.

But what is that meaning? I ask the question, first of all, with reference to s. 158. Let it be supposed that the facts in *The Olympic* (1) were reproduced in the case of another liner, and a claim made by the seamen under s. 162 was brought to this House for final decision, can it be doubted that the use of the words "wreck or loss" in the Act of 1925, where, as it clearly appears, they are a translation D of the words "loss or foundering," would be pointed to, and rightly so, as the strongest confirmation on the part of the legislature itself of the correctness of KENNEDY, L.J.'s views as expressed in *The Olympic* (1)? And, if the question is put with reference to s. 1 of the Act of 1925, is the answer to be reversed? Is it, then, to be said that the decision in *The Olympic* (1) must be treated as now informing the word "wreck" and that, regardless of the fact that the words "wreck E or loss" of the section are a translation of the words "loss or foundering" of the convention and are found in an Act passed to give that convention effect, still the meaning of wreck is not necessarily more than a temporary unseaworthiness of the ship? And is this answer to be given, although it must be recognised that thereby there is being attached to the word a construction to which seamen had always been opposed?

F In *Young & Co.* v. *Leamington Corpn.* (8) (8 App. Cas. at p. 526), in relation to just such a question as we are now discussing, I find LORD BLACKBURN saying this:

> "I have no doubt that in fact those who prepared the Act of 1875 knew of the differences of opinion that had been expressed, and the difficult questions that might yet have to be decided, and really intended to provide that those G differences should not arise with reference to the urban authorities they were creating."

Is it possible for anyone, in the face of the convention and the expressed purpose of the Act of 1925 in this matter, "to have no doubt" that *The Olympic* (1) construction, destructive of both, was by the legislature being permanently attached to the word "wreck"? If the question be permissible there can, I suggest, be no H doubt as to the answer. The question, I think, is permissible. For, giving to the rule of construction now under discussion its fullest expression, it is in the end a question of legislative intention, and it is not every decision of the courts that will be regarded as sufficiently authoritative or notorious to suggest any such intention on the part of the legislature. There is no question as to the existence of the rule. It is in its application that difficulty arises.

I One of its best statements is that made by GRIFFITH, C.J., and approved by LORD HALSBURY, when delivering the judgment of the Privy Council in *Webb* v. *Outtrim* (*Attorney-General for Australia intervening*) (4) ([1907] A.C. at p. 89). It runs as follows:

> "When a particular form of legislative enactment, which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the legislature to bear the meaning which has been so put upon them."

That statement is specially valuable because of its insistence on the condition that the interpretation shall be authoritative. It is useful also in that it recalls that the interpretation may result both from judicial decision and by a long course of practice. If the numerous authorities are looked at it will be found, I think, that the foundation for the application of the rule has been discovered in a long course of practice far more frequently than in a judicial decision, particularly where that judicial decision is one of a court short of this House.

I will give a very notable example of this in a case to which I referred during the argument, but was not able then completely to identify. I have done so since. It is *Colonial Bank* v. *Whinney* (9). The question there was whether shares in an incorporated company were choses in action within the meaning of s. 44 of the Bankruptcy Act, 1883. On the corresponding section of the Bankruptcy Act, 1869, it had been held by Bacon, V.-C., in 1871, in *Re Jackson, Ex parte Union Bank of Manchester, Ltd.* (10), that such shares were not choses in action. That decision had never been questioned, and in 1883 the earlier section was re-enacted in a form unaltered. There, in the opinion both of Cotton and Lindley, L.JJ., was a case for the application of this rule. Cotton, L.J., said (30 Ch.D. at p. 278):

> "Parliament must be taken to have known of that decision, and if they did not intend the same construction to be put upon the expression 'choses in action' in this Act as had been put upon it in a precisely similar proviso of the former Act by a decision which had stood unimpeached for so many years, they would have inserted something to show that intention, and would not have framed this proviso in the same terms as that of the former Act."

Lindley, L.J., expressed the same view (30 Ch.D. at p. 284). The case was brought on appeal to this House. As a pupil of Mr. Buckley, with Sir Horace Davey, of counsel for the respondent, I listened to the argument. I heard Sir Horace Davey cite *Re Jackson, Ex parte Union Bank of Manchester, Ltd.* (10) (as appears in the report) and claim for it the influence attributed to it by the two lord justices. In answer I heard Lord Blackburn say words to the effect that the legislature was not to be presumed to have before it every decision of every judge of first instance, and he brushed the whole thing aside. Unfortunately, the report makes no reference to this incident, but it does show that *Re Jackson, Ex parte Union Bank of Manchester, Ltd.* (10) is not referred to in their judgments by any of their Lordships, and that the House held that "shares" were choses in action under the Act of 1883.

To my mind, that case is much stronger than the present. *Re Jackson, Ex parte Union Bank of Manchester, Ltd.* (10), although the decision of a judge of first instance, was the decision of the Chief Judge in Bankruptcy, sitting in bankruptcy, pronounced two years after the Act of 1869, a decision which must have been constantly applied in bankruptcy, and it was never subsequently questioned. Here the decision is a decision of the Court of Appeal, but of two members of the court only, with a most elaborate dissent from the third lord justice dealing with a subject upon which he had special knowledge—a decision, moreover, which had been qualified, I suggest, almost out of recognition in this House, and even by Lord Wrenbury himself, and with no evidence that it had ever been utilised at the instance of any shipowner. When to all that is added the fact that this decision can only be read into this s. 1 at the price of a partial defeat of the avowed purpose of the statute, it becomes, I suggest to your Lordships, a case outside the rule altogether, however that rule be stated. I have been unable to find any case at all approaching the circumstances of the present in which the rule has been applied.

I wish to add that while *Re Cathcart, Ex parte Campbell* (2) will always remain of value for the statement of the rule by James, L.J., it cannot be invoked as an illustration of its application. James, L.J., there found the application for the rule in his belief that in the Bankruptcy Act, 1861, a section had been brought over from an earlier Act unaltered in its terms, notwithstanding an intervening objection to it by LORD WESTBURY in *Re Thin and Flett, Ex parte Alexander* (11). The lord justice, however, was mistaken in his dates. *Ex parte Alexander* (11), which he had himself argued, was not decided until 1863, while the objection then taken by LORD WESTBURY was removed in the subsequent Bankruptcy Act of 1869. This fact reduces the statement of the lord justice to an obiter dictum. I do not suggest that, coming from such a source, it is really less valuable on that account. But the case is not otherwise in point.

In my judgment, there was in this case no "wreck" of the *Strathclova* within the meaning of s. 1 of the Act of 1925, or of s. 158 of the Act of 1894. The appellant's claim as pursuer in the cause fails in limine, and for that reason his appeal should, I think, be dismissed.

LORD WARRINGTON.—This is an appeal from an interlocutor dated Feb. 5, 1932, whereby the First Division of the Court of Session by a majority (LORDS BLACKBURN and MORISON; the Lord President dissenting) allowed an appeal from interlocutors of the sheriff and sheriff-substitute allowing the claim of the appellant as pursuer in the action.

The appellant was a seaman on the steam trawler *Strathclova*, of which the respondents were the owners, under the terms of a running agreement dated July 4, 1930, and was by that agreement engaged for a period from July 4, 1930, to Dec. 30, 1930. His claim in the action was founded on s. 1 (1) of the Merchant Shipping (International Labour Conventions) Act, 1925, and was for wages as provided by that Act. The section in question is as follows:

> "(1) Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement he shall notwithstanding anything in s. 158 of the Merchant Shipping Act, 1894, but subject to the provisions of this section, be entitled in respect of each day on which he is in fact unemployed during the period of two months from the date of the termination of the service to receive wages at the rate to which he is entitled at that date."

Subsection (2) contains provisions restricting the right to wages under certain conditions not alleged to be applicable to the present case.

Section 158 of the Merchant Shipping Act, 1894, provides:

> "Where the service of a seaman terminates before the date contemplated in the agreement, by reason of the wreck or loss of the ship . . . he shall be entitled to wages up to the time of such termination, but not for any longer period."

Thus the Act of 1925 gives to the seaman, in the event specified in both Acts, a claim to wages more extensive than that to which he would have been entitled under the Act of 1894, and is, in effect, an amendment of that Act.

Two questions arise for decision: (i) Whether on the true construction of the Act of 1925 the event of a wreck or loss of the ship has occurred? (ii) Whether if so the seaman's service was terminated by reason of such wreck or loss? In considering these questions I need not state the facts in detail, but will give a short summary only. [His Lordship stated the facts and continued:] On these facts the first question is: Was the accident to the *Strathclova* a "wreck" within the meaning of the Act of 1925?

In my opinion, this question should be answered in the affirmative, the point being settled by authority. In *The Olympic* (1) it was decided by a majority in the Court of Appeal (VAUGHAN WILLIAMS and BUCKLEY, L.JJ., KENNEDY, L.J., dissenting) that the "wreck or loss" of the ship referred to in s. 158 of the Merchant Shipping Act, 1894, includes any accident occasioned by a peril of the sea which renders the ship unfit or unable to proceed on the voyage. It was further decided on the facts of that case that the mercantile venture on which the ship was then engaged was frustrated by reason of the wreck, and the services of the seamen were, accordingly, terminated. But on this point it may be, and the

Court of Session have so decided, that on the facts this case should be decided the other way. This is, of course, the second question I have to put to myself.

To return to the first question, *The Olympic* (1) clearly decided the point. It is, however, a decision of the Court of Appeal, and would primâ facie be open to review in this House. For myself I should not, I think, differ from the view of the Court of Appeal even if I thought myself at liberty to decide the other way, but this is immaterial if it be true that this House is not now at liberty to overrule their decision.

The present case is, in my opinion, covered by the judgment of James, L.J. in *Re Cathcart, Ex parte Campbell* (2). The question there was whether under s. 216 of the Bankruptcy Act, 1861, a particular interrogatory was covered by the words of the section and was, therefore, one which the witness was bound to answer The point had been decided against a witness in *Ex parte Vogel* (12) under a previous Act of Parliament containing practically the same words as those afterwards employed in the Act of 1861. The learned lord justice said this (5 Ch. App. at p. 706):

> "Where once certain words in an Act of Parliament have received a judicial construction in one of the superior courts, and the legislature has repeated them without any alteration in a subsequent statute, I conceive that the legislature must be taken to have used them according to the meaning which a court of competent jurisdiction has given to them."

Counsel were unable to refer us to any case in which the view of James, L.J., had been questioned. It is particularly applicable in the present case, because in the Act of 1925, which professed to give effect to an international convention in which the words "loss or foundering" in a similar context were used, the legislature have used the words "wreck or loss" appearing in the Act of 1894 which had previously received the interpretation in question. For these reasons, therefore, I think the first question must be answered in the affirmative, namely, that the accident to the *Strathclova* was a wreck within the meaning of the statute.

There then arises the second question, namely: Was the service of the seaman terminated by reason of the wreck? This question was answered in the affirmative by the majority of the court in *The Olympic* (1) on the ground that the whole mercantile adventure was frustrated by the wreck. Vaughan Williams, L.J., expresses the ground of his conclusion in the following terms ([1913] P. at p. 103):

> "Such damage [namely, the damage occasioned by the wreck] although repairable, would make the ship unseaworthy for so long a time as to make the continuance of the voyage useless as a commercial venture.'

Buckley, L.J., says ([1913] P. at p. 107):

> "The wreck of the ship in this context, I think, is anything happening to the ship which renders her incapable of carrying out the maritime adventure in respect of which the seaman's contract was entered into."

In the present case the mercantile adventure in respect of which the seaman's contract was entered into was not merely for a single voyage. It was for a series of fishing trips, each of short duration, extending over several months. The repairs took fourteen days only to complete, and on this being done the ship resumed her fishing trips and continued them until the time fixed by the contract. In these circumstances I agree with Lord Blackburn and Lord Morison that the service of the seaman was not terminated by reason of the wreck, and, accordingly the seaman was not entitled to the benefit of the Act of 1925.

The third plea in law originally set up by the respondents, founded on the averment that the seaman's service was terminated in terms of his contract, was withdrawn, and, in my opinion, rightly withdrawn. It is true that the contract contained a provision that it might be terminated at any time at the discretion of the owner. But I think it is plain that in paying off the men on Sept. 26, 1930, the owner did not purport to act on this provision, for the sheriff-substitute finds as a fact that the crew were told at the time of paying off that the ship would be laid up until the repairs were completed, and we know that on this being done the fishing trips were renewed. On the whole I am of opinion that the interlocutor appealed from should be affirmed and this appeal dismissed with costs.

LORD RUSSELL.—The case of *The Olympic* (1) decided, in reference to the words "wreck or loss" which occur in s. 158 of the Merchant Shipping Act, 1894, that the word "wreck" meant something different from and less than "loss," and that in that section the wreck of the ship meant anything happening to the ship which rendered her incapable of carrying out the maritime adventure in respect of which the seaman's contract had been made. Some twelve years later, the *Olympic* decision having in the meantime governed the construction of the section, the legislature enacted the Merchant Shipping (International Labour Conventions) Act, 1925. That Act shows by its full title and by its preamble that its object is to give effect to certain draft conventions which had been adopted by the International Labour Conference relating to (among other things) "an unemployment indemnity for seamen in case of loss or foundering of their ship." The draft conventions referred to are set out in Sched. I to the Act. Sections 1 and 7 of the Act run thus:

Section 1 (1):

> "Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall, notwithstanding anything in s. 158 of the Merchant Shipping Act, 1894, but subject to the provisions of this section, be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date."

Subsection (2):

> "A seaman shall not be entitled to receive wages under this section if the owner shows that the unemployment was not due to the wreck or loss of the ship, and shall not be entitled to receive wages under this section in respect of any day if the owner shows that the seaman was able to obtain suitable employment on that day."

Subsection (3):

> "In this section the expression 'seaman' includes every person employed or engaged in any capacity on board any ship, but, in the case of a ship which is a fishing-boat, does not include any person who is entitled to be remunerated only by a share in the profits or the gross earnings of the working of the boat."

Section 7:

> "This Act may be cited as the Merchant Shipping (International Labour Conventions) Act, 1925, and shall be construed as one with the Merchant Shipping Acts, 1894 to 1923, and those Acts and this Act may be cited together as the Merchant Shipping Acts, 1894 to 1925."

The effect of s. 7 has been succinctly stated by one of your Lordships in *The Croxteth Hall. The Celtic* (7) ([1931] A.C. at p. 133), where he uses the following language:

> "The Act . . . of 1925 thus becomes a constituent part of a statutory code with special meanings attached to some of its terms by definition and to others by accepted usage or judicial decision. The result, of course, is that a meaning may necessarily be attributable to its provisions very different from that which would attach to the very same words in an independent enactment."

On looking at s. 1, we find that Parliament, in legislating for the purpose of carrying out the draft convention, has used in the first three lines of s. 1 words which are for all relevant purposes the same as those in s. 158 of the Act of 1894, although the order in which they occur is somewhat altered. The words in s. 158, "by reason of the wreck or loss of the ship," become in s. 1 "by reason of the wreck or loss of a ship on which a seaman is employed." There is not, in my opinion, any room for doubt that, whatever they mean, the words "wreck or loss" must mean the same in both sections. Nor, in my opinion, can your Lordships in the present case avoid attributing to the legislature when it used in s. 1 of the Act of 1925 the identical words "wreck or loss" which had in 1913 been judicially construed by the Court of Appeal, and used them in reference to the same subject-matter, an intention to use the words in the sense in which they had been so judicially construed. The authorities in support of a presumption of such intention are numerous and weighty. Some are referred to in the opinions of your Lordships and I need not repeat them. I may, however, call attention to two others. In *Barlow* v. *Teal* (13) (15 Q.B.D. at p. 405), Lord Coleridge, C.J., said:

> "Where cases have been decided on particular forms of words, in courts, and Acts of Parliament use those forms of words which have received judicial construction, in the absence of anything in the Acts showing that the legislature did not mean to use the words in the sense attributed to them by the courts, the presumption is that Parliament did so use them."

In this House, Lord Loreburn, in giving his opinion in *North British Rail. Co.* v. *Budhill Coal and Sandstone Co.* (14) ([1910] A.C. at p. 127), stated that

> "When an Act of Parliament uses a word which has received a judicial construction it presumably uses it in the same sense."

Is there anything in the Act of 1925 which would justify us in rebutting this presumption? For myself I find nothing, but I find much to compel us to act upon it, for, be it observed, full effect could have been given to the draft conventions by legislating strictly in the language thereof and adhering to the words "loss or foundering." Instead of following this course the legislature has, as it appears to me, elected not to do so, but to legislate by reference to a section of an existing Act of Parliament the words of which, by virtue of a judicial construction had stood unchallenged for years, covered many occurrences other than loss or foundering. In these circumstances I feel bound to hold that the word "wreck" in s. 158 of the Act of 1925 bears the meaning attributed to it by the Court of Appeal in *The Olympic* (1) decision.

There remains the question whether the facts of this case bring it within that decision. Did that which happened to the ship render her incapable of carrying out the maritime adventure in respect of which the seaman's contract was made? Was the ship unseaworthy for so long a time as to frustrate that adventure? In my opinion, the answer should be "No." The venture was a contract for a series of practically continuous fishing trips extending over a period of about six months. The ship was laid up for some fourteen days. While the accident to the ship no doubt caused an interruption of and an interference with the maritime adventure, I cannot hold that there was such an interruption or interference as to cause a frustration of that adventure. I agree with the judgments of Lord Blackburn and Lord Morison upon this point. I think that the interlocutor should be affirmed and the appeal dismissed.

LORD MACMILLAN.—The sheriff-substitute in his findings of fact has furnished a full and accurate account of what befell the steam trawler *Strathclova* on Sept. 25, 1930. It is not contested that by reason of the occurrence so described the service of the appellant, who was a seaman (in point of fact the chief engineer) employed on the *Strathclova*, was terminated before the date contemplated in his agreement with the respondents, the owners of the vessel. The question is whether in the circumstances his service can properly be said to have been terminated by reason of the "wreck" of the *Strathclova*, within the meaning of s. 1 (1) of the Merchant Shipping (International Labour Conventions) Act, 1925, so as to give the appellant the benefit of that section.

The legislation under consideration is the most recent step in the progressive mitigation of the harsh rule of the common law that freight is the mother of

A wages, which deprived the seaman of any right to remuneration for his services unless the enterprise of maritime transport in which he was employed was duly completed. By s. 157 (1) of the Merchant Shipping Act, 1894, it is roundly declared that "the right to wages shall not depend on the earning of freight," and in s. 158, where the seaman's service is prematurely terminated by reason of "the wreck or loss of the ship," he is given a right to his wages up to the time of such B termination. Finally, by the section of the Act of 1925 now before your Lordships, the lot of the seaman whose service has suffered untimely termination "by reason of the wreck or loss" of his ship is further alleviated by entitling him to continue receiving his wages for a period of two months after such termination of his service, if he remains so long in fact unemployed.

The question of the circumstances in which a seaman's service could properly C be said to have been terminated by reason of the "wreck" of his vessel came before the courts in the well-known case of *The Olympic* (1). It was there held by a majority of the Court of Appeal, affirming the judgment of BARGRAVE DEANE, J., that, if the service of a seaman was terminated in consequence of a physical casualty befalling his ship, whereby she was rendered

> D "incapable of carrying out the maritime adventure in respect of which the seaman's contract was entered into":

per BUCKLEY, L.J. ([1913] P. at p. 107), then it could properly be said that the seaman's service had terminated by reason of the "wreck" of his ship within the statutory meaning. The criterion is thus seen to lie in the consequences of the casualty. "The frustration of the voyage," to quote LORD LOREBURN, L.C., in E *Horlock* v. *Beal* (3) ([1916] A.C. at p. 493), affords "a test by which to determine whether or not the physical injury inflicted amounted to 'wreck.' "

In my opinion, this interpretation has much to commend it. The word "wreck" is obviously a word of the most vague and general connotation. In the language of the literature of adventure, and possibly also for some legal purposes, it may well be that the wreck of a vessel means, as KENNEDY, L.J., said in his dissenting F judgment in *The Olympic* (1) ([1913] P. at p. 115):

> "such disaster caused by collision with some external object, be it stationary, such as a rock, or moving, as, e.g., another ship or some substance floating in the waves, as destroys her character as a ship, and reduces her practically to the condition which, speaking from memory, I think has been judicially described in the case of a wooden ship as a 'congeries of planks.' "

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But I do not think that it was intended that the enactment now under consideration should operate only on the occurrence of so dramatic and catastrophic a casualty. Suppose a ship at spring tide runs on a sandbank in some remote part of the world and remains fast so that she cannot be re-floated for a long period or at all and the crew are consequently discharged. I should hesitate to H say that in such a case there had been no wreck of the vessel within the meaning of the Act, although she in fact remained intact. It is well to bear in mind what BUCKLEY, L.J., points out in *The Olympic* (1) ([1913] P. 106), that for the present purpose we have not

> "to inquire whether the ship was a wreck, that is to say, whether she had become a certain physical thing, but whether she had been so injured and I damaged that she ceased to be a ship of service for the purposes of the adventure, the subject of the seaman's contract."

On the best consideration I have been able to give to the matter I have come to the conclusion that the view of the majority in *The Olympic* (1) which your Lordships are invited to overrule, was well founded and should be followed. In so holding I am not uninfluenced by the fact that the decision in *The Olympic* (1) was pronounced twenty years ago and until now has not been called in question. For this long period it has doubtless regulated the practice of shipowners and marine insurers. Indeed, so far from being in any way questioned, the decision in *The Olympic* (1) was discussed and expounded in this House in the subsequent case of *Horlock* v. *Beal* (3) without any indication of disapproval, but rather with every indication that the noble and learned Lords who referred to it accepted its doctrine as sound.

I am, accordingly, of opinion that in deciding whether the occurrence which befell the *Strathclova* on the occasion in question brought the appellant's case within the operation of s. 1 (1) of the Act of 1925, which in terms is merely an amending extension of s. 158 of the Act of 1894, the interpretation adopted in *The Olympic* (1) should be applied by your Lordships. I reach this conclusion without the necessity of invoking the rule of construction enunciated by JAMES, L.J., in *Re Cathcart, Ex parte Campbell* (2), upon which some of your Lordships have specially relied, though I am far from desiring to depreciate the value of the aid afforded by that rule in the interpretation of statutes. The principle of the rule is that where the language of a statute has received judicial interpretation, and Parliament again employs the same language in a subsequent statute dealing with the same subject-matter, there is a presumption that Parliament intended that the language so used by it in the subsequent statute should be given the meaning which meantime has been judicially attributed to it. Parliament, in short, is to be presumed to have given statutory effect to the judicial interpretation so as to render it as binding on the courts as if it had been expressly enacted in an interpretation section. If this rule were to be treated as a canon of construction of absolute obligation I can see that it might have very far-reaching and possibly undesirable consequences. I hope I am always ready and willing to obey the voice of Parliament and I fully recognise that, as LORD ESHER once said: *Stevens* v. *Bishop* (15) (2 Tax Cas. at p. 254):

> "The legislature has the power to make you read English in a way in which you would not read it except by command."

But I must be satisfied that it is the authentic voice and the authentic command of Parliament, and I find it rather a strain to have to believe that the reputed omniscience of Parliament extends to every decision of the courts. What if the interpretative decision has never been reported? And what if Parliament has repeated language which has been construed in contrary senses by courts of co-ordinate jurisdiction in England and Scotland? In my view, the rule of interpretation which I am discussing affords only a valuable presumption as to the meaning of the language employed in a statute. Where a judicial interpretation is well settled and well recognised the rule ought, doubtless, to receive effect, but it must, I think, be a question of circumstances whether Parliament is to be presumed to have tacitly given statutory authority, say, to a single judgment of a competent court so as to render that judgment, however obviously wrong, unexaminable in this House. After all, there is another rule of statutory interpretation of not less, if not indeed of higher authority, of which Parliament must be equally taken to be aware, namely LORD WENSLEYDALE'S "golden rule" that in construing statutes the grammatical and ordinary sense of the words is to be adhered to, unless it leads to some absurdity, repugnance or inconsistency. For myself, I prefer the later form in which JAMES, L.J., himself re-stated his rule in *Greaves* v. *Tofield* (16) as follows (14 Ch.D. at p. 571):

> "If an Act of Parliament uses the same language which was used in a former Act of Parliament referring to the same subject, and passed with the same purpose, and for the same object, the safe and well-known rule of construction is to assume that the legislature, when using well-known words upon which there have been well-known decisions, uses those words in the sense which the decisions have attached to them."

To the rule as so stated I am prepared wholeheartedly to subscribe.

It now only remains to consider whether the particular circumstances of the casualty to the *Strathclova* entitle the appellant to say that his service was terminated by reason of the wreck of his ship, within the meaning attributed to that expression in *The Olympic* (1). The appellant was on July 4, 1930, engaged to serve on board the *Strathclova*, "which is to be employed fishing trawl North Sea, Shetland, West Coast and Faroe until the last day of December," 1930. When so employed the vessel was regularly engaged in plying her trade on the fishing grounds, returning to port from time to time to discharge her catch and then putting to sea again after a day or two occupied in unloading, bunkering and other ordinary incidents. In consequence of the casualty of Sept. 25, 1930, the vessel had to be laid off work for a fortnight and placed in dry dock, where repairs costing £265 were effected, the crew, including the appellant, having meantime been paid off. In my opinion, the fact that for this relatively short period of time the vessel was off work in consequence of the casualty which had befallen her, did not render her

> "incapable of carrying out the maritime adventure in respect of which the seaman's contract was entered into,"

so as to entitle the appellant to claim that the premature termination of his service was by reason of the wreck of his ship within the statutory meaning. I am, accordingly, of opinion that the interlocutor appealed from should be affirmed and the appeal dismissed with costs.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, for *Milne & Reid*, Aberdeen; *James Mackenzie*, Edinburgh; *Pritchard & Son*, for *James & George Collie*, Aberdeen; *Alex Morison & Co.*, W.S., Edinburgh.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re HEDDERWICK. MORTEN *v.* BRINSLEY

[CHANCERY DIVISION (Luxmoore, J.), January 20, 23, 24, 25, March 23, 1933]

[Reported [1933] Ch. 669; 102 L.J.Ch. 193; 149 L.T. 188; 49 T.L.R. 381]

Divorce—Alimony—Death of husband—Recovery of arrears from husband's estate—King's Proctor's intervention—Proof of wife's adultery—Abatement of order for alimony.

Alimony is a judicial assessment of the husband's obligation to maintain his wife. It is inalienable and unassignable. It does not create a legal debt and is not recoverable at law. The only method of enforcing an order for alimony is under the Debtors Act, 1869, and arrears of alimony cannot be recovered from a dead person's estate.

Re Stillwell (1), [1916] 1 Ch. 365, not followed.

On Feb. 26, 1929, the testator's wife filed a petition for divorce against him. On June 28 an order was made in her favour for alimony pendente lite. On August 1, 1930, the King's Proctor intervened, and on Nov. 12 his intervention, which was on the ground that the wife had been guilty of adultery other than as disclosed in her petition, was allowed, no order being made on the petition which remained on the file.

Held: in the absence of an application by the wife to the Divorce Court to continue the alimony, the alimony ceased as from Nov. 12.

Notes. Considered: *Re Woolgar, Woolgar* v. *Hopkins*, [1942] 1 All E.R. 583; *Findlay* v. *Findlay*, [1947] 2 All E.R. 71. Referred to: *Re Bidie, Bidie* v. *General Accident Fire and Life Assurance Corpn., Ltd.*, [1948] 2 All E.R. 995.

As to enforcement of orders for alimony, see 12 HALSBURY'S LAWS (3rd Edn.) 471 et seq., and for cases see 27 DIGEST (Repl.) 673 et seq.

Cases referred to:

(1) *Re Stillwell, Brodrick* v. *Stillwell*, [1916] 1 Ch. 365; 85 L.J.Ch. 314; 114 L.T. 604; 32 T.L.R. 285; 60 Sol. Jo. 322; 27 Digest (Repl.) 674, *6419*.

(2) *Bailey* v. *Bailey* (1884), 13 Q.B.D. 855; 53 L.J.Q.B. 583; 50 L.T. 722, C.A.; 27 Digest (Repl.) 682, *6515*.

(3) *Linton* v. *Linton* (1885), 15 Q.B.D. 239; 54 L.J.Q.B. 529; 52 L.T. 782; 49 J.P. 597; 33 W.R. 714; 2 Morr. 179, C.A.; 27 Digest (Repl.) 675, *6436*.

(4) *Re Hawkins, Ex parte Hawkins*, [1894] 1 Q.B. 25; 69 L.T. 769; 42 W.R. 202; 1 Mans. 6; 10 R. 29, D.C.; 4 Digest 300, *2810*.

(5) *Kerr* v. *Kerr*, [1897] 2 Q.B. 439; 66 L.J.Q.B. 828; 77 L.T. 29; 46 W.R. 46; 13 T.L.R. 534; 41 Sol. Jo. 679; 4 Mans. 207, D.C.; 27 Digest (Repl.) 675, *6437*.

(6) *Robins* v. *Robins*, [1907] 2 K.B. 13; 76 L.J.K.B. 649; 96 L.T. 787; 23 T.L.R. 428; 27 Digest (Repl.) 682, *6516*.

(7) *Dunn* v. *Dunn* (1888), 13 P.D. 91; 57 L.J.P. 58; 59 L.T. 385; 36 W.R. 539; 4 T.L.R. 399, C.A.; 27 Digest (Repl.) 494, *4353*.

Summons.

The following facts are taken from the judgment:

The plaintiff is one of the legal personal representatives of the late Norman Stanley Hedderwick. The defendant, Vera Maud Brinsley, is the other legal personal representative. She is entitled under the testator's will to the whole of his residuary real and personal estate. The defendant, Cordelia Edna Hedderwick, is the testator's widow.

On Feb. 26, 1929, the defendant, Cordelia Edna Hedderwick, filed a petition for dissolution of her marriage with the testator. On June 28, 1929, before that petition was heard, the President of the Divorce Division made an order that the testator should pay her alimony pendente lite at the rate of £300 per annum free of tax. On Aug. 1, 1930, the King's Proctor intervened in the divorce proceedings, upon a plea that Cordelia Edna Hedderwick had been guilty of adultery, otherwise than as disclosed in her petition. I should state that on her petition she had confessed to certain acts of adultery and asked the court for the exercise of its discretion in her favour. By an order made on Nov. 12, 1930, the intervention of the King's Proctor was allowed, and it was established that Cordelia Edna Hedderwick had been guilty of adultery, as alleged by the King's Proctor. No order of any kind was made on the petition for divorce, and such petition remained on the file. The testator paid alimony to Cordelia Edna Hedderwick under the order of June 28, 1929, down to the end of May, 1930, but no payments were made after that date. The testator by his will dated April 28, 1932, appointed the plaintiff and the defendant Vera Maud Brinsley to be his executors and devised and bequeathed all his real and personal estate, including any property in respect of which he had a general power of appointment, to his sister Vera Maud Brinsley absolutely. The testator died on April 30, 1932. The testator's estate is said to be insolvent, but this fact is not admitted by Cordelia Edna Hedderwick.

This summons was taken out by the plaintiff, asking the court to determine whether the executors of the testator ought to admit, either in whole or in part, the proof of Cordelia Edna Hedderwick for arrears of alimony pendente lite under the order of June 28, 1929.

Cordelia Edna Hedderwick claims to be entitled as against the testator's estate to recover or prove for arrears of alimony from the end of May, 1930, down to the date of the testator's death.

Vera Maud Brinsley, as sole residuary legatee, claims first that no arrears of alimony are recoverable from or provable against the testator's estate, whether it be solvent or insolvent. She further claims that if this contention be wrong and Cordelia Edna Hedderwick has a legal right either to recover or prove for arrears

A of alimony, the order of June 28, 1929, ceased to have any effect as from Nov. 12, 1930, the date when the intervention of the King's Proctor was allowed. This contention is based on the ground that a husband ordered to pay alimony to his wife is freed from any liability to do so from the moment it is established by the order of the court that the wife has been guilty of adultery. If this be correct, the only arrears available are for the period between the end of May, 1930, and B Nov. 12, 1930. Vera Maud Brinsley further contends that the arrears for the last-mentioned period cannot either be recovered or the subject of proof, because they relate to a period more than one year earlier than the testator's death.

Lavington for the summons.

E. J. Bagshawe for the first defendant.

Winterbotham for the widow.

C The arguments and cases cited appear from the judgment.

Cur. adv. vult.

March 23. **LUXMOORE, J.**, read a judgment in which he stated the facts and continued: The nature of the obligation of a husband to pay alimony to his wife under an order of the Divorce Court has frequently been considered. It was D pointed out by LORD ESHER in *Bailey* v. *Bailey* (2) that

> "in a court of common law no right to alimony existed: at all events the power to make an order did not by the common law exist in the Court of Divorce, because that court was created by the legislature when it passed the Matrimonial Causes Act, 1857."

E The last-mentioned Act empowered the Divorce Court to order alimony to be paid by a man to his wife in cases where the wife was applying for restitution of conjugal rights, or for judicial separation, and also in cases where the ecclesiastical courts would have given that relief: see ss. 17 and 22 of the Act. Section 52 of the same Act, which provides the remedy for disobedience to the decrees and orders of the Divorce Court, is in the following terms:

> F "All decrees and orders to be made by the court in any suit proceeding or petition to be instituted under the authority of this Act shall be enforced and put in execution in the same or the like manner as the judgments orders and decrees of the High Court of Chancery may be now enforced and put in execution."

From this it appears that an order of the Divorce Court for payment of alimony G did not create a legal debt enforceable at common law, but merely a liability enforceable solely in the manner provided by the statute. This position was made quite clear by the judgment of the Court of Appeal in *Linton* v. *Linton* (3). In that case the Divorce Court had, under s. 1 of the Matrimonial Causes Act, 1866, made an order for the payment by a husband to his wife of permanent maintenance as part of an order for judicial separation; the husband filed his petition in bank- H ruptcy and claimed that his adjudication thereunder operated to absolve him from future liability to pay the maintenance. The Court of Appeal held that the order for payment of maintenance remained effective and was not affected by the bankruptcy. BOWEN, L.J., pointed out in his judgment that arrears of alimony are, within the meaning of s. 5 of the Debtors Act, 1869, a debt due in pursuance of an order or judgment of a competent court. He said (15 Q.B.D. at p. 246):

> I "Before [the Debtors Act] the payment of alimony was enforced by proceedings for attachment under the provisions of s. 52 of the Matrimonial Causes Act, 1857. Since the Debtors Act was passed the proceeding by attachment has fallen into disuse, and, unless the payment of alimony can be enforced under s. 5 of the Debtors Act, there seems to be no way of enforcing it. I think it is not too wide a construction to say that arrears of alimony are a debt within s. 5, though they do not constitute a debt at law."

Consideration of the cases leads to the conclusion that alimony is a judicial assessment of the husband's obligation to maintain his wife. It is inalienable and unassignable. It cannot be affected by agreement between the parties, or by the bankruptcy of the husband. Further, it cannot be sued for at law. The order for its payment is not final or conclusive, even in the Divorce Court. It remains subject to the control of that court, which may vary it from time to time, and there is complete discretion as to arrears (see in addition to the cases already cited *Re Hawkins, Ex parte Hawkins* (4), *Kerr* v. *Kerr* (5), and *Robins* v. *Robins* (6).

The authorities to which I have referred make it clear that the only method of enforcing an order for alimony against a husband who refuses to obey it is under the Debtors Act. In *Re Stillwell, Brodrick* v. *Stillwell* (1), SARGANT, J., held that a widow was entitled to recover against her deceased husband's estate, if it were solvent, arrears of alimony due at his death. I am unable to reconcile this decision with those to which I have already referred. SARGANT, J., after referring to some of those decisions, and stating, if I may respectfully say so, their effect with precision, said this:

> "But because the court to deal with the order during the husband's lifetime is the Divorce Court, that is, in my judgment, no reason for holding that arrears cannot be enforced as a debt after the jurisdiction of that court has come to an end by reason of the husband's death."

With the greatest possible deference, it seems to me that this statement assumes that the order for alimony or maintenance created a legal debt. In my reading of the cases, the order for alimony does not create a legal debt, but a liability to pay, which can only be enforced in one way, that is, by attachment under the Debtors Act. Obviously that remedy ceases to be available on the death of the husband. It is difficult to understand how the cesser of the only remedy could change the nature of the liability and convert into a debt legally enforceable that which had not that characteristic during the husband's life. With all possible respect to the learned judge, I think his judgment is contrary to the decisions to which I have referred and that I am not only not bound by it but that I should be deciding contrary to decisions which are binding on me if I decided to follow it. SARGANT, J., in his judgment, limited the wife's right to recover to the arrears for one year only, apparently in recognition of the practice of the Divorce Court not to enforce payment of arrears due in respect of any longer period. It is difficult to understand how this limitation can be justified if the liability has in fact become a debt legally enforceable.

In my judgment, the order for alimony, assuming it was enforceable during the testator's lifetime, ceased to be so on his death, and consequently Cordelia Edna Hedderwick is not entitled to recover anything in respect of it against the testator's estate. Further, I am of opinion that this is the position whether the estate be solvent or insolvent.

In the circumstances it is unnecessary to determine any further question, but since the case may go elsewhere, I think it would be convenient that I should deal with the question whether the order for alimony ceased to operate on Nov. 12, 1930, by reason of the finding, on which the order of that date was based, that Cordelia Edna Hedderwick had been guilty of adultery.

It was decided in *Dunn* v. *Dunn* (7) that where alimony pendente lite has been allotted to a wife in a petition for divorce such alimony ceases upon a verdict finding her guilty of adultery, but the court may in its discretion make an order for the alimony to continue. COTTON, L.J., in that case said:

> "Until adultery has been proved against the wife she is entitled to support and the court gives her alimony pendente lite."

The court was in that case dealing with a wife against whom adultery was alleged. COTTON, L.J., continued:

> "But when her adultery has been proved, though she is still a wife, she has lost that right. The reasonable rule then appears to be that on the jury finding the wife guilty of adultery her right to alimony ceases, subject to this, that if the judge thinks it reasonable to do so he can continue it."

That is if the wife is appealing from the verdict, or for a new trial. In the present case, the wife was the petitioner in the divorce proceedings, she had in her petition admitted that she had been guilty of adultery in certain specific cases. The King's Proctor by his intervention established that she had been guilty of adultery in other cases. On this fact being established the order for alimony pendente lite which had been made with knowledge of the admitted adultery was no longer applicable, and the husband, on the principle enunciated in *Dunn* v. *Dunn* (7), was entitled to refuse to make any payments under the order of June 28, 1929, in respect of any period after Nov. 12, 1930. The wife could, of course, have applied for the continuation of the alimony, notwithstanding the order, but the onus was on her to satisfy the court and to obtain an order for such continuance. The defendant took no step to this end. In my judgment, the alimony ceased as from Nov. 12, 1930.

In the result I hold that the defendant, Cordelia Edna Hedderwick, is not entitled to recover from or prove against the testator's estate, whether solvent or insolvent, for any part of the arrears of alimony under the order of June 28, 1929.

Solicitors: *Farmans, Daniell & Co.*; *Whites & Co.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

HONEYWILL AND STEIN, LTD. *v.* LARKIN BROS. (LONDON'S COMMERCIAL PHOTOGRAPHERS), LTD.

[COURT OF APPEAL (Lord Hewart, C.J., Lord Wright and Slesser, L.J.), October 12, 13, 20, 1933]

[Reported [1934] 1 K.B. 191; 103 L.J.K.B. 74; 150 L.T. 71; 50 T.L.R. 56]

Negligence—Independent contractor—Dangerous work—Negligent performance by independent contractor—Liability of employer.

A general rule of law is that an employer is not liable for the acts of his independent contractor in the same way as he is for the acts of his servants and agents, even though the acts of the independent contractor are done in carrying out work for his (the employer's) benefit under the contract. But a person who causes something to be done, the doing of which casts on him a duty, cannot, by delegating the performance of that duty to an independent contractor, escape from the responsibility attaching to him of seeing that the duty is performed. Where the work to be undertaken is of a dangerous character, which imposes on the employer an obligation to take special precautions, he cannot delegate that obligation to an independent contractor whom he employs to do the work.

Where, therefore, an independent contractor was employed by a company who had done certain work in a theatre to take flashlight photographs of the work, and owing to his negligence a fire was caused and damage sustained by the owner of the theatre,

Held: the owner of the theatre was entitled to recover damages for negligence from the employer of the independent contractor.

Brooke v. *Bool* (1), [1928] 2 K.B. 578, approved and applied.

Notes. Considered: *Matania* v. *National Provincial Bank, Ltd. and Elevenist Syndicate, Ltd.*, [1936] 2 All E.R. 633; *The Pass of Ballater*, [1942] 2 All E.R. 79. Referred to: *Russell* v. *Criterion Film Productions, Ltd.*, [1936] 3 All E.R.

627; *Read* v. *J. Lyons & Co., Ltd.*, [1945] 1 All E.R. 106; *Balfour* v. *Barty-King*, [1956] 2 All E.R. 555.

As to the liability of an independent contractor or his employer, see 23 HALSBURY'S LAWS (2nd Edn.) 710 et seq., and for cases see 34 DIGEST 155 et seq.

Cases referred to:

(1) *Brooke* v. *Bool*, [1928] 2 K.B. 578; 97 L.J.K.B. 511; 139 L.T. 376; 44 T.L.R. 531; 72 Sol. Jo. 354, D C.; 36 Digest (Repl.) 125, *632*.

(2) *Laugher* v. *Pointer* (1826), 5 B. & C. 547; 8 Dow. & Ry. K.B. 556; 108 E.R. 204; 36 Digest (Repl.) 281, *324*.

(3) *Reedie* v. *London and North Western Rail. Co.* (1849), 4 Exch. 244; 6 Ry. & Can. Cas. 184; 20 L.J.Ex. 65; 13 Jur. 659; 154 E.R. 1201; 34 Digest 27, *56*.

(4) *Dalton* v. *Angus* (1881), 6 App. Cas. 740; 50 L.J.Q.B. 689; 44 L.T. 844; 46 J.P. 132; 30 W.R. 191, H.L.; 34 Digest 158, *1234*.

(5) *Quarman* v. *Burnett* (1840), 6 M. & W. 499; 9 L.J.Ex. 308; 4 Jur. 969; 151 E.R. 509; 34 Digest 126, *966*.

(6) *Hole* v. *Sittingbourne Rail. Co.* (1861), 6 H. & N. 488; 30 L.J.Ex. 81; 3 L.T. 750; 9 W.R. 274; 158 E.R. 201; 34 Digest 162, *1263*.

(7) *Pickard* v. *Smith* (1861), 10 C.B.N.S. 470; 4 L.T. 470; 142 E.R. 535; 36 Digest (Repl.) 72, *384*.

(8) *Tarry* v. *Ashton* (1876), 1 Q.B.D. 314; 45 L.J.Q.B. 260; 34 L.T. 97; 40 J.P. 439; 24 W.R. 581; 34 Digest 163, *1274*.

(9) *Black* v. *Christchurch Finance Co.*, [1894] A.C. 48; 63 L.J.P.C. 32; 70 L.T. 77; 58 J.P. 332; 6 R. 394, P.C.; 34 Digest 162, *1266*.

(10) *Hughes* v. *Percival* (1883), 8 App. Cas. 443; 52 L.J.K.B. 719; 49 L.T. 189; 47 J.P. 772; 31 W.R. 725, H.L.; 7 Digest 300, *240*.

(11) *Holliday* v. *National Telephone Co.*, [1899] 2 Q.B. 392; 68 L.J.Q.B. 1016; 81 L.T. 252; 47 W.R. 658; 15 T.L.R. 483, C.A.; 34 Digest 163, *1271*.

(12) *Bower* v. *Peate* (1876), 1 Q.B.D. 321; 45 L.J.Q.B. 446; 35 L.T. 321; 40 J.P. 789; 36 Digest (Repl.) 159, *841*.

(13) *Hardaker* v. *Idle District Council*, [1896] 1 Q.B. 335; 65 L.J.Q.B. 363; 74 L.T. 69; 60 J.P. 196; 44 W.R. 323; 12 T.L.R. 207; 40 Sol. Jo. 273, C.A.; 34 Digest 161, *1255*.

Appeal by the plaintiffs from an order of BENNETT, J., sitting as an additional judge of the King's Bench Division.

The plaintiffs had entered into a contract with Denman Picture Houses, Ltd. (hereinafter called the cinema company), for the installation of a sound reproduction apparatus at a cinematograph theatre owned by the cinema company. After the installation the plaintiffs obtained permission from the cinema company to take photographs of the auditorium of the theatre, which they required for their business purposes. The plaintiffs instructed the defendants to take the photographs. The defendants first attempted to take the photographs by daylight, but this was unsuccessful, and they then proceeded to take them by flashlight, which was the normal and proper method for the class of work. This involved the use of magnesium powder, which was highly inflammable, and the photographer employed by the defendants acted negligently by igniting the powder in close proximity to a curtain. In the result a fire took place and damage was caused to the theatre to the extent of £261 4s. 3d. The cinema company threatened the plaintiffs with an action to recover this amount. The plaintiffs, having been advised that they had no defence to the proposed action, voluntarily paid the amount claimed, and brought the present action to recover that amount from the defendants. The defendants denied that the plaintiffs had ever been under any liability to the cinema company. They said that the negligence, if any, of their photographer was, as between the plaintiffs and the cinema company, that of an independent contractor, for which the plaintiffs were not responsible, and the payment made to the cinema company was, therefore, a voluntary payment which could not be

A recovered from the defendants. BENNETT, J., accepted this contention, and dismissed the action. The plaintiffs appealed to the Court of Appeal.

Macaskie, K.C., and *Baillieu* for the plaintiffs.
Monckton, K.C., and *Levine* for the defendants.

Cur. adv. vult.

B Oct. 20. **SLESSER, L.J.**, read the following judgment of the court.—The appellants, the plaintiffs in the action, are specialists in acoustic work. They had done acoustic work in a cinema owned by the Denman Picture Houses, Ltd. (hereinafter called the cinema company), and were anxious to have photographs taken of the interior of the cinema. They, accordingly, applied to the cinema company for the necessary permission to send a photographer to take the photo- C graphs. That permission was granted and an appointment was made with the cinema company for the defendants, who are photographers, to attend at the cinema to take photographs, the plaintiffs having employed the defendants to do that work. The defendants in due course went to the cinema; a photograph was taken without flashlight, but it was not satisfactory; the defendants, accordingly, went again to the cinema to take a photograph with flashlight. Their evidence D was that the use of flashlights is the normal way of photographing interiors, and is employed in photographing large interiors in the majority of cases, but that it is inevitably attended with danger. In fact, it obviously involved the making either of fire, or explosion, or both, because it involves the ignition in a metal tray or holder, held above the lens, of a certain amount, one ounce or more, of magnesium powder, or agfa. This powder, on being ignited, flares up, and develops an intense E heat, and hence is dangerous if brought into close proximity with fabrics, or other inflammable material, so that not only must precautions be taken against draughts, but there must be no inflammable material too close when the flash is fired. On the occasion in question the operator took the photograph by placing the camera on the stage, in the space between the footlights and the curtain, and ignited the magnesium at a distance of not more than 4 ft. from the curtain. The learned F judge has found that in so doing he was guilty of negligence. The curtain caught fire from the ignited magnesium and damage was done, before the fire could be extinguished, to the extent of £261 4s. 8d.

It is not contested that the defendants are liable to the plaintiffs either in contract or for negligence, but it is contended that no damages, or merely nominal damages, are recoverable, because, it is said, the plaintiffs suffered no damage. G While it is admitted that the plaintiffs, acting under advice and under threat of a writ being issued, paid the cinema company the amount claimed as the cost of repairing the damage caused by the fire, it is contended by the defendants that this was a purely voluntary payment, because the plaintiffs would have had a defence to any claim brought against them by the cinema company; that is, a defence based on the ground that the damage was caused by the negligence of the defen- H dants, who were independent contractors, and not servants or agents of the plaintiffs, so that the plaintiffs were not responsible for the defendants' acts or defaults. It was said that the defendants were the only persons whom the cinema company could have successfully sued. It was rightly conceded that the defendants were, vis-à-vis the appellants, independent contractors.

It is well established as a general rule of English law that an employer is not I liable for the acts of his independent contractor in the same way as he is for the acts of his servants or agents, even though these acts are done in carrying out work for his benefit under the contract. The determination whether the actual wrongdoer is a servant or agent, on the one hand, or an independent contractor, on the other, depends on whether or not the employer not only determines what is to be done, but retains the control of the actual performance, in which case the doer is a servant or agent, but, if the employer, while prescribing the work to be done, leaves the manner of doing it to the control of the doer, the latter is an independent contractor, Cases like *Laugher* v. *Pointer* (2) and *Reedie* v. *London and North Western Rail. Co* (3) state the general rule of law that the ultimate employer is not responsible for the negligence of the independent contractor or his men. It was said by **Lord Blackburn** in *Dalton* v. *Angus* (4) (6 App. Cas. at p. 829):

> "Ever since *Quarman* v. *Burnett* (5) it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servant. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed but he cannot thereby relieve himself from liability to those injured by the failure to perform it: *Hole* v. *Sittingbourne Rail. Co.* (6), *Pickard* v. *Smith* (7) *Tarry* v. *Ashton* (8).

But there are exceptions to this rule. It may be that, as in other cases of vicarious liability, the tendency of the English law, as it has developed since the dates of the cases just mentioned, has been rather to enlarge the scope of these exceptions, but the development has followed certain broad lines. It is clear that the ultimate employer is not responsible for the acts of an independent contractor merely because what is to be done will involve danger to others if negligently done. The incidence of this liability is limited to certain defined classes, and for the purpose of this case it is only necessary to consider that part of this rule of liability which has reference to extra hazardous acts, that is, acts which, in their very nature, involve in the eyes of the law special danger to others.

Of such acts the causing of fire and explosion are obvious and established instances. Thus, in *Black* v. *Christchurch Finance Co.* (9), a case of creating a fire in the bush, which spread to an adjoining owner's land, it was said in the judgment of the Privy Council ([1894] A.C. at p. 54):

> "the lighting of a fire on open bush land, where it may readily spread to adjoining property and cause serious damage, is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all reasonable precautions to prevent the fire extending to his neighbour's property; sic utere tuo ut alienum non laedas; and if he authorises another to act for him, he is bound, not only to stipulate that such precautions shall be taken, but also to see that these are observed, otherwise he will be responsible for the consequences: see *Hughes* v. *Percival* (10), and authorities there cited."

Similarly, in *Holliday* v. *National Telephone Co.* (11), where a passer-by on the highway was injured through the negligence of a plumber engaged by the defendant company under an independent contract, it was held that the defendant company were liable. A. L. **Smith**, L.J., thus sums up the case ([1899] 2 Q.B. 392 at p. 399):

> 'The defendants were a telephone company who were engaged in the execution on a highway of works which were clearly dangerous. It obviously involves a certain amount of danger to have a cauldron of molten lead on a highway. The defendants, therefore, on the hypothesis that Highmore was an independent contractor, were delegating to him the execution of dangerous work upon a highway. The deputy judge finds that in making the joints between the pipes it was a proper thing for the purpose of getting the necessary flares to dip the benzoline lamp into molten metal. The safety valve of the lamp being out of order, the result of doing that was that the lamp exploded, and the molten metal was scattered about, some falling on the plaintiff, who was passing by upon the highway. The defence is that the defendants are not liable in respect of the injury sustained to the plaintiff because it was

A occasioned by the negligence of an independent contractor for whom they are not responsible. In my opinion, since the decision of the House of Lords in *Hughes* v. *Percival* (10), and of the Privy Council in *Black* v. *Christchurch Finance Co.* (9), it is very difficult for a person who is engaged in the execution of dangerous works near a highway to avoid liability by saying that he has employed an independent contractor, because it is the duty of a person who B is causing such works to be executed to see that they are properly carried out so as not to occasion any damage to persons passing by on the highway. I do not agree that this was a case of mere casual and collateral negligence within the meaning of that term, for it was negligence in the very act which Highmore was engaged to perform."

C The decision in this case, in our judgment, does not depend merely on the fact that the defendants were doing work on the highway, but primarily on its dangerous character, which imposes on the ultimate employers an obligation to take special precautions, and they cannot delegate this obligation by having the work carried out by independent contractors. This is equally true when the work being done by the independent contractor for the ultimate employer is being done D on another person's premises. It was so held by TALBOT, J., in *Brooke* v. *Bool* (1). The defendant there went into the plaintiff's shop and got another man named Morris to help to ascertain if there was an escape of gas. Morris proceeded to investigate, using for the purpose a naked light. TALBOT, J., thus stated his conclusion ([1929] 2 K.B. at p. 587):

"It is obvious that to examine a place in which an escape of gas is suspected E is highly dangerous unless proper care is taken; and that one of the necessary precautions against disaster is to avoid the use of a naked light. In my opinion the defendant, having undertaken this examination, was under a duty to take reasonable care to avoid danger resulting from it to the shop and its contents, and, if so, he cannot escape liability for the consequences of failure to discharge this duty by getting, as he did, someone to make the examination, F or part of it, for him, whether that person is an agent, or a servant, or a contractor, or a mere voluntary helper. This is the principle of such cases as *Bower* v. *Peate* (12), *Black* v. *Christchurch Finance Co.* (9), *Hughes* v. *Percival* (10), *Hardaker* v. *Idle District Council* (13); and see the judgment of LORD BLACKBURN in *Dalton* v. *Angus* (4). The principle is that if a man does work on or near another's property which involves danger to that property G unless proper care is taken, he is liable to the owners of the property for damage resulting to it from the failure to take proper care, and he is equally liable if, instead of doing the work himself, he procures another, whether agent, servant, or otherwise to do it for him. A like principle applies to work done on or near a highway, involving danger to those who use it: see, e.g., *Holliday* v. *National Telephone Co.* (11)."

H In our opinion, the principles enunciated by TALBOT, J., are correct, and are applicable to the present case To take a photograph in the cinema with a flashlight was, on the evidence stated above, a dangerous operation in its intrinsic nature, involving the creation of fire and explosion on another person's premises, that is, in the cinema, the property of the cinema company. The plaintiffs, in procuring this work to be performed by their contractors, the defendants, assumed I an obligation to the cinema company which was, as we think, absolute, but which was at least an obligation to use reasonable precautions to see that no damage resulted to the cinema company from those dangerous operations. That obligation they could not delegate by employing the defendants as independent contractors, but they were liable in this regard for the defendants' acts. For the damage actually caused the plaintiffs were, accordingly, liable in law to the cinema company, and are entitled to claim and recover from the defendants damages for their breach of contract or negligence in performing their contract to take photographs.

The learned judge has found for the defendants because he has held (founding himself on the words of LORD WATSON in *Dalton* v. *Angus* (4)) that the work to be done by the defendants for the plaintiffs,

> "was not necessarily attended with risk. It was work which, as a general rule, would seem to be of quite a harmless nature."

But, with respect, he is ignoring the special rules which apply to extra hazardous or dangerous operations. Even of these it may be predicated that, if carefully and skilfully performed, no harm will follow. As instances of such operations may be given those of removing support from adjoining houses, doing dangerous work on the highway, or creating fire or explosion. Hence it may be said in one sense that such operations are not necessarily attended with risk. But the rule of liability for independent contractors attaches to those operations, because they are inherently dangerous, and hence are done at the principal employer's peril.

For these reasons, we are of opinion that the appeal must be allowed, the judgment set aside and judgment entered for the appellants for the amount of the damage.

Appeal allowed.

Solicitors: *Linklaters & Paines*; *Berrymans.*

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

ADELAIDE ELECTRIC SUPPLY CO., LTD. *v.* PRUDENTIAL ASSURANCE CO., LTD.

[HOUSE OF LORDS (Lord Atkin, Lord Warrington, Lord Tomlin, Lord Russell and Lord Wright), October 31, November 2, 3, 6, 7, 9, 10, December 15, 1933]

[Reported [1934] A.C. 122; 103 L.J.Ch. 85; 150 L.T. 281; 50 T.L.R. 147; 77 Sol. Jo. 913; 39 Com. Cas. 119]

Interest—Interest on company's stock—Payment abroad—Payment in currency of place of payment.

In 1905 the appellant company was registered in England under the Companies Acts, 1862–1900, but its business was carried on in Australia, and in 1906 a branch register was established in Southern Australia. By special resolutions of the company passed in 1921 it was provided that all business of the company should be transacted in Adelaide or elsewhere in Australasia, and that: "All dividends that may be declared by the company in general meeting shall be declared only at a general meeting held in Adelaide or elsewhere in Australasia and shall be paid in and from Adelaide or elsewhere in Australasia, and all preference and interim dividends declared by the board shall be declared only at meetings of the board held in Adelaide or elsewhere in Australasia and shall be paid in and from Adelaide or elsewhere in Australasia, and no part of the profits of the company shall be transmitted to the United Kingdom except in payment of dividends to members ordinarily resident there." The respondents were the holders of preference stock in the appellant company which they had acquired between 1924 and 1928.

Held: where in an English contract governed primâ facie by English law (here the articles of the company as amended by the resolutions of 1921) there was a provision for performance in part in another country the presumption was that performance was to be in accordance with the local law; in the present case the obligation of the company to pay was an obligation to pay in

A Australia a sum of money expressed in a money of account common to the United Kingdom and Australia; and, therefore, payment was to be made in what was legal tender in Australia for the sum expressed in the common money of account and not in English legal tender or its equivalent in Australian currency.

Broken Hill Proprietary Co., Ltd. v. *Latham* (1), [1933] Ch. 373, overruled.

B **Notes.** Applied: *Auckland Corpn.* v. *Alliance Assurance Co.*, [1937] 1 All E.R. 645. Considered: *British and French Trust Corpn.* v. *New Brunswick Rail. Co.*, [1937] 4 All E.R. 516. Explained: *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society, Ltd.*, [1937] 4 All E.R. 206. Considered: *Ottoman Bank of Nicosia* v. *Chakarian*, [1937] 4 All E.R. 570; C *De Bueger* v. *Ballantyne & Co.*, [1938] 1 All E.R. 701; *National Bank of Australasia, Ltd.* v. *Scottish Union and National Insurance Co.*, [1952] A.C. 493; *National Mutual Life Association of Australasia, Ltd.* v. *A.-G. for New Zealand*, [1956] 1 All E.R. 721. Referred to: *Payne* v. *Deputy Federal Comr. of Taxation*, [1936] 2 All E.R. 793; *Apostolic Throne of St. Jacob* v. *Saba Eff Said*, [1940] 1 All E.R. 54; *Treseder-Griffin* v. *Co-operative Insurance Society*, [1956] 2 All E.R. 33.

D As to the currency in which a debt is payable, see 23 HALSBURY'S LAWS (2nd Edn.) 173 et seq., and for cases see 35 DIGEST 169 et seq.

Cases referred to:

(1) *Broken Hill Proprietary Co., Ltd.* v. *Latham and others*, [1933] Ch. 373; 102 L.J.Ch. 163; 148 L.T. 412; 49 T.L.R. 137; 77 Sol. Jo. 29, C.A.; E Digest Supp.

(2) *King Line, Ltd.* v. *Westralian Farmers, Ltd.* (1932), 48 T.L.R. 598, H.L.; Digest Supp.

(3) *Mitchell* v. *Egyptian Hotels, Ltd.*, [1915] A.C. 1022; 84 L.J.K.B. 1772; 113 L.T. 882; 31 T.L.R. 546; 59 Sol. Jo. 649; 6 Tax Cas. 542, H.L.; 29 Digest 26, *139*.

F (4) *Ralli Bros.* v. *Compañia Naviera Sota y Aznar*, [1920] 2 K.B. 287; 89 L.J.K.B. 999; 123 L.T. 375; 15 Asp.M.L.C. 33; 25 Com. Cas. 227; 36 T.L.R. 456; 64 Sol. Jo. 462, C.A.; 11 Digest (Repl.) 435, *791*.

(5) *Chatenay* v. *Brazilian Submarine Telegraph Co., Ltd.*, [1891] 1 Q.B. 79; 60 L.J.Q.B. 295; 63 L.T. 739; 39 W.R. 65; 7 T.L.R. 1, C.A.; 17 Digest (Repl.) 339, *1445*.

G (6) *Mixt Moneys Case* (1605), Davis 18; 2 State Tr. 113; 11 Digest (Repl.) 640, *637*.

(7) *Saunders* v. *Drake* (1742), 2 Atk. 465; 26 E.R. 681, L.C.; 11 Digest (Repl.) 407, *613*.

(8) *Scott* v. *Bevan* (1831), 2 B. & Ad. 78; 9 L.J.O.S.K.B. 152; 109 E.R. 1073; 35 Digest 174, *44*.

H (9) *Cash* v. *Kennion* (1805), 11 Ves. 314; 32 E.R. 1109, L.C.; 35 Digest 173, *35*.

Appeal from an order of the Court of Appeal (LORD HANWORTH, M.R., LAWRENCE and ROMER, L.JJ.), affirming a decision of FARWELL, J.

The appellant company was registered in England under the Companies Acts, 1862–1900, and had its registered office in London. The respondents were registered in the appellant company's English register as holders of £11,000 "A" I preference stock and £30,000 "C" preference stock in the appellant company. Some of the shares now represented by such stock had been issued before 1921 and others after that date.

By special resolutions of the appellant company duly passed on Jan. 19, 1921, and confirmed on Feb. 4, 1921, it was (inter alia) provided that all business of the company should be transacted in Adelaide or elsewhere in Australasia and that

> "All dividends that may be declared by the company in general meeting shall be declared only at a general meeting held in Adelaide or elsewhere in Australasia and shall be paid in and from Adelaide or elsewhere in Australasia,

> and all preference and interim dividends declared by the board shall be declared only at meetings of the board held in Adelaide or elsewhere in Australasia, and shall be paid in and from Adelaide or elsewhere in Australasia and no part of the profits of the company shall be transmitted to the United Kingdom except in payment of dividends to members ordinarily resident there."

Since March 1, 1931, the appellant company had paid the interest due on its stock by delivery to the stockholders of warrants to the nominal amount of the respective dividends, subject, where necessary, to deduction of tax, payable at the Bank of Adelaide in Adelaide.

By their statement of claim the respondents had claimed a declaration of their rights, payment of the balance of a dividend, and consequential relief. The question arising on this appeal was whether the respondents were entitled to be paid their interest in England in English legal tender to the full nominal amount of such interest in sterling without any deduction in respect of Australian exchange, or whether the appellant company's obligation to pay such interest could be satisfied by payment in Australia of the full nominal amount in Australian legal tender or by payment in England of such an amount in English legal tender as would be equal to the nominal amount of such interest after deduction in respect of Australian exchange.

Farwell, J., held that he was obliged by the decision of the Court of Appeal in *Broken Hill Proprietary Co., Ltd.* v. *Latham and others* (1) to hold that the English "pound" and the Australian "pound" were separate monetary units and that the rights attached to the preference shares were expressed in English and not Australian pounds, and that the special resolutions of Jan. 19 and Feb. 4, 1921, had not altered the right of the preference stockholders to be paid in English pounds or their equivalent. The Court of Appeal having affirmed the decision of Farwell, J., the company appealed.

Wilfrid Greene, K.C., and *J. W. Brunyate* for the appellants.

Sir William Jowitt, K.C., *W. P. Spens, K.C.*, and *H. S. G. Buckmaster* for the respondents.

The House took time for consideration.

Dec. 15. The following opinions were read.

LORD ATKIN.—I have had the opportunity of reading the opinion which is about to be given by my noble and learned friend Lord Wright, and, agreeing, as I do, with much of his reasoning, subject to the qualification which I am about to express, I do not propose to discuss at length the question before the House.

I desire, however, to add a few words on the topic whether there are or were two different "pounds"—the Australian and the English. We do not seem to get very far by describing the "pound" as a unit of account. Its essential use is to denote a measure of value expressed in a specific currency or currencies. I say currencies, for it seems to me that it may well happen that the recipient of an obligation expressed in pounds may be indifferent as to the currency denoted by the pound in which the obligation is discharged and is prepared to accept the currency which is legal tender in the country where performance is made, and that the legal rights of the parties accord with that position. It is in that sense that the "pound" can be said to be the "same" in the two countries. I think myself that this was the position for years while both England and Australia were on the gold standard, during the time when the "pound" in either country expressed a value measured in gold sovereigns or in promises contained in notes by whatever institution issued which were as good as gold. Of course, notwithstanding that the pound was the same, the contract might expressly or impliedly state the place for performance. In such a case the pound denoted value expressed in the currency of that place. The question of construction would then be not which pound was intended, but in what place the obligation to pay a common pound was to be enforced. I think, however, that where values in one currency or another

A show a substantial difference there is every reason for concluding that the recipient is not indifferent to the currency in which the obligation is performed, and that the pounds then become different, so that there will be an English and an Australian pound. I apprehend that at the present day when an Australian farmer sells so many bales of wool in Australia for so many pounds he will ask for and receive quite a different number of pounds in accordance with the place, Australia B or England, in which the obligation is to be performed. No doubt, ordinarily in such cases the place of payment is expressed; but, if not, it would seem improbable that the parties intended different values in the two countries.

Without expressing a final opinion I incline to think that at the present day the English pound and the Australian pound are not the same. In the application of this view to the present case I should prefer to say that at the material times C the pound English and Australian was the same; and that, therefore, when the articles validly provided for payment in Australia the law of legal tender in Australia governed performance. If, however, they were different I do not dissent from the construction that as altered the articles provided for payment in Australian pounds. I should add that I also agree with the criticism of the decision in *Broken Hill Proprietary Co., Ltd.* v. *Latham and others* (1), which must be D considered to be overruled. I move your Lordships that the appeal be allowed and the action be dismissed, with costs.

LORD WARRINGTON (read by LORD TOMLIN).—The appellants are a company registered in England under the Companies Acts, and the respondents are registered in the appellants' English register as holders of preference stock in the appellant E company, carrying the right to fixed preferential dividends, some of the shares now represented by such stock having been issued before 1921 and others after that date. By a special resolution of the appellant company, confirmed in 1921, all dividends are to be declared in Australasia and are to be paid in and from Australasia. The question between the parties is whether (as the appellants contend) such dividends may be satisfied by payment in Australia of Australian F legal tender to the nominal amount of the dividends, or whether (as the respondents contend) preferential dividends payable to stockholders registered in the English register can be satisfied only by payment in England of English legal tender to the nominal amount of the dividends or by payment in Australia of an amount in Australian legal tender sufficient, at the rate of exchange ruling for the time being, to purchase that amount of English legal tender in England. This question was G decided by FARWELL, J., and by the Court of Appeal in favour of the respondents, both courts being of opinion that they were bound by the judgment of the Court of Appeal (LORD HANWORTH, M.R., dissenting) in *Broken Hill Proprietary Co., Ltd.* v. *Latham and others* (1), reversing a decision of MAUGHAM, J.

The solution of the question depends upon the true construction and effect of the contract between the appellants and the several classes of shareholders having H regard to the monetary conditions prevailing in England and Australia respectively.

The relative obligations of the company and its stockholders are, of course, derived from and depend upon the memorandum and articles of association and the resolutions under which the several denominations of shares (now converted into stock) were issued and taken up. In this case, the company being an English company registered under the Companies Acts, the contract between the company I and its members is an English contract, and the law of the contract is English. Until the confirmation of the special resolution of 1921 hereinafter mentioned the business of the company was managed from England, and dividends were declared in England and payment thereof was made in England and in English currency. This was in strict accord with the lex loci solutionis at that time applicable. The practical business of the company—namely, that of supplying electric energy in the city of Adelaide—was, however, conducted and its profits were made in that place, and in 1921 it was determined, obviously with a view to escaping from liability to English income tax, to transfer the entire business to Adelaide, leaving only mere formal business connected with the English register and so forth to be conducted here. This transfer was carried into effect by the special resolution confirmed in February, 1921, already referred to. It is only necessary to refer to that part of the resolution relating to dividends, which runs as follows:

> "All dividends that may be declared by the company in general meeting shall be declared only at a general meeting held in Adelaide or elsewhere in Australasia, and shall be paid in and from Adelaide or elsewhere in Australasia, and all preference and interim dividends declared by the board shall be declared only at meetings of the board held in Adelaide or elsewhere in Australasia and shall be paid in and from Adelaide or elsewhere in Australasia, and no part of the profits of the company shall be transmitted to the United Kingdom except in payment of dividends to members ordinarily resident there."

It cannot on the admitted facts be successfully contended that this resolution was otherwise than an effective special resolution under the Companies Acts, and binding on the respondents, and, if this be so, it has the effect of modifying the original contract between the company and its members whether the latter became such before or after its date. The particular modification material in the present case was the change of the locus solutionis as regards dividends from England to Australia. The general rule, I think, is well settled, namely, that in such cases monetary obligations are effectually discharged by payment of that which is legal tender in the locus solutionis, and, unless there is something in this case to take it out of the general rule, the question ought, in my opinion, to be decided in favour of the contention of the appellant company.

Is there then in this case any circumstance sufficient to take the case out of the general rule as above stated? In the first place, the fact that "A" preference stock forming a portion of the respondents' holding was created before 1921 cannot, in my opinion, distinguish their position as regards this stock from their position as to the remainder of their holding. The special resolution of 1921 applies to the dividends on all preference stocks without distinction, and from that date all such dividends are to be declared and paid in Adelaide or elsewhere in Australasia. The place of payment is, therefore, Australasia. The next question is what amount in Australian currency must be paid in order to satisfy an obligation to pay so many pounds, shillings, and pence. After consideration of the history of Australian and English money I have come to the conclusion that merely as a unit of account the pound symbolised by the £ is one and the same in both countries, and that the difference in the currencies merely concerns the means whereby an obligation to pay so many of such units is to be discharged. The currency in both countries is now a paper currency and is not convertible into gold, and it is legal tender in each country for any amount. There is a token currency in silver and bronze in each country which is legal tender as to silver for not more than £2 and as to bronze for not more than one shilling. An obligation, therefore, to pay in Australia so many pounds, shillings, and pence is, in my opinion, effectually discharged by payment there of that amount and no more in Australian currency. It happens unfortunately for the present holders in England of the various preference stocks that the exchange between the two countries is considerably against Australia, though from September, 1922, to June, 1926, it was in her favour. But if I am right in the opinion which I have expressed, questions of exchange are irrelevant, inasmuch as the obligations in question are finally discharged by the payment in Australia: see *King Line, Ltd.* v. *Westralian Farmers, Ltd* (2).

In my opinion, this appeal should be allowed and the orders of FARWELL, J., and of the Court of Appeal should be reversed, with costs here and below, and judgment entered in the action for the defendants. It follows that, in my opinion, the judgments of MAUGHAM, J., and of LORD HANWORTH, M.R., in *Broken Hill Proprietary Co., Ltd.* v. *Latham and others* (1) were correct, and that the judgment of the majority in the Court of Appeal should be treated as overruled.

A **LORD TOMLIN.**—The appellant company is an English company incorporated on April 10, 1905, under the Companies Acts, 1862–1900, as a company limited by shares. Its registered office is, and always has been, in London. Since the year 1906 it has kept, in addition to the principal register of shareholders in London, a branch register in South Australia. The business of the appellant company is, and always has been, carried on in the city and district of Adelaide,
B South Australia. Before the passing, on Jan. 19, 1921, of certain special resolutions, which will be referred to later, the headquarters administration of the appellant company was seated in London, where all general meetings were held.

The capital of the appellant company includes (i) certain stock known as 5 per cent. (free of British income tax) "A" cumulative preference stock, and (ii) certain stock known as 6½ per cent. "C" cumulative preference stock. I shall refer
C hereafter to these two classes of stock respectively as the "A" stock and the "C" stock. Both the "A" stock and the "C" stock were originally in the form of shares, and were converted into stock by virtue of a resolution of the appellant company passed on Nov. 21, 1929, and a resolution of the board of directors passed on Jan. 30, 1930. The "A" stock had its origin in a resolution of the appellant company of July 1, 1919, increasing the then existing capital by £250,000, divided
D into 250,000 shares of £1 each. The resolution provided (inter alia) that the shares were to be entitled to a cumulative dividend at a rate which, after deducting British income tax at the rate for the time being current, should be equivalent to a dividend of 5 per cent. per annum on such shares, and that such shares were to rank pari passu with certain existing 6 per cent. cumulative preference shares of the appellant company. The shares created by or pursuant to the last-mentioned
E resolution were all issued in England in July, 1919; 11,000 of them were allotted to predecessors in title of the respondents, who transferred them to the respondents in or about June, 1925. On June 1, 1925, the respondents became, and since have been, on the register in England of the appellant company the registered holders of such shares or of the corresponding amount of stock into which such shares were subsequently converted.

F The "C" stock came into existence in the circumstances which I will next state. By four resolutions of the appellant company, dated respectively Aug. 14, 1922, Oct. 1, 1924, Nov. 10, 1926, and Nov. 12, 1928, the capital of the appellant company was increased by sums which in the aggregate amounted to £1,000,000, divided into 1,000,000 shares of £1 each. The shares created by or in pursuance of the second and fourth of these four resolutions were offered for public subscrip-
G tion in England and Australia concurrently (applicants in Australia paying for the nominal amounts allotted in corresponding sums in Australian currency). On Nov. 3, 1924, 20,000 "C" shares of the 1924 issue were allotted to the respondents as the result of an application by them in England, and on Dec. 3, 1928, 10,000 "C" shares of the 1928 issue were allotted to them as the result of a like application. Since each of such allotments the respondents have been the registered
H holders on the English register of the appellant company of the "C" shares thereby allotted, or of the corresponding amount of stock into which such shares were converted.

On Jan 19, 1921 and Feb. 4, 1921, certain special resolutions of the appellant company were duly passed and confirmed, having for their object the complete transfer to Adelaide or elsewhere in Australasia, as the appellant company in
I general meeting should determine, of the transactions, control, management, and conduct of the whole of the business of the appellant company, except such formal parts of the business as were, by the statutes for the time being applicable to such company, required to be transacted in England or at the registered office for the time being. These resolutions provided (inter alia) that, except so far as otherwise required by statute, all general meetings of the appellant company, and all meetings of the board of directors, and all class meetings of shareholders should be held in Adelaide or elsewhere in Australasia as aforesaid, and, further, that all dividends that might be declared by the appellant company in general meeting should be

declared only at a general meeting held in Adelaide or elsewhere in Australasia as aforesaid, and should be paid in and from Adelaide or elsewhere in Australasia as aforesaid, and that all preference and interim dividends declared by the board should be declared only at meetings of the board held in Adelaide or elsewhere in Australasia as aforesaid, and should be paid in and from Adelaide or elsewhere in Australasia as aforesaid, and that no part of the profits of the appellant company should be transmitted to the United Kingdom except in payment of dividends to members ordinarily resident there.

Since these resolutions were passed the affairs of the appellant company have been managed and conducted wholly in Australasia, and all dividends have been declared in Adelaide. Before March 1, 1931, all dividends paid to the holders of "A" stock or "C" stock registered on the English register were paid by the appellant company by cheque drawn on a bank in England, and all dividends paid to the holders of "C" stock registered on the Australian register were paid by a cheque drawn on a bank in Adelaide, the cheques being made out for identical amount in pounds, shillings, and pence for identical holdings, subject, where necessary, to deduction of tax. On and since March 1, 1931, the appellant company has paid the dividends due upon its stock by delivery to the stockholders of warrants to the nominal amount of the respective dividends, subject, where necessary, to deduction of tax, payable at the Bank of Adelaide in Adelaide. The result, having regard to the present position of the exchange between this country and Australia, is that the respondents, who are resident in this country and are registered on the English register, receive over here in money of English tender an amount which is less than the face value of the cheque which has been satisfied in Australia in money of Australian tender.

The respondents launched the present action in February, 1932, claiming in effect that they are entitled to be paid either in England in English legal tender the full nominal amount of the dividends, or in Australia in Australian legal tender, sufficient at the ruling rate of exchange at this due date to purchase in England the required amount of English legal tender. The appellant company, on the other hand, contend that by the payments made in Australia all sums due to the respondents have been duly discharged. FARWELL, J., and the Court of Appeal, treating themselves as bound by the decision of the Court of Appeal in *Broken Hill Proprietary Co., Ltd.* v. *Latham and others* (1), have decided in favour of the respondents.

The case, both in the courts below and before your Lordships' House, led to an interesting discussion upon the past history and present position of the currency laws in the United Kingdom and Australia respectively with a view to illuminating the question whether or not there is an English pound distinct from the Australian pound, or whether the pound is the unit or the money of account common to both countries. In a matter of this complexity a difference of opinion is not unlikely to occur, but I have reached the conclusion that MAUGHAM, J.—whose decision was reversed by a majority of the Court of Appeal—was right in *Broken Hill Proprietary Co., Ltd.* v. *Latham and others* (1) in holding that in October, 1920, the relevant date in that case, there was no Australian pound as a distinct money of account from the English pound. In my opinion, the position was the same in January and February, 1921, the relevant dates in the present case.

The pound sterling as the unit of measure was carried by the early settlers from this country to Australia. There has never, in fact, been either in the United Kingdom or Australia, so far as I am aware, any statute or Order in Council or other Act in the law having the force of statute expressly separating the money of account of the United Kingdom from the money of account of Australia or creating a distinct Australian unit. The Commonwealth of Australia created in 1900 was given full powers to make laws with respect to currency, coinage and legal tender. It has, in fact, never affected expressly to alter the money of account or to set up a distinct Australian money of account. Both before and after the establishment of the Commonwealth the sovereign, whether minted in London or in any of the Australian mints, which were, and are, branches of the Royal Mint in London, was, as theoretically it is to-day, legal tender both in the United Kingdom and in Australia. The same is true of United Kingdom silver and bronze coins within the limits (common to both the United Kingdom and Australia) of the sums for which they are respectively legal tender, though the actual amount of United Kingdom silver and bronze coin current in Australia is negligible in amount.

The Australian Coinage Act of 1909 authorised the Treasurer of the Commonwealth to cause to be made and issued silver and bronze coins of specified denominations and specified weight and fineness corresponding in fact with silver and bronze coins of the United Kingdom, and expressly provided that tender of payment of money, if made in United Kingdom or Australian coins, should be legal tender in the case of gold coins for the payment of any amount, and in the case of silver and bronze coins for the payment of 40s. and 1s. respectively. This Act reproduced, as s. 7, s. 6 of the Coinage Act, 1870, of the United Kingdom. This section is as follows:

> "Every contract, sale, payment, bill, note, instrument, and security for money, and every transaction, dealing, matter, and thing whatever relating to money, or involving the payment of or the liability to pay any money, which is made, executed, or entered into, done or had shall be made, executed, entered into, done and had according to the coins which are current and legal tender in pursuance of this Act, and not otherwise, unless the same be made, executed, entered into, done or had according to the currency of some British possession or some foreign state."

I confess that I find difficulty in assigning any meaning of precision to this obscure section. Whatever it means, however, it does not seem to contain anything inconsistent with the pound remaining the common money of account of the United Kingdom and Australia. The power of making and issuing Australian gold coins possessed by the Commonwealth has never been exercised. In 1910 power was conferred on the Treasurer of the Commonwealth to issue, and there were issued, Australian notes convertible into gold which were legal tender within the territories of the Commonwealth. In 1911 the Commonwealth Bank was established by the Commonwealth Bank Act, 1911, and by an amending Act of 1920 the bank was empowered to issue, and issued, notes convertible into gold which were made legal tender in the territories of the Commonwealth. The notes of the Commonwealth are not, and never have been, legal tender in the United Kingdom.

So the matter stood in the year 1921, and in that year, at any rate, there was, in my judgment, a common money of account of the United Kingdom and the Commonwealth, notwithstanding that there were differences between the two countries so far as legal tender was concerned. The difference in exchange in 1921 was small, and between 1922 and 1924 was in favour of Australia. Further, I am not able to convince myself that the course of events subsequent to 1921 has made any difference in the theoretical position that there is one common money of account. It is true that neither country is any longer on the gold standard, and that in each country as part of the legal tender there is an inconvertible note issue, but how do those facts affect the matter? There are still in law, as there always have been, common elements in the two currencies. I ask myself, if there has been a change in the money of account, when did it take place and what caused it, and I find no answer. The importance of this question seems to me to be that the answer must necessarily affect the angle from which the question of the construction of the appellant company's obligations in respect of the payment of dividends is to be approached.

I do not think it can be doubted that the obligations which govern the relations between the appellant company and their stockholders in regard to the payment of dividends are obligations arising out of an English contract, and are to be regarded and construed as governed primâ facie by English law. In relation to such obligations, therefore, the word "pound" and the symbol for pound must, I think, be regarded as referring in the light of what I have said to the money of account which, in my view, is common to the United Kingdom and Australia, and any payment to be made expressed in that money of account must be treated in the absence of any special provision as a payment to be made in England in that which is legal tender in England.

The question is: What was the effect in 1921 of introducing into the obligation of the appellant company, having the effect I have indicated, a modification providing for payment only in Australia? The provision as to the payment of dividends in and from Adelaide was, so far as "A" stock was concerned, introduced as a new condition after the issue of such stock, but so far as the "C" stock is concerned preceded, and, therefore, formed part of, the terms of issue. Now, where in an English contract governed primâ facie by English law there is a provision for performance in part in another country the primâ facie presumption is that performance is to be in accordance with the local law, and I see no reason why this presumption does not apply in the present case. That must mean, applied to the facts of this case and upon the view I have expressed as to the pound, that the obligation to pay is an obligation to pay a sum of money expressed in a money of account common to the United Kingdom and Australia, and that when the payment under the terms of the obligation has to be discharged in Australia it has to be made in what is legal tender in Australia for the sum expressed in that common money of account. It cannot mean that it is an obligation to pay a sum of money expressed in money of account which is not Australian money of account and that, therefore, if payable in Australia, it must be discharged there by payment either in English legal tender of the amount expressed in the English money of account or in Australian legal tender of such an amount expressed in the money of account of Australia as will buy in London the amount in English legal tender of the obligation expressed in the English money of account.

So far as the decision of the majority of the Court of Appeal in *Broken Hill Proprietary Co., Ltd.* v. *Latham and others* (1) differs in principle from the foregoing, I think it was wrong, and that, apart from a special question in relation to the "A" stock which I will next consider, the appeal in the present case ought to succeed. It is, however, urged by the respondents that the resolutions of 1921, if and so far as they operate to the detriment of holders of "A" stock, were invalid because they were not consented to by a class meeting of such holders. This contention is based upon art. 74 of the articles of association of the appellant company, which is in the following terms:

> "74. The holders of any class of shares may, by an extraordinary resolution passed at a meeting of such holders, give on behalf of all the holders of shares of the class any consent required to the issue or creation of any shares ranking equally therewith, or having any priority thereto, or may consent to the abandonment of any preference or priority, or of any accrued dividend, or to the reduction for any time or permanently of the dividends payable thereon, or to any scheme for the reduction of the company's capital affecting the class of shares, and such resolution shall be binding upon all the holders of shares of the class: Provided that this article shall not be read as implying the necessity for such consent in any case in which, but for this article, the object of the resolution could have been effected without it."

I do not think this contention is well founded. The object of the resolution—namely, the changing of the place of payment of dividends—was one which, in my opinion, could be effected without any consent by or on behalf of the "A" stockholders. The fact that by reason of the operation of exchange rates there is some loss to such stockholders arising out of the change in the place of payment or dividends is not, I think, a reduction in dividend within the meaning of the article or an interference with any preference or priority of such stockholders. In the result, therefore, I think that the appeal should be allowed and that the judgment of FARWELL, J., and the order of the Court of Appeal be set aside and that the action should be dismissed, and the costs here and below be paid by the respondents.

LORD RUSSELL.—In common with all those before whom this case has come for decision, I have found it to be one of great difficulty.

I will not repeat the facts which have given rise to the question before this House. The courts below answered it in favour of the respondents, conceiving themselves bound by the earlier decision of the Court of Appeal in *Broken Hill Proprietary Co., Ltd.* v. *Latham and others* (1). The present is, in a sense, the converse of that case; but, as FARWELL, J., pointed out, the Court of Appeal had held in the *Broken Hill Case* (1) that the English pound and the Australian pound were separate monetary units, and that considering the matter upon that basis he could find nothing in the relevant resolution affecting the primary obligation of the company to pay its dividends, at any rate to its English stockholders, in English currency.

The crucial point and the foundation of the difference between MAUGHAM, J., and the majority of the Court of Appeal in the *Broken Hill Case* (1) are the answer to the question whether there existed something (which is variously called a measure of value, a standard unit of value, money of account, and a unit of account) which could be called an Australian pound as distinct from an English pound. MAUGHAM, J., thought not. LAWRENCE and ROMER, L.JJ., held that such an Australian pound did exist.

In the opinion of my noble and learned friend LORD TOMLIN, which has just been delivered, is contained a short but sufficient account of how matters stood in Australia in the year 1921 in regard to the pound as a unit of account, and in regard to legal tender for discharging debts incurred in terms thereof. I need not repeat it, but it satisfies me that the pound in Australia was originally the same unit of account as the pound in England, not merely a unit of account with the same name, and that it is impossible to say that any other or different unit of account has ever taken its place.

If this be the correct view, this problem would resolve itself into a case of the company becoming indebted from time to time in amounts payable in Australia, and expressed in terms of units of account common to Australia and England. The question then is, How can the company discharge that indebtedness? The answer can, I think, only be in whatever currency is legal tender in the place in which the indebtedness is dischargeable. It is not a question what amount of coins or other currency the debtor has contracted to pay. A debt is not incurred in terms of currency, but in terms of units of account. It is a question of discharging a debt incurred in terms of units of account common to more than one country, in the currency which is legal tender in the particular country in which the debt has to be paid.

I am of opinion that the judgment of MAUGHAM, J., upon this point in the *Broken Hill Case* (1) was correct. Upon the question arising under art. 74 of the company's articles of association I have nothing to add to what has already been said. I would allow this appeal.

LORD WRIGHT.—The action which gives rise to this appeal was brought by the respondents on behalf of themselves and all other holders of 5 per cent. "A" cumulative preference stock and 6½ per cent. "C" cumulative stock of the appellant company registered in the appellant company's register in England. The question at issue was whether the dividends on these stocks (the shares of the appellants having been converted into stock) were payable in English sterling or Australian currency. The Court of Appeal affirmed the order made by FARWELL, J., that such dividends were payable either in England by paying English legal tender to the full nominal amount without deduction in respect of Australian exchange, or in Australia by paying such amount in Australian legal tender as would, at the rate of exchange ruling between England and Australia at the date of payment, be equivalent to English legal tender in England to the full nominal A amount of the dividends, subject to any proper tax deduction. The appellant company contends that the order is wrong in law, and that since and in virtue of a special resolution of the appellant company duly passed on Jan. 19, 1921, altering the company's articles, the dividends are due and payable in Australia in Australian legal tender, subject, where proper, to any deduction on account of tax. The determination of the question depends on the true construction of the special B resolution in all the circumstances of the case.

The appellant company was incorporated in 1905 under the Companies Acts, 1862–1900, as a company limited by shares, and its registered office is situate in London. Its business has, however, throughout been carried on in South Australia, in Adelaide, the business being that of supplying electric light and power. Since 1906 it has kept a branch register in Adelaide. The object of the special resolution C was, by transferring all the management and control of the company's affairs and its seat and head to South Australia, to secure that the appellant company was no longer resident in England, and was, therefore, no longer liable to English income tax in accordance with the decision of this House in *Mitchell* v. *Egyptian Hotels, Ltd.* (3). It is not questioned that this object was successfully achieved by the resolution. The material part of the resolution for the purposes of this appeal D was as follows:

> "All dividends that may be declared by the company in general meeting shall be declared only at a general meeting held in Adelaide or elsewhere in Australasia and shall be paid in and from Adelaide or elsewhere in Australasia and all preference and interim dividends declared by the board shall be E declared only at meetings of the board held in Adelaide or elsewhere in Australasia and shall be paid in and from Adelaide or elsewhere in Australasia and no part of the profits of the company shall be transmitted to the United Kingdom except in payment of dividends to members ordinarily resident there."

At the date of the special resolution the issued capital of the appellants consisted F of 100,000 ordinary shares of £5 and 250,000 "A" cumulative preference shares of £1 each, entitled to a dividend at a rate which, after deducting British income tax, should be equivalent to a dividend of 5 per cent. per annum. There were also debentures, which are irrelevant for purposes of these proceedings. All the holders of the "A" cumulative preference shares were entered in the London register, though there is nothing to show (except in the case of the respondents) where they G were resident. The respondents acquired in 1925 £11,000 "A" preference shares, and in 1924 and 1928 were allotted in all 30,000 of the 6½ per cent. "C" preference shares eventually issued by the appellant company. By 1931 the capital of the appellant company had been increased under various resolutions to a total of £3,000,000, which in 1930 had been converted into stock. As the appellant company was registered in England, it is clear that its capital must be a fixed sum in H British sterling, and hence that in a winding-up the stockholders' shares of the assets on a distribution must be ascertained in British sterling. Similarly, all the returns and accounts required by the Companies Acts must have been rendered and kept according to the same currency. Before the special resolution dividends were paid to shareholders in the London register by cheque drawn on a bank in England. The appellant company, however, contends that the payment of divi- I dends involves different considerations from those applicable to capital, and that as from the time when all dividends were, under the special resolution, to be declared in Adelaide or elsewhere in Australasia, and to be paid in and from Adelaide or elsewhere in Australasia, they were to be paid according to the law of the place of performance—that is, in whatever was legal tender in Australia.

It is established that, primâ facie, whatever is the proper law of a contract regarded as a whole, the law of the place of performance should be applied in respect of any particular obligation which is performable in a particular country other than the country of the proper law of the contract. To refer only to one authority, it was held in *Ralli Bros.* v. *Compañia Naviera Sota y Aznar* (4) that freight which, under an English charterparty, was payable at Barcelona was only payable to the extent of a proportion, being all that was permissible under the Spanish law, the law of the place of performance, since that law had forbidden payment of more than a maximum rate of freight, substantially less than the charterparty rate. Lord Warrington quoted with approval from Dicey on the Conflict of Laws (2nd Edn.), p. 563:

> "When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place. . . . This last statement [Lord Warrington adds] is in substance identical with a passage in the judgment of Lord Esher in *Chatenay* v. *Brazilian Submarine Telegraph Co., Ltd.* (5) ([1891] 1 Q.B. at p. 83)."

I need not multiply authorities on this point. But an essential element in the foreign law of the place of performance, when the performance is the payment of money, is the law of currency or legal tender governing in that place. An old authority may be cited. In the case of the *Mixt Moneys* (6), decided in the second year of James I, in the Privy Council in Ireland, the facts were that where one Gilbert, in London, had taken from one Brett, merchant, of Drogheda, a bond for £200 on condition that the latter should pay to the former £100 in Dublin, the question arose whether a tender of £100 which Brett had made in Dublin at the due date was sufficient; at the time the bond was executed the currency in Ireland had been the same as that in England, but before the date for the tender certain "mixed moneys" of inferior purity had been proclaimed to be "loyall and currant money of the realm of Ireland." Brett made his tender in that currency; this tender was held to be sufficient. The report goes on to say (Davis at p. 28):

> "En touts contracts de marchants, consuetudo et statua loci in quem est destinata solutio, respicienda sunt, Budelius de re Nummaria lib. 2, cap. 21."

Thus, the rule was recognised in the law merchant in reference to currency law. The word "pound" or the symbol £ was the unit of account common to both countries, but in the absence of express words it was held to signify in Ireland a different currency, or measure of value, from that expressed by it in England. Where, however, the unit of account is different in the two countries a stipulation to pay a sum of sterling must be construed with reference to the country where payment is to be made; thus, in *Ralli's Case* (4) the freight in question was expressed to be payable at Barcelona "in cash or approved bills at charterers' option." Lord Sterndale ([1920] 2 K.B. at p. 291) construed "in cash" as meaning "in Spanish currency." But the Irish case I have just cited shows that, where the same denomination is used in the two countries, the result may be that the sum in figures is to be construed as meaning that number of the common unit of account, "pounds" according to its meaning in the currency law of the country where payment is to be made. Thus, it will be a question of construction in the absence of express terms whether the word "pound" means what may compendiously be described as an English pound or a colonial pound. In *Saunders* v. *Drake* (7) a question arose under the will of a testator who had lived in Jamaica in respect of a legacy under the will of £300. The legatee claimed that, as he was living in England and as the testator had property both in Jamaica and England, the legacy was payable in sterling and not according to the Jamaican "pound," which was of less value. Lord Hardwicke held that the legacy was payable according to the current money of Jamaica; he said that as a general rule if a sum of money is left by will in Dublin or Jamaica it must be paid in current money. He also held, apart from the general rule, that Jamaican pounds must be meant because other legacies in the same will were expressly left in sterling. Reference to the different values of English sterling and colonial currencies, having the same denomination of the pound, are not uncommon in the reports, as, for instance, in *Scott* v. *Bevan* (8).

The respondents have, however, contended that in the present case the true construction of the special resolution is that the appellant company are bound to pay to all shareholders, whether they are resident in England or Australia (or, I presume, elsewhere), not the agreed number of pounds in Australian currency, but such an amount of Australian currency as would equal at the appropriate date the agreed number of pounds in English currency, applying the same principles as in the case of the Spanish pesetas and treating as immaterial the fact that "pound" is identically used as the unit of account both in England and Australia. On the other hand, the appellants have contended that the word "pound" means the same in both places, though local monetary conditions have given a different value in the different places. I need not pursue in detail the elaborate discussion, historical and economic, which there has been on this point before your Lordships in this case, but I can state shortly the conclusion at which I have arrived on the matter. For simplicity I disregard silver and bronze coins. Up to 1914 the currency of both England and Australia was based on, and stabilised by, the same gold coin, the sovereign, as established by the Imperial Coinage Act, 1870; sovereigns (and other gold coins) were minted only at the Royal Mint or its branches in Australia; these gold coins were legal tender in either country. Each country had, however, its own note issue, the English notes being issued by the Bank of England under the Bank Charter Act, 1833, and the Australian notes, at first, by the Treasurer under the Australian Notes Act, 1910, and later by the Commonwealth Bank under the Commonwealth Bank Act of 1920; but as both these classes of notes were by law convertible into gold according to the same gold coinage there can have been little, if any, reason to distinguish one currency from the other. In each currency the unit of account, the pound, was the same; and in each currency the measure of value expressed by that unit of account was the same, namely, the gold sovereign. In 1921, the date of the special resolution, the legal position had not changed, save that in England during the course of the war of 1914–18 and by an Act of 1920, the export of gold had been prohibited. In 1914 also the issue of Treasury notes of 10s. and £1 had been established. In fact, gold had by 1921 practically gone out of circulation both in England and Australia, but in law in either country the notes were still convertible into gold as before. Later, in 1925, by the Gold Standard Act, the Bank of England was relieved of its obligation to pay its own notes and the Treasury notes in gold, though it was bound to sell bullion in bars of about 400 oz. at a fixed rate. In Australia, by the Commonwealth Bank Act, 1929, a person might be required by the Treasurer to surrender for the nominal equivalent in Australian notes any gold coin in his possession, and similarly any gold bullion; this in effect ended the convertibility of the Commonwealth notes. Finally, in England by the Gold Standard (Amendment) Act, 1931, the obligation of the Bank of England to sell gold bullion at a fixed rate was suspended, and by the Commonwealth Bank Act, 1932, the promise of the Treasurer to redeem the bank's notes in gold was repealed. Thus each country went off the gold standard, and the value of the pound, whether English sterling or Australian currency, was left to depend on the credit of the respective governments and banks of issue. Exchange rates are quoted between England and Australia; your Lordships have been provided with a summary of these at various dates from 1913 to 1932. If I take as illustrations the exchange in December, 1921, about the date of the special resolution, it was £1 10s. per cent. in favour of English sterling; in September, 1924, about the time of the allotment of "C" preference shares to the respondents, it was £3 per cent. in favour of Australian currency; it was still in favour of Australian currency in 1925, when the respondents acquired by purchase the "A" preference shares; in March, 1928, about the date at which the respondents were allotted their remaining "C" preference shares, it was 15s. per cent. in favour of English sterling; in January, 1931, it was £30 5s. per cent. in favour of English sterling; and in March, 1932, it was £25 5s. per cent. in favour of English sterling.

I think it must be held, in view of these facts, that not only in a business sense, but in a legal sense, the currencies of England and Australia are and were at all material times different currencies, notwithstanding the identity of the unit of account. This difference is inherent in the difference of the law-making authority at either place, as well as in the different commercial conditions prevailing. In *King Line, Ltd.* v. *Westralian Farmers, Ltd.* (2), the parties had expressly provided in a charterparty between them, dated Sept. 5, 1930, as between British sterling and Australian currency on the basis of their being different currencies, for the various payments according to the proper places at which they were to be made.

There thus falls to be decided in the present case which currency is intended on the true construction of the special resolution which altered the place at which dividends are declared and payable. Where the denominations of the currency are different, as in the case of the Spanish pesetas, it is clear that an exchange operation is necessarily involved. But where the denomination of the unit of account is identical in the two currencies, though the measure of value which is expressed by the unit of account is different, the question is not so concluded. If in the present case the articles as altered are treated as constituting pro tanto the contract between the shareholders and the appellant company, the question is whether the proper law of the contract (which is English because the appellant company is an English company), or the law of the place of the declaration and the payment of dividends, which is Australian, is to govern the meaning of the word "pound." In my opinion, the latter is the true construction. The old cases I have cited show, as I think, that in determining what currency is intended the general rule primâ facie applies that the law of the place of performance is to govern. As Lord Eldon said in *Cash* v. *Kennion* (9), the debtor is bound to have the money ready at the appointed time and place of payment. It is natural and reasonable that the money he should be bound to have ready should be the legal money of that place, rather than that he should have a foreign currency or should have an amount in his home currency which is not the agreed figure but a different figure representing an exchange operation by which the agreed figure is converted (in this case) from sterling to currency. Similarly, if a Frenchman and a Belgian were to agree that francs were to be paid by one to the other in Brussels, it would naturally be inferred, in the absence of express terms, that the Belgian franc was intended. The appellant company, furthermore, was earning its profits in Australia, and, except formal matters (such as the necessary returns and accounts under the English Companies Acts), all its affairs, including the declaration of dividends, were being conducted in Australia. It is not in evidence what proportion of the shareholders (now stockholders) are resident in Australia, but it is clear that a considerable number are so resident. If an Australian shareholder went with his preference dividend warrant to the appellant company's bank in Adelaide and asked for payment in notes, he would, it seems, expect to be paid in the legal tender there current—that is, in Commonwealth banknotes, and equally the same would be true of an English shareholder who happened to be in Adelaide and asked for payment there. But the fact that a shareholder is in London and has the dividend transmitted to him by post cannot affect his legal rights; the payment is still a payment in Australia, which is all that he is entitled to. In truth, at the date of the resolution in January, 1921, the question of exchange would not naturally assume the importance that it did in 1931, when the dispute arose. Neither the shareholders nor the appellant company would, it seems, have in mind anything more than the payment of so many pounds in Australia, and it may fairly be inferred that they left the matter to be decided by the general rules of law applicable to the payment of so many pounds in Australia and took their chance how the exchange went; these rules, I think, involved the payment in Australia of the dividends, declared in Australia, in Australian currency. Any consideration of exchange would not naturally enter into question at all. The exchange might, from time to time, go, as in fact it did, in favour of one or the other currency.

I shall deal with some minor objections. First of all, the fact that shareholders on the English register were between the date of the resolution and the beginning of the dispute in 1931 paid in sterling at the agreed percentage cannot affect the construction of the special resolution, which was, as I think, unambiguous. The directors could not vary the terms of that resolution or change its legal effect by any such course of conduct. Up to a late date, however, the actual exchanges were on balance very little in favour of sterling. It is further objected that what is involved is that in the appellant company's articles the "pound" in regard to dividends has a different meaning from the meaning of the "pound" on a distribution of capital; that result, however, follows because the place of performance—that is, of payment—is different in the case of a dividend from the place of payment in the case of the distribution of assets in a winding-up. It is well recognised that in the same contract different laws may apply to the performance of the different obligations consequent on differences in the respective places of performance. Such a case was illustrated by the decision of this House in *King Line, Ltd.* v. *Westralian Farmers, Ltd.* (2), where various payments were to be made, some in England and some in Australia, and the several places of performance determined what currency was to apply. In the same case this House also recognised that a sum arrived at as a percentage on a sterling sum might properly be held to be payable in Australian currency because it was payable in Australia. This meets the objection taken by the respondents that the dividend is expressed in the allotment and certificates as 5 per cent. or 6½ per cent. on £100 of capital; presumably, however, each dividend, which is only an enforceable debt when it is declared, is declared and expressed in the relative warrant as so many pounds.

A further objection has, however, been pressed on behalf of the respondents, though it was not taken before FARWELL, J., or the Court of Appeal; it is objected that so to accept the appellant company's construction would involve, particularly in the case of the "A" preference shareholders, whenever the exchange went against Australia, an oppression on the preference shareholders on the London register, and, indeed, on the whole body of such shareholders, because they would be compelled to accept payment, at least in present conditions, in a currency depreciated as compared with sterling, though it would need to be conceded that the converse is true whenever the exchange went the other way. I do not think there is any force in that objection. It is not contested that the new article embodied in the special resolution of Jan. 19, 1921, was in the interests of the company as a whole. There is no record of any objection being taken by anyone to the change, which would save the appellant company as a whole from double taxation. The only proviso in the articles which required the special consent of any class of shareholders had reference to a case where it was proposed to issue new shares with any preference or priority over then existing preference shares; that proviso does not apply to the resolution in question, and art. 74 provides that, apart from such a case, no consent of any class of shareholders should be required where the object of a resolution could be effected without that consent. In my judgment, the special resolution changing the article was not only in form validly carried, as is admitted, but was in all respects effective. Nor can I attach any weight to the further objection that, if the resolution be construed as I think it ought to be construed, it was invalid as not giving a sufficiently clear notice to the preference shareholders that the amount of their dividends might be prejudicially affected by an adverse course of the Australian exchange, and hence must be construed as involving no change in the currency in which payment was to be made. In my opinion, the special resolution is clear and unambiguous in providing that the place of payment should be Adelaide; what constitutes in law payment in Adelaide must follow by the application of general rules of law. But in any case I think this whole objection is unsubstantial. Indeed, as I have already indicated, in my opinion, no one could have anticipated in 1921 that in 1931 the Australian currency would fall as far as it did below sterling. And if shareholders took the risk of loss through the Australian exchange being adverse, they would be entitled to reap the benefit in the converse case.

For the reasons which I have explained, the appellant company were right in law and on the construction of the articles as validly altered by the special resolution of 1921 in claiming, as they eventually did, that dividends declared after that resolution in Australia were payable to shareholders or stockholders in Australian legal tender in Australia, and that it made no difference whether particular shareholders were registered on the London or the Colonial register. The Court of Appeal gave no separate judgment in this case, treating (as did Farwell, J.) the matter as concluded by the decision of the Court of Appeal in *Broken Hill Proprietary Co., Ltd.* v. *Latham and others* (1). In that case the plaintiff company were registered in and carried on business in Australia, but had also a registered office in London; they had issued debentures, a register of debenture holders being also established in London, and the moneys secured, both capital and interest, were payable at the holder's option either in Australia or London. It was held by Maugham, J., that debenture holders who had exercised the option to be paid in London were entitled to payment in sterling, because the exercise of the option made the moneys due and payable in London, whereas those holders who had elected to be paid in Australia were entitled to be paid in Australian currency. In the Court of Appeal that decision was reversed, Lord Hanworth, M.R., dissenting and agreeing with Maugham, J. In my judgment, the decision of the majority of the Court of Appeal was erroneous in law. I agree with the conclusion of Maugham, J., and Lord Hanworth, M.R.; I think the law was correctly stated by Maugham, J., where he says ([1933] Ch. at p. 391):

> "A contract to pay so many pounds, whether a British or Australian contract, was not in 1920, and still less is now, a contract to pay in gold, but is primâ facie a contract to pay money according to the currency of the country where payment has to be made."

He and Lord Hanworth, M.R., treated the case as one in which a sum of pounds payable in England was on all the facts of the case payable in English legal tender. The principle is in accordance with that which I think is to be applied in the case now before your Lordships, where a sum expressed in pounds, being payable in Australia, is payable, in my opinion, for the reasons I have expressed, in Australian legal tender. In the result I think this appeal should be allowed.

Appeal allowed.

Solicitors: *Sydney Morse & Co.*; *Herbert H. Moseley.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

ST. JAMES'S AND PALL MALL ELECTRIC LIGHT CO., LTD *v.* WESTMINSTER ASSESSMENT COMMITTEE

[HOUSE OF LORDS (Lord Atkin, Lord Warrington, Lord Tomlin, Lord Russell and Lord Wright), October 23, 24, November 9, 1933]

[Reported [1934] A.C. 33; 103 L.J.K.B. 9; 150 L.T. 123; 98 J.P. 20; 50 T.L.R. 75; 77 Sol. Jo. 815; 32 L.G.R. 1]

Rates—Assessment—Profits basis—Transfer of undertaking to statutory authority—Capital of undertaking secured by sinking funds—Deductibility of sums set aside for sinking funds.

By a private Act a metropolitan electric light company, whose undertaking could have been purchased in 1931 by the London County Council, was granted the right to continue trading until 1971, when their undertaking was to be handed over without payment to a joint electricity authority. The capital of the company, found both before and after the creation of that authority, was to be secured to them by the establishment of sinking funds. Standard prices for electricity were fixed by the statute to cover, inter alia, the sinking fund annual payments, and the annual interest on the funds, and dividends were limited. On the assessment of the rateable value of their hereditament on the "profits basis" the company contended that in arriving at that value the annual sums which they were obliged to set aside out of their revenue for the sinking funds and interest thereon should be excluded from their receipts, or, alternatively, allowed as a deduction therefrom.

Held: the amounts set aside yearly for the provision of the sinking funds had nothing to do with the expenses of earning the gross receipts of the undertaking or with repairs and were irrelevant to the calculation of rent on the "profits basis," and, therefore, those amounts should not be deducted as claimed by the undertakers.

Kingston Union Assessment Committee v. *Metropolitan Water Board* (1), [1926] A.C. 331, applied.

Notes. Premises, other than dwelling-houses, occupied by electricity boards are not now liable to be rated, but payment is made for the benefit of local authorities (see the Local Government Act, 1948, ss. 85, 96). This case still may apply to water and other undertakings which have not been nationalised.

Considered: *Barking Rating Authority* v. *Central Electricity Board*, [1940] 2 All E.R. 341. Applied: *Lee* v. *Mid-Northants Water Board*, [1956] 2 All E.R. 59. Referred to: *Re Southern Rail Co. Appeals* (1935), 152 L.T. 299; *Sandown Park, Ltd.* v. *Castle*, [1955] 2 All E.R. 634.

As to rating of public undertakings, see 27 HALSBURY'S LAWS (2nd Edn.) 417 et seq., and for cases see 38 DIGEST 546 et seq.

Case referred to:

(1) *Kingston Union Assessment Committee* v. *Metropolitan Water Board*, [1926] A.C. 331; 95 L.J.K.B. 605; 134 L.T. 483; 90 J.P. 69; 42 T.L.R. 275; 24 L.G.R. 105; 1 B.R.A. 111, H.L.; 38 Digest 547, *901*.

Appeal from an order of the Court of Appeal (SCRUTTON, GREER and SLESSER, L.JJ.), [1933] 1 K.B. 605, on a Case Stated under the Valuation (Metropolis) Act, 1869, s. 40.

The St. James's and Pall Mall Electric Light Co., Ltd., appealed from a decision of the assessment committee of the city of Westminster in respect of the rating of the undertakings owned and occupied by the company for the supply of electricity. The facts, as stated by SCRUTTON, L.J., in the Court of Appeal, were as follows: Before 1925 the London County Council had the right to purchase in 1931 the undertaking of the company on terms of paying the then value of the lands and works belonging to the company. Before 1910 there was no statutory requirement of a sinking fund to replace capital or to repay money borrowed, or restriction of dividends. In 1924 certain negotiations took place between the London electric lighting companies and the London County Council as the then purchasing authority, which resulted in an agreement dated May 27, 1924, given statutory authority by the London Electricity (No. 2) Act, 1925, s. 10. Under this bargain (i) The companies were given forty years' longer profitable existence before they were purchased, i.e., till 1971. (ii) Their undertaking was then to be handed over without payment to a joint electricity authority to be created, but their capital, found both before and after that creation, was to be secured them by the establishment of two sinking funds, A and B, relating respectively to capital found before and after the creation of the joint electricity authority. (iii) Standard prices for electricity were fixed by the statute and were to cover and provide for, inter alia, the sinking fund annual payments and the annual interest on that fund. The effect of this was that the consumers, who, as represented by the joint electricity authority, would in 1971 get the St. James's undertaking without then paying for it, would have paid for it in the years 1931–71 out of the standard prices they paid in so far as they provided for sinking fund instalments. (iv) The electricity companies, some of which had been paying dividends of 17½ per cent., were, in consideration of their extended life, limited in dividends to 7 per cent., except that, if they reduced prices, they might increase dividends. The result was that the companies bought forty years' further existence on terms that their prices charged, and their dividends, were limited, and that by sinking funds created out of standard prices, besides replacing their capital, subscribed or borrowed, they relieved the purchasing body or the consumers of the liability to pay in 1971 for the transfer to them of the undertaking of the companies. In other words, the electricity companies continued to hold their undertakings on the terms of complying with certain statutory provisions, including the obligation to create sinking funds by annual payments.

Sinking funds A and B were to be retained by the company in 1971, when they transferred the undertaking to the joint electricity authority, and the physical assets which they replaced were treated throughout as belonging to the capital account of the company. The contention of the company was that in arriving at the gross and rateable values of the hereditament the sums which they were obliged to set aside out of their revenue for these sinking funds and interest thereon should be excluded from their receipts. The assessment committee, who fixed the gross and rateable values of the hereditament at £89,992 and £44,961, rejected this contention.

The Court of Appeal, reversing the decision of the Divisional Court, held that these sums were payments of rent or in the nature of rent. The obligation to set aside these sums for sinking funds was not a restriction on earning capacity, but a restriction upon the application of profit, when earned. The contention of the company was contrary to practice, reasoning, and authority. In finding the measure of rent payable by a hypothetical tenant on the "profits basis" the provision of a statute relating to what was to be done with the sum available for rent, so ascertained, had not to be taken into account in assessing the figures which afforded the statutory measure of the gross and rateable values of the hereditament. The company appealed.

Wilfrid Greene, K.C., and *Colin H. Pearson* for the appellants.

Tyldesley Jones, K.C., and *Harold Murphy*, for the respondents, were not called upon to argue.

The House took time for consideration.

Nov. 9. The following opinions were read:

LORD ATKIN.—The question before the House arises upon an appeal by one of the large London electric lighting undertakings in respect of their assessment for rates. Their rateable hereditaments were assessed by the assessment committee at £89,992 gross and £44,961 rateable. They seek to establish the values at £72,664 gross and £36,332 rateable. According to the Valuation (Metropolis)

Act the problem before your Lordships is what annual rent the company might reasonably be expected, taking one year with another, to pay for the hereditament if the tenant undertook to pay rates and taxes and the landlord undertook to bear the costs of repairs and insurance. It is obvious that when this formula has to be applied to occupiers who carry on such undertakings as mines, docks and harbours, sewage and drainage works, railways, water, gas and electric lighting works, it is inept. In those cases the occupiers generally own the hereditaments on or in which the undertaking is carried on; in some cases they are the sole persons entitled to occupy the premises or carry on the undertaking. In all cases the one inconceivable condition of things is that they should be occupying the hereditaments as tenants from a landlord owner at a rent varying from year to year on the footing that the landlord executed the necessary repairs. Nevertheless, the legislature has refrained from giving any assistance in the matter, with the result that the rights and obligations of occupiers and rating authorities over an important field of rating are determined by rules of law which are entirely based on judicial decisions adopting or modifying the suggestions of rating surveyors and accountants.

Various methods have been adopted for determining what rent a hypothetical tenant might reasonably be expected to pay to a hypothetical landlord in the imaginary circumstances premised in the Act. The most usual system is to adopt the so-called "profits basis," which, by an interesting development of judicial decision, is now held to be the system which ought to be adopted in the absence of special circumstances: *Kingston Union Assessment Committee* v. *Metropolitan Water Board* (1). This system, which seems to be intended to be an application of an economic theory of rent, is founded on an inquiry as to how much the tenant will pay for the privilege of occupying the premises and making what he can out of the undertaking he carries on there. The system, roughly speaking, is that the gross receipts of the undertaker are taken for the year of calculation; from them are deducted the expenses of earning those receipts. From the residue a tenant's share is subtracted, a hypothetical sum which represents what the tenant might reasonably be satisfied with for his "profits," which will include interest on capital remuneration for his industry and compensation for risk, and the residue will be the landlord's share of rent. I am not proposing to re-state the judicial definition of the profits basis but merely to indicate its general principle. The system is expounded with authority in the judgments in the *Kingston Case* (1). It must be observed that the hypothetical fund which is assumed to be divided is not calculated so as to represent the profits of the undertaking. As was remarked by Greer, L.J., in the Court of Appeal it is arrived at before deduction of rent, and I may add that, as the landlord's share has to be calculated for the purpose of ascertaining the gross rateable value, the fund is arrived at before deducting the cost of repairs, which are a deduction from the gross to give the rateable. It also follows that the amount of the landlord's or tenant's share of the fund does not depend upon the use to which they put their shares when received, whether voluntarily or under statutory obligation. It is well established, for instance, that sinking funds to satisfy capital obligations, whether imposed by statute or not, are not permissible deductions in calculating the fund to be divided.

It remains to consider the application of this system to the present case. At the date of the London Electricity (No. 2) Act, 1925, the London County Council, under the provisions of various statutes, had an option to purchase the undertaking of the appellants in 1931 on the terms of paying the then value of the physical assets of the undertaking. If not exercised in 1931, the option revived at the end of a further ten years and so on indefinitely. In 1925 the Electricity Commissioners were proposing to set up a joint electricity authority for London and the home counties, and an agreement was made between the London County Council and the electric light companies under which the joint authority took the place of the London County Council as the ultimate purchaser, the purchase was postponed to a definite date, Dec. 31, 1971, and the existing terms of transfer were substantially altered. For the present purpose all that it is necessary to state is that, instead of the new authority paying in 1971 the value of the physical assets existing in 1925, they were to have them transferred free of charge; as to assets which came into existence after 1925, they were to pay the difference between cost and the amount of a sinking fund to meet the cost, which is one of the funds in respect of which the present question arises. In order to prevent the undertakers from suffering unfair loss by the proposed transfer they were to be entitled to include in their charges to consumers for current an amount which would enable them to create a sinking fund which in 1971 would be the equivalent of the value of the 1925 assets. This fund in 1971 would remain the property of the undertakers. Similarly, for assets acquired after 1925 a similar fund was to be created, though in respect of such assets it is obvious that in 1971 the fund might not amount to the entire cost. I do not stay to deal with the provisions for fixing a standard price and limiting the undertakers' dividends during the period 1925 to 1971, for, in my opinion, they have little bearing on the issue. The actual words of the obligation as to the sinking fund are contained in cl. 9:

> "Each company . . . shall provide a sinking fund A by setting aside out of their revenue such sums as with interest will be sufficient to liquidate . . . the value . . . of any physical assets."

Similar words are used with reference to the sinking fund *B* to liquidate the cost of assets acquired after 1925. The agreement was given statutory force by the Act of 1925 above-mentioned.

The question is whether the amounts provided yearly for the provision of the two sinking funds should be deducted before the ascertainment of the hypothetical sum to be divided between the tenant and the landlord. In my opinion, the Court of Appeal was right in concluding that those amounts should not be deducted. The sums in question have nothing to do with the expenses of earning the gross receipts, or with repairs; they plainly relate to the application of the balance by the undertakers either as hypothetical tenant or as hypothetical landlord. They are irrelevant to the calculation of rent on the "profits basis"; or indeed on any basis. They do not enter into the picture at all. If, indeed, one had to consider whether the charge was a landlord's charge or a tenant's charge there seems to be no doubt that almost in its entirety it is a landlord's charge. On the hypothesis he owns the hereditament for which the tenant pays rent. At the end of 1971 the hereditament will pass to the ownership of a third person free of charge. It is the owner for whose benefit the sinking fund is created so far as the physical assets represent the rated hereditament. And except for relatively unimportant items such as meters and possibly some other plant the assets to be transferred are identical with the hereditament. It seems plain, therefore, that the rent to be received should by any measurement include the equivalent of the sums which the landlord must put by if his property is to be protected by a sinking fund. The only value, however, if any, of this consideration is to show that the principle works out fairly when tested in this particular case. As I have already said, the particular application of the receipts when once ascertained is immaterial. In my opinion, the contention of the appellant fails and the appeal should be dismissed with costs.

LORD WARRINGTON.—I concur.

LORD TOMLIN.—I concur.

LORD RUSSELL.—I concur.

LORD WRIGHT.—I agree.

Appeal dismissed.

Solicitors: *Sydney Morse & Co.*; *Allen & Son.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

GOLDSMITH *v.* DEAKIN

[KING'S BENCH DIVISION (Avory and Lawrence, JJ.), November 3, 1933]

[Reported 150 L.T. 157; 98 J.P. 4; 50 T.L.R. 73; 31 L.G.R. 420;
30 Cox, C.C. 32]

Road Traffic—Stage carriage—"Permitting" user without licence—No affirmative knowledge of offence—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 67 (1), *s.* 72 (1).

Per **Avory, J.**: If an owner hires out an unlicensed vehicle in circumstances in which he ought to know that it probably will be, or may be, used as a stage carriage, and puts his servant in charge of it for use according to the directions of the hirer, the owner is guilty of permitting the vehicle to be used as a stage carriage without the licences required by s. 67 and s. 72 of the Road Traffic Act, 1930.

Per **Lawrence, J.**: Although the owner may not have known affirmatively the way in which the vehicle was being used, if in fact he allowed it to be used, and did not care whether or not it was used, in contravention of the statute, he "permitted" its use.

Notes. Considered: *Newell* v. *Cross*, [1936] 2 All E.R. 203; *Evans* v. *Dell*, [1937] 1 All E.R. 349; *Morris* v. *Williams* (1951), 50 L.G.R. 308; *James & Son, Ltd.* v. *Smee*, *Green* v. *Burnett*, [1954] 3 All E.R. 273. Referred to: *Clark* v. *Brims*, [1947] 1 All E.R. 242.

As to public service vehicles under the Road Traffic Acts, see 31 HALSBURY'S LAWS (2nd Edn.) 728 et seq., and for cases see DIGEST Supps., tit. Street Traffic, case No. 76a et seq. For Road Traffic Act, 1930, see 24 HALSBURY'S STATUTES (2nd Edn.) 569. See also Road Traffic Act, 1956; 36 HALSBURY'S STATUTES (2nd Edn.) 795.

Cases referred to:

(1) *Osborne* v. *Richards*, [1933] 1 K.B. 283; 102 L.J.K.B. 44; 147 L.T. 419; 96 J.P. 377; 48 T.L.R. 622; 30 L.G.R. 385; 29 Cox, C.C. 524, D.C.; Digest Supp.

(2) *Allen* v. *Whitehead*, [1930] 1 K.B. 211; 99 L.J.K.B. 146; 142 L.T. 141; 94 J.P. 17; 45 T.L.R. 655; 27 L.G.R. 652; 29 Cox, C.C. 8, D.C.; Digest Supp.

(3) *Somerset* v. *Wade*, [1894] 1 Q.B. 574; 63 L.J.M.C. 126; 70 L.T. 452; 58 J.P. 231; 42 W.R. 399; 10 T.L.R. 313; 10 R. 105, D.C.; 14 Digest (Repl.) 39, *89*.

(4) *Commissioner of Police* v. *Cartman*, [1896] 1 Q.B. 655; 74 L.T. 726; 60 J.P. 357; 44 W.R. 637; 18 Cox, C.C. 341, D.C.; 14 Digest (Repl.) 49, *159*.

Case Stated by Kent justices.

Two informations were preferred by the appellant, Goldsmith, a superintendent of the Kent Constabulary, under ss. 67 and 72 of the Road Traffic Act, 1930, charging the respondent, Deakin, a garage proprietor, that on Jan. 26, 1933, at Hackington, Kent, he unlawfully permitted a motor vehicle to be used on a road as a stage carriage when he was not the holder of a public service vehicle licence or of a road service licence authorising him so to do. The informations were, by consent, heard together.

On the hearing of the informations it was proved that the respondent was at all material times the proprietor of the Langton Garage, Gravel Walk, Canterbury, and the owner of a motor coach. He held a public service vehicle licence authorising him to use the coach as a contract carriage, but not as a stage carriage. He did not hold a road service licence. Before Jan. 26, 1933, a subscription dance was organised by the members of the Query Club, whose headquarters were at the Castle Hotel, Canterbury. The dance was to be held at Hales Place Sports Pavilion, Hackington, on Jan. 26, 1933, from 8.30 p.m. to 2 a.m. A poster

A advertising the dance contained the announcement "special late bus service will be arranged." Mr. Selwood, a traffic officer employed by the East Kent Road Car Co., of Canterbury, attended the dance. He was not a member of the Query Club. On entering the pavilion he paid 3s. 6d. for a double dance ticket. In consequence of an announcement made during the dance, Mr. Selwood purchased from an official of the club three tickets for 6d. each for seats in a motor coach. B One of these tickets was annexed to the Case. It consisted of a plain card bearing the number "4." At 1.30 a.m. on Jan. 27 Mr. Selwood boarded the respondent's motor coach, which was standing outside the pavilion. He presented to the driver two of the tickets and retained the third. The driver was in the employment of the respondent and wore a cap with the words "Langton Garage" on it. Other passengers boarded the motor coach and presented their tickets to the driver. C Including Mr. Selwood, there were eight passengers on board. There was a wait of about ten minutes, and just before leaving Mr. Selwood requested the driver to put him down at Hocker's Mill, between Hales Place and the Castle Hotel, and he was put down there accordingly. Prior to the date of the dance officials of the Query Club had made arrangements with the respondent for him to provide a motor coach on the date of the dance to take parties from the Castle Hotel, D Canterbury, to Hales Place, and vice versa. The respondent contracted to provide a motor coach for this purpose at a charge of 10s. each way, and further agreed that the driver should collect tickets from the persons using the coach in order to prevent unauthorised persons boarding it. No money was paid to the driver or to the respondent by persons using the coach. The respondent made no arrangement as to passengers paying fares and did not know that they had done so.

E The appellant contended (a) that the persons travelling in the motor coach attending the dance did not constitute a private party; (b) that the dance was not a "special occasion" within the meaning of the proviso to s. 61 (2) of the Road Traffic Act, 1930; and (c) that the respondent was responsible for the use of the vehicle and was guilty of permitting it to be used as a stage carriage. The respondent contended (a) that the dance was a special occasion; (b) that the persons F attending the dance were a private party of the Query Club; (c) that he did not know that the officials of the Query Club were making any charge to persons using the vehicle, and so he could not, therefore, be convicted of permitting its use as a stage carriage.

The justices were of opinion that the persons attending the dance did not constitute a private party, and that the dance was not a special occasion, and that, G therefore, the respondent's vehicle was in fact used as a stage carriage. They were further of opinion that the respondent was unaware that it was so used, and could not, therefore, be held to have permitted such use. They, accordingly, dismissed the informations. The question for the opinion of the court was whether the justices came to a correct decision in point of law.

The Road Traffic Act, 1930, provides:

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> Section 67: "(1) No person shall cause or permit a motor vehicle to be used on any road as a stage carriage, an express carriage or a contract carriage unless he is the holder of a licence (in this Act referred to as "a public service vehicle licence") to use it as a vehicle of that class in accordance with the provisions of this Part of this Act. . . . (3) If any person causes or permits a I vehicle to be used in contravention of this section he shall be guilty of an offence."

Similar provisions are made in s. 72 (1) and (10), as to using, or causing, or permitting a vehicle to be used in contravention of the provisions as to road service licences under s. 72.

Wilfrid Lewis, for the appellant, referred to the following cases as to the meaning of the word "permitting": *Osborne* v. *Richards* (1), *Allen* v. *Whitehead* (2), *Somerset* v. *Wade* (3), and *Commissioner of Police* v. *Cartman* (4).

The respondent did not appear.

AVORY, J. [after stating the terms of the informations].—There is no dispute that upon the facts of this case the vehicle was used on the occasion in question as a stage carriage, and the whole question is whether the respondent permitted it to be used without having the necessary licences. It is, in my opinion, all important to bear in mind that under s. 67 the offences of "causing" a vehicle to be so used and of "permitting" it to be so used are two separate offences. It may well be that upon the facts of this case it could not be said that the respondent has caused the vehicle to be used in contravention of the statute, but I am satisfied that in the circumstances he was permitting it to be used in contravention of the statute. [His Lordship summarised the facts and contentions in the Case Stated, and continued :] The justices, in expressing their opinion, having properly rejected the contentions that the persons attending the dance were a private party and that the dance was a special occasion, said that they were further of opinion that the respondent was unaware that the vehicle was used as a stage carriage, and could not, therefore, be held to have permitted such use. In my opinion, if a person hires out a vehicle in circumstances in which he ought to know that it probably will be or may be used as a stage carriage, and puts his servant in charge of that vehicle to use it in any way in which the hirer may choose to direct the servant to use it, then he is, within the meaning of this statute, permitting it to be used as a stage carriage without the proper and appropriate licence.

That is the short point in this case, and although many authorities arising under different statutes as to the meaning of the word "permit" have been cited, the principle to be derived from them is that the court ought to look at the object of the statute and see whether the principal may be held liable for the conduct of his agent, although he himself was unaware of the Act of Parliament being broken. In *Osborne* v. *Richards* (1), which appears to me to be the nearest authority to the present case, I think an authority is to be found in support of the view I have taken, although there was the distinction in that case that the owner of the coach had been warned beforehand that he might be breaking the law and had said : "I can hire my coaches to anyone, and neither the Traffic Commissioners nor anyone else can say anything." I think that was really in effect the attitude of the respondent in this case. He was, in effect, hiring out his coach and putting his servant in charge of it and at least leaving it to chance whether it would be used as a stage carriage or not. If a man does that, he is permitting a vehicle to be used within the meaning of the statute. I am, therefore, of opinion that the justices ought to have found the offences proved.

LAWRENCE, J.—I agree. There seems to me to be two questions in this case—first, as to the meaning of the word "permit," and, secondly, as to the construction of the Case Stated and opinion given by the justices. Whether or not the respondent permitted this motor coach to be used in contravention of the statute is a question of fact on which the justices' opinion is final, if they addressed their minds to the true question from the legal point of view. In my opinion, the word "permit" means "intentionally allow," in the sense that one has to consider the state of the defendant's mind. The respondent undoubtedly allowed his vehicle to be used by the club, and the question is whether he cared whether it might be used in contravention of the statute or not. It is immaterial that he did not actually know of the use. The question is whether, if he had known, he would have prevented the use or not. The facts known to the respondent were that the motor coach was being hired by the club for a dance to be held under the terms of the advertisement referred to in the case; also that tickets were to be issued to persons attending the dance and to be collected by the driver. It seems to me the respondent must have known that either motor coach facilities were to be included in the tickets for the dance or else that separate tickets were to be issued. In those circumstances, having regard to the method and the nature of the conveyance, it seems to me that the respondent must have known that the statute was being infringed. The justices have said that, in their opinion, the respondent was unaware that the vehicle was being used as a stage carriage. Having regard to the facts before them, I think that the only interpretation of their opinion is that they have used the words "the respondent was unaware" as meaning that he did not affirmatively know. That, in my opinion, is not a proper interpretation of the statute, because, although the respondent may not have known affirmatively the way in which the vehicle was being used, if in fact he allowed it to be used, and did not care whether or not it was used, in contravention of the statute, he did, in my view, permit the use. As the facts known to the respondent clearly indicated that state of mind on his part, I think that the justices' decision ought to be reversed and the appeal allowed.

Appeal allowed.

Solicitor: *The Treasury Solicitor.*

[*Reported by* T. R. F. BUTLER, ESQ., *Barrister-at-Law.*]

Re HOARE & CO., LTD.

[CHANCERY DIVISION (Maugham, J.), December 14, 1933]

[Reported 150 L.T. 374]

Company—Scheme to transfer shares to transferee company—Approval of scheme by necessary majority of shareholders—Presumption of fairness of scheme—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 155 (1).

Where a scheme involving the transfer of shares in a company to another company has been approved by the number of shareholders specified in s. 155 (1) of the Companies Act, 1929, primâ facie the court should regard the scheme as a fair one as it would appear impossible to suppose that the court, in the absence of very strong grounds, is to be entitled to set up its own view of the fairness of the scheme in opposition to so very large a majority of the shareholders concerned, and, therefore, the reasons for inducing the court to order otherwise must be supplied by the dissentients who apply to the court for an order preventing the acquirement of their shares by the transferee company.

Notes. Section 155 of the Companies Act, 1929, has been replaced by s. 209 of the Companies Act, 1948, which is in substantially the same terms.

Applied and followed: *Re Evertite Locknuts (1938), Ltd.*, [1945] 1 All E.R. 401. Considered: *Re Press Caps, Ltd.*, [1949] 1 All E.R. 1013.

As to schemes of arrangement, reconstruction, and amalgamation of companies, see 6 HALSBURY'S LAWS (3rd Edn.) 764 et seq., and for cases see 10 DIGEST (Repl.) 1084 et seq. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Originating Summons.

On March 21, 1933, the respondents, Charrington & Co., Ltd., made an offer to the shareholders of Hoare & Co., Ltd., to purchase all their shares in the latter company. The offer was to give in exchange for every five such shares £7 10s. in cash, and three 4 per cent. cumulative preference shares and two ordinary shares in Charrington & Co., Ltd. Within four months from the date of the offer acceptances of the offer had been received in respect of the bulk of the shares. These acceptances, together with subsequent acceptances in respect of 3,318 shares, made the total number of shares in respect of which the offer was accepted 1,941,597 shares, representing 99·62 per cent. of the total issued share capital of the company. There remained a balance of 7,465 shares, representing ·38 per cent. of the capital outstanding. Of these 4,665 were acquired by Charrington & Co., Ltd., under the power conferred by s. 155 (1) of the Companies Act, 1929. There remained outstanding 2,800 shares, representing ·14 per cent. of the issued capital, the subject of this application.

The applicants, being the holders of the outstanding 2,800 shares, by this summons sought an order pursuant to s. 155 of the Companies Act, 1929, that the respondents, Charrington & Co., Ltd., were not entitled to acquire the shares of the applicants in Hoare & Co., Ltd.

By the Companies Act, 1929, s. 155:

> "(1) Where a scheme or contract involving the transfer of shares or any class of shares in a company (in this section referred to as 'the transferor company') to another company, whether a company within the meaning of this Act or not (in this section referred to as 'the transferee company'), has within four months after the making of the offer in that behalf by the transferee company been approved by the holders of not less than nine-tenths in value of the shares affected, the transferee company may, at any time within two months after the expiration of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and where such a notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders are to be transferred to the transferee company. . . . (2) Where a notice has been given by the transferee company under this section and the court has not, on an application made by the dissenting shareholder, ordered to the contrary, the transferee company shall, on the expiration of one month from the date on which the notice has been given, or, if an application to the court by the dissenting shareholder is then pending, after that application has been disposed of, transmit a copy of the notice to the transferor company and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which by virtue of this section that company is entitled to acquire, and the transferor company shall thereupon register the transferee company as the holder of those shares. (3) Any sums received by the transferor company under this section shall be paid into a separate bank account, and any such sums and any other consideration so received shall be held by that company on trust for the several persons entitled to the shares in respect of which the said sums or other consideration were respectively received. (4) In this section the expression 'dissenting shareholder' includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme of contract."

Cyril J. Radcliffe for the applicants.

H. S. G. Buckmaster for the company.

MAUGHAM, J.—I have to deal with an application under s. 155 of the Companies, Act, 1929, the purport of which I have often had to apply with regard to schemes which have been approved by a large majority of shareholders some time before the commencement of the Act of 1929. This, I think, is the first case I have had with regard to a quite recent scheme, and I will observe with regard to it that I am in the same difficulty as I was with regard to schemes approved by shareholders before the commencement of the Act, namely, that the legislature has not thought fit to indicate in any way, however remote, the grounds on which the court is to intervene and to make an order preventing the transferee company from acquiring the shares of the dissenting shareholders.

The section deals with a case where a scheme involving the transfer of shares in a company called the transferor company to another company called the transferee company has, within the time named after the making of the offer, been approved by an overwhelming number of holders—holders of not less than nine-tenths in value—of the shares whose transfer is involved. It gives the transferee company in that case power, within two months after the expiration of the period for accepting the offer, to give notice to the dissentients that it desires to acquire their shares, and where the notice is given the transferee company becomes entitled, on the one hand, and bound, on the other, to acquire those shares on the terms on which, under the scheme, the shares of the approving shareholders are to be transferred to the transferee company. But there is this phrase inserted as a sort of parenthesis after the verb "shall,"

> "unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise."

I have some hesitation in expressing my view as to when the court should think fit to order otherwise. I think, however, the view of the legislature is that where not less than nine-tenths of the shareholders in the transferor company approve the scheme or accept the offer, primâ facie, at any rate, the offer must be taken to be a proper one, and in default of an application by the dissenting shareholders, which includes those who do not assent, the shares of the dissentients may be acquired on the original terms by the transferee company. Accordingly, I think it is manifest that the reasons for inducing the court to "order otherwise" are reasons which must be supplied by the dissentients who take the step of making an application to the court, and that the onus is on them of giving a reason why their shares should not be acquired by the transferee company.

One conclusion which I draw from that fact is that the mere circumstance that the sale or exchange is compulsory is one which ought not to influence the court. It has been called an expropriation, but I do not regard that phrase as being very apt in the circumstances of the case. The other conclusion I draw is this, that again primâ facie the court ought to regard the scheme as a fair one inasmuch as it seems to me impossible to suppose that the court, in the absence of very strong grounds, is to be entitled to set up its own view of the fairness of the scheme in opposition to so very large a majority of the shareholders who are concerned. Accordingly, without expressing a final opinion on the matter, because there may be special circumstances in special cases, I am unable to see that I have any right to order otherwise in such a case as I have before me, unless it is affirmatively established that, notwithstanding the views of a very large majority of shareholders, the scheme is unfair. There may be other grounds, but I see no other grounds available in the present case for the interference of the court.

The facts here are that the offer was made to the shareholders in Hoare & Co., which I shall call "the company," on March 21, 1933. Within four months from that date—that is, the four months similar to the four months mentioned in the section, that is to say, by July 21, 1933—acceptances of the offer had been received by just upon 2,000,000 shares of £1 each out of the share capital of the company, and subsequently acceptances were received in respect of a further 3,318 shares, making the total number of shares in respect of which the offer was accepted (and here I am going to give exact figures) 1,941,597 shares, representing 99·62 per cent. of the total issued share capital of the company. There was a balance of ·38 per cent., namely, 7,465 shares. Of those 4,665 had been acquired under the terms of the section without objection by the holders, and there remain outstanding 2,800 shares, the subject of the present application. They together represent ·14 per cent. of the total issued shares of the company. It is further to be observed that the directors of the company, who hold, as I understand it, almost half the share capital in Hoare & Co., Ltd., accepted the Charrington offer. The director who has made an affidavit, Mr. Arthur Lawford Wigan, himself accepted the offer in respect of his total holding of 10,550 shares in the company, and he expresses the opinion that the offer was a fair one and that there is no unfairness or hardship in the matter.

The court has been quite properly asked to consider the balance-sheets of the two companies concerned, and quite fair and reasonable contentions have been put before me on behalf of the applicants tending to show that, notwithstanding the facts with regard to the acceptance of the offer which I have mentioned, the offer is really not a fair one. The affidavit of Mr. Sharples on behalf of the applicants is one which I have very carefully considered, but I do not think that it establishes the view which he takes as a correct one—that the transaction, looked at from the question of capital values, is in the least unfair. It is manifest that from modern balance-sheets very little real information can be obtained as to the capital value of assets, even treating the companies as going concerns, and, of course, on the footing of a liquidation the balance-sheet figures are almost useless, but, taking these companies as being sound and solvent concerns, with excellent prospects, I am not persuaded that the offer made by Charrington was an unfair one from the point of view of the value of the shares and cash which were offered to the shareholders of Hoare & Co.

Counsel has argued before me, as he was entitled to do: "If you look at the question of probable revenue from a holding in Hoare & Co., you will come to the conclusion that the revenue or the income will be reduced as the result of the offer being accepted," and I think there is some weight in that contention. I do not, however, myself consider that it is sufficient to enable me to say that I must exercise my power and make an order preventing the transferee company from acquiring these shares. It is to be observed that the offer is partly for cash and partly for preference shares in the transferee company; and greater security may have to be bought at the expense of a somewhat smaller income.

On the whole, I do not think I am justified in coming to the conclusion that the applicants have established that the offer is one in regard to which the court would think fit to order that the transferee company is not entitled to acquire these shares substantially on the terms of the original scheme. I confess I have some sympathy with people in the position of the applicants. I am myself not quite able to understand why the legislature should ever have passed s. 155 at all, and therefore I am not at all indisposed to consider the objections of such applicants as I have before me. Further, I think that the terms of the original scheme, involving, as they do, the payment of cash at a past date, may in a proper case be regarded as involving that, if the cash is to be paid at a future date, it is to be paid with interest at 5 per cent. The transferee company has, of course, had the benefit of the money all this time, and if the dissentients are to be treated on exactly the same terms as those who accepted the offer, I think they ought to have interest at 5 per cent.

On the whole, therefore, I shall exercise my discretion by ordering that the terms on which the shares are to be acquired include interest at 5 per cent. from the date when the cash would have been paid had the original offer been accepted, and I shall direct that, with that modification, there shall be no order upon the summons except that the company do pay the costs of the application. With regard to costs, I will say that in cases of this sort I think a substantial number of dissentients are entitled to submit the matter to the court, and I am not, therefore, unwilling to say that these applicants may have their costs. I am giving them a small solatium, and, having given them that solatium, I think I am entitled also to say that the respondent company, having now got the whole of the shares, should pay the costs.

Solicitors: *Lawrance, Messer & Co.*; *Loxley, Gardner, & Sewell.*

[*Reported by* Miss B. A. Bicknell, *Barrister-at-Law.*]

GILFORD MOTOR CO., LTD. *v.* HORNE AND ANOTHER

[Court of Appeal (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), April 27, 28, 1933]

[Reported [1933] Ch. 935; 102 L.J.Ch. 212; 149 L.T. 241]

Contract—Illegality—Public policy—Restraint of trade—Covenant by managing director—Not to "solicit, interfere with, or endeavour to entice away" any customer of, or person "in the habit of dealing with," the company.

The plaintiff company carried on the business of selling motor vehicles, and "servicing" and supplying spare parts for them. By an agreement in writing, dated May 30, 1929, the defendant was appointed managing director of the company for six years from Sept. 1, 1928. Clause 9 of the agreement provided that he "shall not at any time while he shall hold the office of a managing director or afterwards solicit, interfere with, or endeavour to entice away from the company any person, firm, or company who at any time during or at the date of the determination of the employment of the managing director were customers of or in the habit of dealing with the company. . . ." In November, 1931, the defendant resigned from the position of managing director. Thereafter he started a business of supplying spare parts and service for all models of the plaintiff company's vehicles, and admittedly sent circulars to persons who had been customers of the company while he was managing director. On a claim by the company for an injunction to restrain the defendant from acting in contravention of cl. 9,

Held: the test of the validity of a covenant in restraint of trade was whether it was reasonably necessary for the protection of the covenantee; cl. 9 was intended to deal with persons on its books or with whom the company dealt, and the words "customers or persons in the habit of dealing with the company" covered only customers who were such while the defendant was managing director and were not too wide or uncertain; cl. 9 was reasonably necessary for the protection of the company; and, therefore, the company was entitled to the injunction claimed.

Notes. Distinguished: *M. & S. Drapers* v. *Reynolds*, [1956] 3 All E.R. 814.

As to agreements in restraint of trade, see 32 Halsbury's Laws (2nd Edn.) 397 et seq., and for cases see 43 Digest 19 et seq.

Cases referred to:

(1) *Mitchel* v. *Reynolds* (1711), 1 Sm.L.C. (13th Edn.) 462; 1 P.Wms. 181; Fortes Rep. 296; 10 Mod. Rep. 130; 24 E.R. 347; 43 Digest 11, *59*.

(2) *Dubowski & Sons* v. *Goldstein*, [1896] 1 Q.B. 478; 65 L.J.Q.B. 397; 74 L.T. 180; 44 W.R. 436; 12 T.L.R. 259; 40 Sol. Jo. 334; 43 Digest 43, *438*.

(3) *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535; 63 L.J.Ch. 908; 71 L.T. 489; 10 T.L.R. 636; 11 R. 1, H.L.; 43 Digest 22, *139*.

(4) *Mason* v. *Provident Clothing and Supply Co., Ltd.*, [1913] A.C. 724; 82 L.J.K.B. 1153; 109 L.T. 449; 29 T.L.R. 727; 57 Sol. Jo. 739, H.L.; 43 Digest 22, *143*.

(5) *Smith* v. *Hancock*, [1894] 2 Ch. 377; 63 L.J.Ch. 477; 70 L.T. 578; 58 J.P. 638; 42 W.R. 465; 10 T.L.R. 433; 38 Sol. Jo. 416; 7 R. 200, C.A.; 43 Digest 53, *549*.

(6) *Mills* v. *Dunham*, [1891] 1 Ch. 576; 60 L.J.Ch. 362; 64 L.T. 712; 39 W.R. 289; 7 T.L.R. 238; 43 Digest 62, *641*.

Appeal from an order of Farwell, J.

The plaintiffs, Gilford Motor Co., Ltd., sought an injunction against the first defendant, Edward Bert Horne, to restrain him from

"soliciting, interfering with, or endeavouring to entice away from the plaintiffs any person, firm, or company who at any time during or at the date of the

> determination of the employment of the defendant Horne as managing director of the plaintiffs were customers of or in the habit of dealing with the plaintiffs."

They further sought against the defendant company, the second defendant, J. M. Horne & Co., Ltd., a similar injunction, the case against the defendant company being put on the ground that the defendant company was merely the creature of the first defendant who was committing breaches of covenant by the agency of the defendant company.

The plaintiff company was a public company which was incorporated in the year 1926, and its business was that of producing a certain class of motor vehicle known as the Gilford motors. Some of the parts bought by the plaintiff company were standard parts, but other parts were made to the direction of the plaintiff company. In addition to the manufacture and sale of the Gilford motors, they also give to their customers "service," doing repairs to the vehicles which they sold, and, in addition to that, they sold spare parts. The defendant Horne had been since the plaintiff company was incorporated connected with that company, and in 1929 he was appointed managing director of the company under the terms of a written agreement dated May 30. The agreement was made between the plaintiff company, of the one part, and the first defendant, of the other part. By it the defendant was appointed managing director to

> "perform the duties and exercise the powers which may from time to time be assigned to or vested in him by the directors of the company."

By cl. 2 it was provided:

> "The managing director shall hold the office for the term of six years as from Sept. 1, 1928."

By cl. 3:

> "The managing director shall during the continuance of this agreement devote the whole of his time, attention and abilities during the business hours of the company to the business of the company and shall comply with the directions and regulations given and made by the directors of the company, and shall well and faithfully serve the company and use his best endeavours to promote the interests thereof. The managing director shall not either before or after the termination of this agreement disclose to any person whomsoever any information relating to the business of the company."

By cl. 9:

> "The managing director shall not at any time while he shall hold the office of a managing director or afterwards solicit, interfere with, or endeavour to entice away from the company any person, firm, or company who at any time during or at the date of the determination of the employment of the managing director were customers of or in the habit of dealing with the company, and also will not at any time within five years from the determination of this agreement, either solely or jointly with or as agent for any other person, firm, or company, be engaged directly or indirectly in any business similar to that of the company within a radius of three miles from any premises wherein the business of the company shall for the time being be carried on except with the consent in writing of the directors of the company for the time being."

Under that agreement the defendant acted as managing director until the end of October, 1931. The directors of the plaintiff company then came to the conclusion that they were not going to employ him any longer, and on Nov. 17 an agreement was come to between the company and Mr. Horne that, in consideration of a payment made to him by the company, Mr. Horne should resign from the company. On that date Mr. Horne signed a letter, addressed to the chairman of the company, which was in these terms:

> "Dear Mr. Baker,—I hereby tender my resignation as a director and joint managing director of the Gilford Motor Co., Ltd., on terms as arranged with

> A you to-day; namely, that the company pay me a cheque immediately for £500 and give me two bills for £500 each, due on Dec. 31, 1931, and Feb. 15, 1932, respectively, which sum of £1,500 I agree to accept in full discharge of all sums due to me by the company, including compensation for cancellation of my joint managing director's agreement.—Yours faithfully, E. B. HORNE."

At the same time Mr. Baker wrote and signed a letter addressed to Mr. Horne of B the same date in these terms:

> "I beg to acknowledge receipt of your letter of to-day's date tendering your resignation as a director and joint managing director of this company on the terms as set out in your letter. I have placed this before my board, and they have accepted same to operate from to-day. I have pleasure in handing you C herewith cheque for £500 and will see that the two bills for £500 each are forwarded to you. Yours sincerely,"

and that is signed by Mr. Baker. Then there is a note as to the dates on which the bills are to fall due.

Shortly afterwards Mr. Horne set up business on his own account at his own private address. He had printed cards and other documents, e.g., a card in this D form:

> "Spares and service for all models of Gilford vehicles. 170 Hornsey Lane, Highgate, N.6. Opposite Crouch End Lane"

with E. B. Horne's name at the bottom, and then "No connection with any other firm." There were billheads in much the same form. Admittedly, the defendant E Horne sent out circulars to various persons in which it was stated that the defendant was ready and in a position to supply spare parts for Gilford vehicles, and in fact he did supply spare parts and at prices which were considerably lower than those charged by the plaintiff company. Later, the defendant company was incorporated as a small private company. It had a capital of 500 shares of £1 each, of which 202 were issued, 101 being issued to the defendant's wife, and 101 to F one Howard who had been an employee of the plaintiff company and was then an employee of the defendant company. The only two directors of that company were the defendant's wife and Howard, and the registered office of the company was the private house of the defendant. The forms of billheads and other documents used by the defendant company were the same as the billheads and documents used by Mr. Horne, except that the initials "E.B." were blocked out G in black, and there was added instead "J. M. Horne," and then after the words "J. M. Horne" "& Co., Ltd." That company also sent out circulars and other documents inviting persons to deal with it as a company who could supply Gilford motor spare parts, and admittedly some of the circulars which were sent out both by Mr. Horne and by the defendant company were sent to persons or firms who had been customers of the plaintiff company during the period while Mr. Horne H was managing director of that company. FARWELL, J., found that the defendant company was obviously carried on wholly by the defendant Horne. He felt convinced that at any rate one of the reasons for the creation of that company was the fear of Mr. Horne that he might commit breaches of the covenant in carrying on the business, as, for instance, in sending out circulars as he was doing, and that he might possibly avoid that liability if he did it through the defendant company. I There was no doubt that the defendant company has sent out circulars to persons who were at the crucial time customers of the plaintiff company.

This state of affairs being brought to the attention of the plaintiff company, they issued the writ in this action, and the statement of claim was framed on the footing that the defendant Horne had committed breaches of the covenants in the agreement, and relief was sought on that ground both against him and against the defendant company. FARWELL, J., held that the covenant was not necessary for the protection of the plaintiff company and was, therefore, not enforceable and he gave judgment for the defendants. He said: I am not prepared to say that the phrase "customers of or persons in the habit of dealing with the company" is the same. It may be that is the true meaning of it, but I cannot help feeling that when the additional words "persons in the habit of dealing with the company" were inserted the employers had in their minds some persons or companies who would not come within the ambit of the word "customers"; otherwise I fail to see the use of putting those words in. At any rate, this, in my judgment, is clear upon this covenant as it stands, that it will not only include persons who are customers of the plaintiff company in the sense that their names and addresses are to be found in the books of the plaintiff company, but will include any person who habitually from time to time buys a spare part in the shop. As it seems to me, that is a covenant which is of a very wide nature. I can conceive that, if the plaintiffs had been content to seek to restrain the defendant from canvassing the customers whose names appear in the books, or persons in a list of customers supplied to the defendant, or in some other way limiting and defining what was meant by "customers," such a covenant as that would be a reasonable one necessary for the protection of the plaintiff company and, therefore, enforceable. But I cannot myself think that a covenant which would include persons who merely from time to time buy spare parts, even though they be spare parts for the Gilford motor, but who do not enter into any transaction which involves any entry in any book at all, merely coming to the premises and buying something and paying for it and going away, is a covenant which would prevent solicitation of those persons, and it is one which might render the defendant liable for a breach of covenant years afterwards without in the least knowing he had committed that breach, because he would have solicited some person whom he himself did not know and had no means of knowing had been a customer of the plaintiff company at the material date. It is said: Oh, but if that did happen, of course the court would never commit the defendant; he would be safe from any penalty because the court would come to the conclusion that he had acted innocently. But that is, in my judgment, not an answer. The plaintiffs have got to satisfy me that the scope of the covenant is not wider than is necessary for their protection, and a covenant against solicitation for the rest of the defendant's life, which would include possibly very large numbers of persons with whom the defendant might never have come into touch at all during the whole time of his employment, whose names would not have been known to him, and to whom he might never have even spoken, seems to me far wider than is reasonably necessary for the protection of the plaintiff company, and I cannot read this covenant as limited to anything else than that. If it was intended to put a limit on it, it was for the plaintiffs to do it. The plaintiffs have not done it, and, therefore, in my judgment, they are unable to establish the validity of the covenant on which they sue.

The plaintiff company appealed.

Sir Herbert Cunliffe, K.C., and *W. E. Vernon* for the company.

Sir Walter Greaves-Lord, K.C., *F. H. Collier* and *H. J. Astell Burt* for the defendants.

LORD HANWORTH, M.R.—In this case a business was carried on by the Gilford Motor Co., Ltd., which had a registered office in Holloway Road, London, and a manufacturing place in Green Lanes, High Wycombe. The business that was carried on by the Gilford Motor Co. was this. They sold motors which were assembled by them, but they were not in fact the actual manufacturers of the whole of the motors thus sold; it was rather that they assembled and then completed the motors that they sold and were able to supply spare parts for these cars. The defendant, Edward Bert Horne, was, in May, 1929, of primary importance in the business, and on that date the company made an agreement with him whereby he was made a managing director for a term of six years from Sept. 1, 1928. There were the usual clauses in that agreement. The managing director was to devote his whole time and attention and abilities during business hours to the company and the business of the company; he was entitled to certain holidays; he was entitled to a remuneration of £1,250 a year and to a certain percentage on the profits; and during that time he was not to be directly or indirectly in any capacity except as a shareholder interested in any business or company other than the Gilford company. Then it was provided by cl. 9:

> "The managing director shall not at any time while he shall hold the office of a managing director or afterwards solicit, interfere with, or endeavour to entice away from the company any person, firm, or company who at any time during or at the date of the determination of the employment of the managing director were customers of or in the habit of dealing with the company, and also will not at any time within five years from the determination of this agreement either solely or jointly with or as agent for any other person, firm, or company be engaged directly or indirectly in any business similar to that of the company within a radius of three miles from any premises wherein the business of the company shall for the time being be carried on."

It is the interpretation to be given to that cl. 9, and the effect of it, which has to be decided between the parties in this action, and it is the first part of that clause, of which I have read both limbs, which is in question.

Difficulties arose between the company and Mr. Horne, and letters passed on Nov. 17, 1931, that is, approximately some three years before the termination of the span for which the managing director was employed. The letters that passed were to the effect that Mr. Horne tendered his resignation as a director and joint managing director of the motor company "on terms as arranged with you to-day," and those terms are set out, that there is to be a total of £1,500 paid to Mr. Horne by instalments of three separate sums of £500; and he concludes the letter:

> "which sum I agree to accept in full discharge of all sums due to me by the company including compensation for cancellation of my joint managing director's agreement."

The reply of the same date was an acknowledgment of the letter tendering the resignation and stating the board have accepted the resignation, to operate "from to-day," and it is recorded in a minute of that same day that the board resolve to accept the resignation as a director and joint managing director of the company on terms as arranged in accordance with the letter handed in and signed by Mr. E. B. Horne.

After that resignation took effect Mr. E. B. Horne established a business and carried it on at his own home, 170, Hornsey Lane, Highgate, and the business he had was one carried on by "E. B. Horne," and there is no doubt that his business was one of supplying spare parts and service for all models of the Gilford vehicles. (I ought to have observed that in addition to the business then carried on by the Gilford Motor Co. they carried on the business of service as well as the sale and supply of motors.) Having established himself, or attempted to establish himself, in that way as "E. B. Horne," he became anxious as to whether or not what he was doing was in contravention of the agreement which he had entered into and to which I have referred, and so it was that on March 29, 1932, his solicitors wrote this letter to the Gilford Motor Co.:

> "Dear Sirs,—I am acting for Mr. E. B. Horne, the late joint managing director of your company, and I understand that he entered into certain agreements with your company as to service and for sale. As I am desirous of advising him upon the terms of these agreements, I shall be glad if you will be good enough to forward copies to me, and accept this letter as my undertaking to pay your reasonable charges for such copies.—Yours faithfully, J. R. CORT BATHURST."

The reply on March 30 was:

> "We are in receipt of your letter of yesterday's date, and in reply would inform you that Mr. E. B. Horne's copy of the original service agreement with this company was left with the writer for safe custody. Therefore we have pleasure in enclosing it herewith."

Thus the solicitor was, on March 30, placed in possession of the agreement of which I have read some and indicated other portions of its terms. On April 8 a private company under the title of "J. M. Horne," a limited company, was incorporated. The paper which had been previously "E. B. Horne" was altered by blacking out the initials of Mr. E. B. Horne—"E.B."—and inserting at the commencement "J.M." and adding "& Co., Ltd." It so happens that "J.M." are the initials of the wife of Mr. Horne. The primary objects of the company are to carry on the business of factors' agents and distributors and vendors and buyers of accessories and spare parts of all classes of vehicles, and so on, and for charabancs, motor cars, taxis, and so on. The registered office is at the private address of Mr. Horne, 170, Hornsey Lane, the directors are Jessie May Horne, the wife of Mr. E. B. Horne, and Mr. Albert Victor Howard, a person who had been, as I understand, originally in the employ of Gilford Motors, but who was at that time associated with Mr. E. B. Horne in the business which he carried on after November, 1931. The nominal capital was £500 divided into 500 shares of £1 each, and the allotments that were made on April 12 were, as to 101 shares, to Mrs. J. M. Horne, and 101 shares to Mr. A. V. Howard. The solicitor was the writer of the letter of March 29 which I have read, and that was the company which was incorporated eight days after the receipt of the agreement.

Farwell, J., heard the evidence about that company and had these documents before him. He says this:

> "The defendant company is a company which, on the evidence before me, is obviously carried on wholly by the defendant Horne. Mrs. Horne, one of the directors, is not, so far as any evidence I have had before me, taking any part in the business or the management of the business. The son is engaged in a subordinate position in the company, and the other director, Howard, is an employee of the company. As one of the witnesses said in the witness-box, in all dealings which he had had with the defendant company, the 'boss' or the 'guvnor,' whichever term is the appropriate term, was the defendant Horne, and I have not any doubt on the evidence I have had before me that the defendant company was the channel through which the defendant Horne was carrying on his business. Of course, in law the defendant company is a separate entity from the defendant Horne, but I cannot help feeling quite convinced that at any rate one of the reasons for the creation of that company was the fear of Mr. Horne that he might commit breaches of the covenant in carrying on the business, as, for instance, in sending out circulars as he was doing, and that he might possibly avoid that liability if he did it through the defendant company. There is no doubt that the defendant company has sent out circulars to persons who were at the crucial time customers of the plaintiff company."

I have recalled that portion of the judgment of Farwell, J., and I wish in clear terms to say that I agree with every word of it. I am quite satisfied that this company was formed as a device, a stratagem, in order to mask the effective carrying on of a business of Mr. E. B. Horne. The purpose of it was to try to enable him, under what is a cloak or a sham, to engage in business which, on contemplation of the agreement which had been sent to him just about seven days before the company was incorporated, was a business in respect of which he had a fear that the plaintiffs might intervene and object.

This action is brought by the plaintiffs, the Gilford Motor Co , Ltd. to enforce the terms of cl. 9 of the agreement of May 30, 1929, on the ground that the defendant Horne, and the company as his agent and under his direction, have committed breaches of the covenant which I have read. Admission has been made quite frankly and candidly in this court, as it was made below, that there have been circulars sent out to the customers of the Gilford Motor Co. The statement is made in the evidence:

> "It is admitted now, I gather—although my learned friend says it is small, that does not seem to me to matter, with respect—that persons were solicited

A
> by Mr. Horne, both before and after the formation of the company, who were customers of the plaintiff company at the time he was in its service. That is right, is it not?"

and counsel for the defendants says: "That is right." So that the learned judge was on sure ground when he said there was a clear admission that these two defendants were soliciting the customers of Gilford Motors. As FARWELL, J., puts it: B

> "Admittedly the defendant Horne sent out circulars to various persons in which it was stated that the defendant was ready and in a position to supply spare parts for Gilford vehicles; and, in fact, he did supply spare parts and at prices which were, I gather, considerably lower than those charged by the plaintiff company, so that in a sense he was what is known as under-cutting the plaintiff company." C

In other words, there is no defence at all to the claim made in this action unless the conduct of the two defendants can be excused on one of two grounds: (i) that the covenant is unenforceable in law by reason of the width of its terms, or, (ii), that it has ceased to be operative by reason of the terms which were arranged between the company for the discharge or the release of the managing director from that position on Nov. 17, 1931. D

I, therefore, proceed now to consider those two points in order, and, first: Is the covenant unenforceable as being bad in law? I accept the proposition that a covenant in restraint of trade is primâ facie one which the law will not enforce, but to that broad proposition there have been many, many exceptions over a very long period of time. The famous case of *Mitchel* v. *Reynolds* (1) decided, by a judgment delivered by LORD MACCLESFIELD, within what limits and terms the court will enforce such agreements. The old rule was, undoubtedly, that, for a covenant in restraint to be valid, the restraint must be partial in space or in time, but we have to bear in mind that the nature of these agreements has been considered in the light of later considerations which have gradually arisen as there has been an evolution or development of business transactions, and, as RIGBY, L.J., points out in *Dubowski & Sons* v. *Goldstein* (2) ([1896] 1 Q.B. at p. 484), in words which I will now read: E F

> "We have now gone far beyond what was supposed to be the law in the time of TINDALE, C.J., and LORD DENMAN, C.J. I am not surprised that at that time they expressed the opinions they did. LORD WATSON has pointed out in the case of *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.* (3) that the opinion of the judges of this age as to matters of public policy may differ very much from that of judges of a bygone age when the circumstances of the world were different. The only test of the validity of an agreement in restraint of trade now is whether or not such an agreement is reasonably necessary for the protection of the person with whom it is made." G

H As pointed out on p. 475 of the first volume of SMITH'S LEADING CASES, dealing with the case of the Nordenfelt Company, which went to the House of Lords, and LORD WATSON'S judgment, the true view is

> "that any restraint, whether general or partial, is primâ facie invalid but may be good if the circumstances of the case show it to be reasonable."

I We have, therefore, to consider: Were the terms of this covenant in cl. 9 reasonable? Let me just add one further passage from *Mason* v. *Provident Clothing and Supply Co., Ltd.* (4) ([1913] A.C. at p. 741). LORD SHAW, in dealing with a case where the activities of a canvasser were in question, says:

> "A very reasonable restriction of a canvasser in such circumstances as are here disclosed might no doubt have been that he should not canvass his old customers or in the limited locality of his former labour. This the law would naturally and properly enforce, and would look upon as a reasonable protection of the employer";

and in *Dubowski's Case* (2), in which the agreement was one with a man who had been in the employ of the plaintiffs and had ceased to be in their employ, the court enforced an agreement which they held to be good in part, that part being severable, and valid with regard to customers of the plaintiffs who were such while the defendant was in their service. Lopes, L.J., says this ([1895] 1 Q.B. at p. 483):

> "This agreement, like all others, must be construed with regard to the surrounding circumstances. It has been objected to as being too wide in two respects: first, in respect of space; secondly, in respect of time,"

and then he holds that the objection fails in respect of those persons who were customers of the late employers at the time when the employee was in their employ.

I turn to the present agreement. It appears to me that the plaintiff company, who had got a business established, might quite reasonably impose the term upon their employee that their business should be protected from any activity on his part after the close of the agreement under which he was serving the company, and that it was necessary for that protection to insert the words which are here found, words which form a covenant varying, no doubt, in some agreements, but which are broadly a common form, namely, that while he shall hold the office of managing director or afterwards, he shall not solicit, interfere with, or endeavour to entice away from the company any person, firm, or company who at any time during or at the date of the determination of the employment were customers of or in the habit of dealing with the company. Let us read this agreement in the setting in which it is found. What is its purpose? It is to protect the business, the profits which are to be earned by the company with the persons, firms, or companies who at that time—the time of the employment of the defendant Horne—were customers of the company and from whom, in the business they did with them, the company derived profit. I repudiate altogether the suggestion that you can, by reason of taking one or two words such as "the habit of dealing with the company," impute a meaning to this covenant that it deals with or covers the case of a person from whom the Gilford company buy, and in respect of whose dealings there can be no profit at all arising to the Gilford company. It is intended to deal with persons who are upon their books, or with whom they deal and, in the course of dealing, earn a profit. Objection is taken that these words are too wide, and Farwell, J., has said that it may be that by reason of the fact that the customers are not defined, or the persons who were in the habit of dealing with the company are not particularised, a danger might accrue to this man from an innocent sale to one of such persons, and he might have been imperilled during all time, long after his employment had ceased, by the nature of such transactions. I cannot agree that such is a fair test to apply to the covenant. It appears to me that this covenant was, as in the many scores of cases in which covenants have been upheld in these courts, necessary for the protection of the plaintiffs' business. It operated after the determination of the employment and in respect of persons of whom the defendant himself would have the best knowledge, for he was the managing director of the company, and what it means is that he is not to solicit, to interfere with, or endeavour to entice away for his advantage customers or persons who are in the habit of dealing with the company for the company's advantage. Objection is taken that these words, "customers of or in the habit of dealing with the company," either have no meaning or are tautological. I do not agree with that. It appears to me that a customer is a person who frequents a place of business for the purpose of making purchases, and those persons may be determined in a particular way by, for instance, having their names recorded in the books of the company, or they may be upon a list, and there may be other persons who are in the habit of dealing with the company but whose names have not yet been inscribed upon any register of customers. I see no reason to object to the employment of both those terms by reason of the fact that one or other of them might have covered many of the persons who are to be found in the alternative category. If that be so, it appears to me that this is a covenant which was required for the purpose of reasonably protecting the company's business. It does not go so far as to cover customers who become customers after the managing director has left, and it was entered into by him with full knowledge of what he was doing, and with full knowledge of who were the persons included in that phrase, and it is in respect of them that he is debarred from solicitation, interference or enticing away. The covenant is definite in date, it is not uncertain, because you have the time at which you are to look for the customers or persons in the habit of dealing, and you have got, therefore, a covenant which is reasonable in the sense of being necessary for the protection of the plaintiffs' business.

The defendant has, by his own admission, solicited persons who come within the ambit of the covenant. What is the justification? It appears to me that this is an agreement which must be upheld by the court, and the plaintiff company are entitled to the protection of the court, and the injunction must be granted. The question whether in any particular case some casual purchaser from the defendant may cause the defendant to be in danger of further action by the court is quite a different question. I do not quite understand the meaning of what is called a "casual customer." I think the two words are mutually antagonistic: I think a "customer" is a person who, as I have said, frequents the shop; a casual purchaser seems to be a different person. But, however, that may be, we have to say that the plaintiffs are entitled in this action to have this covenant upheld, and an injunction is the proper mode of enforcing that, as against these defendants.

The other suggestion is that there has been an agreement whereby the defendant was released from the restrictive covenant. It will be observed that as the matter went before the court the defence relied upon an oral agreement to release him, and now the suggestion is made that, if you look to the letters of Nov. 17, there is a cancellation of the agreement, and the cancellation means a release from cl. 9. I do not so read the letters or the entry in the minute book. It appears to me that the defendant rightly stated that there was an oral agreement, and although some of the terms which had been agreed between the parties, particularly the one as to which and under which the defendant was to receive compensation, may have been recorded in the letters, in the absence of any specific term dealing with this protective cl. 9, I agree with the learned judge, and do not accept the view that there has been any release of the clause. Counsel for the defendants strenuously argued that inasmuch as there was a new agreement there was a release of this clause; but that, of course, will depend upon whether or not the new agreement covered the same area that the previous agreement had done. It appears to me that the purpose of the second agreement was to deal with the question of the shortening of the term of the employment and the compensation to be paid in consequence of that shortening, and did not intend to deal with or release the defendant from the restrictive covenant.

In these circumstances the appeal must be allowed, and for the reasons which I have already stated, with regard to the defendant company, I think the injunction must go against the company. Their counsel admitted that, if the company was such as is indicated by LINDLEY, L.J., in *Smith* v. *Hancock* (5), it would not be possible to object to the injunction going against the company. LINDLEY, L.J., indicated the rule which ought to be followed by the court:

> "If the evidence admitted of the conclusion that what was being done was a mere cloak or sham, and that in truth the business was being carried on by the wife and Kerr for the defendant, or by the defendant through his wife for Kerr, I certainly should not hesitate to draw that conclusion, and to grant the plaintiff relief accordingly."

I do draw that conclusion. I do hold that the company was "a mere cloak or sham"; I do hold that it was a mere device for enabling Mr. E. B. Horne to continue to commit breaches of cl. 9, and in those circumstances the injunction must go against both defendants, the appeal must be allowed with costs here and below, and the injunction will be in the terms asked in the prayer in the statement of claim.

LAWRENCE, L.J.—The main question in this case is whether the provision against solicitation contained in the agreement of May 30, 1929, is too wide to be enforceable. The answer to that question depends upon whether, upon the particular facts of the present case, the covenant was reasonably necessary for the protection of the business carried on by the covenantee at the time when it was entered into. In order to determine that question, the court must have regard, first, to the nature of the business; secondly, to the position of the covenantor, and, thirdly, to the scope of the covenant.

As to the nature of the business, the company carried on the business of suppliers of commercial motor vehicles (including charabancs) and of suppliers of service for such vehicles. In addition to those businesses, the company supplied spare parts for the motor vehicles. The head office of the company was situate in Holloway Road, in London, where the company also had a service depot. The company's works were situate at High Wycombe, in Buckinghamshire. As to the position of the covenantor, he was appointed managing director, with the obligation of devoting his whole time and attention to the business of the company, his remuneration consisting of a substantial salary, and a percentage of the profits earned by the company. He was, therefore, not in a subordinate position, but in a highly responsible and confidential position, being placed in actual charge of the business of the company. As regards the scope of the covenant, it is plain that the covenant is limited to the non-solicitation of customers or persons in the habit of dealing with the company during or at the date of the determination of the covenantor's employment, and does not extend to prevent the covenantor from soliciting persons who might become customers of the company after his employment by the company had terminated.

In these circumstances I am clearly of opinion that the company was entitled not to have its customers, by solicitation or any other means, enticed away by the covenantor after his employment had terminated. By such a covenant the company was legitimately endeavouring to protect what it had (namely, the chance of its customers continuing to resort to the company, or to its places of business), and not to gain a special advantage which it could not otherwise secure. FARWELL, J., seems to have considered that the introduction of the words, "or persons in the habit of dealing with the company," after the word "customers," rendered the covenant ambiguous. In my opinion, there is no ambiguity in the covenant, and the covenantor has not ventured to go into the witness-box to say that he did not understand or was in any way embarrassed by the wording of the covenant. The expression "customers," in my judgment, is synonymous with the expression "persons who are in the habit of dealing with the company." The two expressions, to my mind, mean practically the same thing, and the alternative expression introduced after the word "customers" was, in my opinion, inserted as a definition of the latter so as to make it plain that what was intended to be guarded against by the covenant was any interference with or enticing away of those persons who were in the habit of dealing with the company, during the covenantor's employment. I cannot myself think that there could have been any reasonable doubt in the minds of the parties to this covenant as to the class of persons who were not to be solicited after the employment had terminated.

The learned judge further held, and I think that this was the main ground of his decision, that the covenant is too wide and unenforceable, because it does not specify which of the customers the covenantor is not to solicit. The learned judge points out that the covenant is not limited to customers whose names were entered in the books of the company, or to customers mentioned in any list supplied by the company to the covenantor at the termination of the agreement, or to customers who were defined in some other manner. With the greatest respect for the opinion of the learned judge, I find myself quite unable to agree with this conclusion. In my judgment, having regard to the nature of the business and to the position of the covenantor, it was unnecessary further to define the persons who were not to be solicited by the covenantor, beyond describing them as the "customers or persons in the habit of dealing with the company" during his employment or at its termination. The learned judge seems to have considered that the covenant was too wide because it would include customers who might be in the habit of buying spare parts at the service depot and at the works, without their names being entered in the books of the company and without their becoming personally known to the covenantor. Apart from the question whether there is any evidence in the present case to show that there were any such customers, I am clearly of opinion that the fact that such customers were included in the covenant would not make the covenant too wide. The company, in my opinion, is entitled not to have that class of customers enticed away by solicitation any more than any other of its customers. The covenantor might inadvertently solicit one of that class of customers, but in such a case the court would not grant an injunction against him or commit him for contempt for the breach of any injunction already granted if he could show that what he had done was done inadvertently and would not be repeated. But where I think the learned judge has erred is in making the possibility of such an innocent breach of the covenant a test of its validity. The position to which the covenantor was appointed was one in which he had the fullest opportunity of getting to know every customer of the company, and it seems to me that in these circumstances the restraint placed upon him was a reasonable restraint.

For the reasons stated, I am of opinion that the covenant was one which was reasonably required for the protection of the company, and was neither ambiguous nor did it impose too wide a restraint on the covenantor.

There only remain two subordinate points to be considered. The first is whether the oral agreement arrived at in November, 1932, operated to put an end to the covenant. Upon that question I find myself in entire agreement with the Master of the Rolls and with FARWELL, J. The question depends upon what took place at the interview at which the oral agreement was arrived at. Apart from the primâ facie presumption that the company would not readily have agreed that their managing director, who had for a substantial time been in control of their business, should on leaving be permitted to solicit their customers, there is no evidence that at this interview it was agreed that the covenant in question, which was to come into operation after the termination of the employment, should be abrogated.

Secondly, as to the question whether the injunction ought to extend to restraining the defendant company from soliciting the plaintiff company's customers, I am of opinion that the evidence amply justified the learned judge in drawing the inference that the defendant company was a mere cloak or sham for the purpose of enabling the defendant to commit a breach of his covenant against solicitation. I need not recall the facts, but it seems to me that the evidence as to the formation of the company and as to the position of its shareholders and directors lead to that inference. Of course, that inference might have been displaced by evidence adduced on the part of the defendants, but although the issue was plainly raised on the pleadings no such evidence was forthcoming. In these circumstances I agree with the finding by the learned judge that the defendant company was a mere channel used by the defendant Horne for the purpose of enabling him, for his own benefit, to obtain the advantage of the customers of the plaintiff company, and that therefore the defendant company ought to be restrained as well as the defendant Horne.

I agree that this appeal ought to be allowed, with the consequences stated by the Master of the Rolls.

ROMER, L.J.—I have come to the same conclusion. The covenant with which we have to deal in the present case is, obviously, a covenant in restraint of trade. It is, therefore, primâ facie, unenforceable. It can, however, be enforceable if it be shown that the covenant was reasonably necessary and not more extensive than is reasonable for the protection of the covenantee. The particular covenant with which we have to deal is a covenant which is commonly referred to as a covenant against solicitation—that is to say, it is a covenant by an employee that he will not during the term of his employment, or after his employment shall have ceased, solicit orders from customers of his employers' business who were such at the time of the cessation of his employment or had been such during the existence of the covenantor's employment. It is not, of course, every such covenant that is reasonably necessary for the protection of the employers. I can readily conceive cases in which such a covenant by an employee is in no way necessary for the protection of the employer. The question whether it be necessary or not depends upon the nature of the business carried on by the employer and the nature of the employment that is being given to the employee. It has, however, been frequently recognised in these courts, and is, in my opinion, established law, that where an employee is being offered employment which will probably result in his coming into direct contact with his employer's customers, or which will enable him to obtain knowledge of the names of his employer's customers, that the covenant against solicitation is reasonably necessary for the protection of the employer.

In the present case the covenantor was employed as a managing director of the company, who are the covenantees, and it is perfectly obvious that at the date of his employment it was extremely probable, if not certain, that he would come into contact with the customers of his employers who were customers during the term of his employment. In those circumstances, I should have thought that this covenant was enforceable. I will not read the covenant again, nor do I intend to comment upon the precise words in which that covenant is framed. It is sufficient to say that, in my opinion, it restrains the covenantor from soliciting in the way of business such as is carried on by the employers, from persons who were customers of the employers during, or at the date of, the termination of the defendant's employment as managing director. I do not myself think that the words "or in the habit of dealing with the company" enlarge or diminish in any way the meaning of the word "customers." But it was said, and the argument has found favour with FARWELL, J., that the covenant is unenforceable because the particular customers whom the defendant is precluded by the covenant from soliciting are not sufficiently defined in the covenant. FARWELL, J., said this:

> "I can conceive that if the plaintiffs in this case had been content to seek to restrain the defendant from canvassing the customers whose names appear in the books, or persons in a list of customers supplied to the defendant, or in some other way limiting and defining what was meant by 'customers,' such a covenant as that would be a reasonable one."

But so to limit a covenant against solicitation would not be sufficient protection for the employers. There may be customers with whom the employee has come into contact, whose names he would know, whose names do not appear in the books, and in a case where the employee is a person, one of whose duties might be to see that the names of customers were inserted in the books, a covenant so restricted obviously would not be a proper or sufficient protection for the employers. FARWELL, J., also said that the covenant would be enforceable if the plaintiffs had been content to confine the customers to persons whose names were specified in the list of customers supplied to the defendant. It must be remembered, however, that the question whether the covenant is a valid one or not, that is to say, whether it is a reasonable covenant or not, is a question which has to be determined as at the date of the covenant being entered into. At that time, quite clearly, it would be impossible to supply the defendant with a list of persons who would become customers during the term of his employment. Further, it is to be observed, that the covenant extends not only to the period after the defendant's employment has come to an end, but also to the period covered by the term of his employment. I do not think it reasonable to suppose that the employers are from time to time, during the man's employment, to hand to him a list of the customers of the firm, so that he might know what customers he might and what customers he might not solicit during the term of his employment. Then FARWELL, J., referred to, as other cases in which the covenant might be enforceable, cases in which in some

A other way the meaning of the word "customers" was limited or defined. With great respect to the learned judge, I cannot myself think of any other way in which, consistently with the proper protection of the employers, the customers who were not to be solicited can be limited or defined other than by calling them "customers."

B There are numerous cases before the courts where covenants against the solicitation of customers have been considered, and I know of no authority, and certainly our attention has not been called to any authority, where any such limitation upon the covenant as is suggested by FARWELL, J., has been held to be necessary. In the cases to which we have been referred in which such covenants have been held to be good, there was no such limitation. In *Mills* v. *Dunham* (6), C in which there was a very wide covenant, a covenant in the sense that it extended not only to soliciting but to transacting the business with customers of the employer, no such words of limitation were to be found. The covenant was against transacting business with or soliciting orders from "any person or firm who, during the continuance of this agreement, shall be customers of the" employers. The case came before CHITTY, J., and afterwards before the Court of Appeal, and in D neither court was it suggested, either in argument or judgment, that any such limitation of the word "customers" was necessary in order that the covenant should be enforceable. Another case to which our attention was called was *Dubowski & Sons* v. *Goldstein* (2). That was a case of a covenant entered into by an employee of a milkman, a man carrying on a milk business who was employed as a milk carrier, and the covenant was that he would not

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> "interfere with or cause to be solicited, or interfered with, any of the customers who shall at any time be served by or then belonging to the employer his successors or assigns in the said business."

Again it was never suggested that any such limitation was necessary in order that the covenant might be enforced, and, in my opinion, with the greatest deference to FARWELL, J., no such limitation is necessary. The limitation that is necessary, F of course, is a limitation to persons who are customers during the employment of the covenantor. No such limitation as is suggested by FARWELL, J., is, in my opinion, necessary.

So far as regards the other two points upon which reliance was placed by the respondents, I do not wish to add anything. In my opinion, FARWELL, J., was perfectly right in the conclusion to which he came as to the effect of the oral G agreement come to between the parties in the month of November, 1931, and was perfectly right in coming to the conclusion, as I think he did conclude, that this defendant company was formed and was carrying on business merely as a cloak or sham for the purpose of enabling the defendant Horne to commit the breach of the covenant that he entered into deliberately with the plaintiffs on the occasion of and as consideration for his employment as managing director. For this reason, H in addition to the reasons given by my Lords, I agree that the appeal must be allowed with the consequences which have been indicated by the Master of the Rolls.

[The court granted an injunction to restrain the defendant Horne either directly or indirectly by means of the defendant company or otherwise, and also to restrain the defendant company, from soliciting, interfering with, or endeavouring to entice I away from the plaintiffs any person, firm or company who at any time during or at the date of the determination of the employment of the defendant Horne as managing director of the plaintiffs were customers of or in the habit of dealing with the plaintiffs. It was also ordered that the defendants pay to the plaintiffs the amount of damages which should be certified as the result of an inquiry, and the costs of the action.]

Appeal allowed.

Solicitors: *Cardew-Smith & Ross*; *J. R. Cort Bathurst.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

MOULD *v.* MOULD

[Probate, Divorce and Admiralty Division (Bateson, J.), January 30, 1933]

[Reported [1933] P. 76; 102 L.J.P. 21; 148 L.T. 499; 49 T.L.R. 242; 77 Sol. Jo. 117]

Divorce—Maintenance of wife—Assessment—Factors to be considered—Conduct of parties—Charges not raised in defence of divorce suit—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 190 (1)—*Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 19 (2).

A husband, whose wife had been granted a decree of divorce from him in an undefended suit, made charges of cruelty and adultery against the wife in his answer to her petition for maintenance.

Held: the charges of cruelty and adultery should not be struck out on the ground that they might have been set up in answer to the wife's petition for divorce, as they raised matters which were relevant (i) to the quantum of maintenance, and (ii) to the question whether a dum casta clause should be inserted in the maintenance order: *Restall* v. *Restall* (1), [1930] P. 189, followed.

Notes. This case must now be read subject to *Robinson* v. *Robinson*, [1943] 1 All E.R. 251, and to *Duchesne* v. *Duchesne*, [1950] 2 All E.R. 784, in which it was held that the husband respondent could only rely, in answer to the wife's claim for maintenance, on conduct (which he had not set up in answer to her petition for divorce) which he could not have known of at the time of the divorce even if he had taken the trouble to inquire (*Robinson* v. *Robinson*); or which could not reasonably have been expected to result in an effective answer to the petition or in a different substantive order (*Duchesne* v. *Duchesne*). This limitation does not, however, apply to conduct disclosed by the wife herself at the trial, e.g., in her discretion statement: see the Court of Appeal case of *J.* v. *J.*, [1955] 2 All E.R. 617 at p. 622.

Section 190 (1) of the Act of 1925 has now been repealed and replaced by s. 19 (2) of the Matrimonial Causes Act, 1950, which is in substantially the same terms.

Doubted: *Lindsay* v. *Lindsay*, [1934] All E.R. Rep. 149. Considered: *Duchesne* v. *Duchesne*, [1950] 2 All E.R. 784. Referred to: *Dipple* v. *Dipple*, [1942] 1 All E.R. 234; *Robinson* v. *Robinson*, [1943] 1 All E.R. 251.

As to conduct of the parties as affecting allotment of maintenance and evidence which a husband may put forward thereof, see 12 Halsbury's Laws (3rd Edn.) 434, para. 978, and for cases on the subject see 27 Digest (Repl.) 613–616, *5742–5760*; and as to insertion of a clause dum sola et casta, see 12 Halsbury's Laws (3rd Edn.) 438, para. 983, and 27 Digest (Repl.) 625–626, *5841–5867*. For the Matrimonial Causes Act, 1950, s. 19 (2), see 29 Halsbury's Statutes (2nd Edn.) 407.

Cases referred to:

(1) *Restall* v. *Restall*, [1930] P. 189; 99 L.J.P. 123; 143 L.T. 225; 46 T.L.R. 398; 74 Sol. Jo. 319, C.A.; 27 Digest (Repl.) 616, *5762*.

(2) *Wood* v. *Wood*, [1891] P. 272; 60 L.J.P. 66; 64 L.T. 586; 7 T.L.R. 463, C.A.; 27 Digest (Repl.) 625, *5846*.

(3) *Kettlewell* v. *Kettlewell*, [1898] P. 138; 67 L.J.P. 16; 77 L.T. 631; 14 T.L.R. 96; 27 Digest (Repl.) 619, *5785*.

(4) *Fowler* v. *Fowler* (1932), unreported.

(5) *Winstone* v. *Winstone and Dyne* (1861), 2 Sw. & Tr. 246; 30 L.J.P.M. & A. 109; 3 L.T. 895; 164 E.R. 989; 27 Digest (Repl.) 614, *5749*.

(6) *Henderson* v. *Henderson* (1843), 3 Hare, 100; 1 L.T.O.S. 410; 67 E.R. 313; 21 Digest 174, *276*.

(7) *Scott* v. *Scott*, [1921] P. 107; 90 L.J.P. 171; 124 L.T. 619; 37 T.L.R. 158, C.A.; 27 Digest (Repl.) 631, *5917*.

Summons adjourned into court appealing from an order of the registrar striking out an issue of conduct raised in the respondent's answer to the wife's petition for maintenance.

The parties were married at Wolverhampton in June, 1923. There were two children, a daughter aged eight and a son aged seven years. Differences arose and husband and wife parted. On Nov. 29, 1928, the wife petitioned for restitution of conjugal rights. By his answer, dated Jan. 30, 1929, the respondent made allegations against his wife of cruelty and of too close an intimacy with a named man, and of lack of sincerity in presenting the suit. By her reply the petitioner denied the charges. The suit was compromised by a deed of separation dated June 24, 1929, and eventually dismissed. On Oct. 5, 1931, the wife petitioned for divorce. The suit was not defended, and she was granted on April 8, 1932, a decree nisi, made absolute on Oct. 17, 1932, and the custody of the children. She petitioned for maintenance on Sept. 28, 1932. By his answer, dated Nov. 17, the respondent set up the defence of conduct, alleging not only the charges made in his answer to the former restitution suit, but also adultery with the same man, and a recent association with another man. The registrar by his order on Dec. 14, 1932, struck out these allegations of the respondent on the petitioner's application. The respondent appealed.

Section 190 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, provides that:

> "The court may, if it thinks fit, on any decree for divorce or nullity of marriage [direct the respondent to make certain provision for the wife], having regard to her fortune, if any, to the ability of the husband and the conduct of the parties."

Rule 65A of the Matrimonial Causes Rules, 1924, provides that any application for maintenance should be made by separate petition, and r. 69A empowers a registrar on an application for maintenance to require any affidavits, the production of any document, and the attendance of either spouse for examination or cross-examination, and to take oral evidence for the purpose of the investigation.

H. B. D. Grazebrook for the husband, the respondent.—The registrar apparently struck out the husband's allegations in his answer to the petition for maintenance, because some of the allegations were the same as in his answer to the petition for restitution of conjugal rights, and might therefore have been raised by way of answer to the wife's petition for dissolution. He was not entitled to do so, not only because the evidence is plainly admissible as to the amount of maintenance to be ordered and the question of a dum casta clause, but also because the question has been concluded by the Court of Appeal in *Restall* v. *Restall* (1), in which LORD HANWORTH, M.R., held that "conduct of the parties" must apply to conduct before as well as after the marriage, and said:

> "When there is a petition for maintenance, and the term of the continuance of the maintenance has to be fixed, and also perhaps the question of the imposition of a dum casta clause arises, I think it is most important that the court should have before it the relevant evidence to enable it to investigate thoroughly the conduct of the parties."

The Master of the Rolls in his judgment cited *Wood* v. *Wood* (2) and *Kettlewell* v. *Kettlewell* (3). [BATESON, J.—In this case the allegations made would have been sufficient, if proved, to have barred a decree. Is the husband to be allowed now to set them up, as if he had set them up he might not have been divorced?] In a recent unreported case in chambers—*Fowler* v. *Fowler* (4)—the President remitted to the registrar for inquiry allegations against a wife petitioner, who was seeking maintenance, of conduct which the husband had not pleaded by way of answer to the petition for divorce.

G. Tyndale for the wife, the petitioner.—In the present case I submit that the registrar was right in holding that the husband could not stand by and let the decree be made absolute and thereafter raise the charges. *Restall* v. *Restall* (1) was a nullity suit, and the marriage being void ab initio the decree was merely declaratory; the conditions were quite different, and no such matter as in the present allegations could have been pleaded in answer to the main suit. There was no statutory provision for wife petitioners in nullity suits until the Matrimonial Causes Act, 1907, and therefore *Wood* v. *Wood* (2) and *Kettlewell* v. *Kettlewell* (3) do not apply. [BATESON, J.—The Court of Appeal in *Restall* v. *Restall* (1) did not confine their judgments to nullity only.] Moreover, the registrar has a discretion to strike out pleadings in maintenance inquiries which he considers irrelevant or vexatious, and he has exercised his discretion. [BATESON, J.—If the registrar has to consider if he must insert a dum casta clause, an issue of adultery seems to be a proper allegation to take into account.] That would mean allowing the husband to bring a new action after decree absolute. Formerly, permanent maintenance was considered on the decree, before any decree nisi was constituted, and therefore any relevant matter relating to the petitioner's own conduct was considered before the final decree, as in *Winstone* v. *Winstone and Dyne* (5). Maintenance inquiries have now been delegated to the registrar for determination on the hearing of the maintenance petition. The question of estoppel by implied res judicata also arises. The husband, having neglected to raise those charges in the suit for divorce, is estopped now from setting them up on the question of allowance. The principles are dealt with in SPENCER BOWER ON RES JUDICATA (1924 Edn., s. 165 at p. 108), and *Henderson* v. *Henderson* (6) (3 Hare at p. 115) and *Scott* v. *Scott* (7) ([1921] P. 107, per SCRUTTON, L.J., at p. 125) support my contention.

BATESON, J.—I think this case is concluded by *Restall* v. *Restall* (1). In November, 1928, the wife petitioned for restitution of conjugal rights, and a great many charges were made by the respondent husband in answer to that petition. Some of those charges re-appear in the answer to the petition for maintenance, but they are not the same in the two cases. On June 24, 1929, a deed of separation was drawn up between the parties, and eventually the petition for restitution was dismissed, but there was no withdrawal of the charges by the husband. In October, 1931, there was a petition by the wife for divorce—no doubt he was anxious for a divorce as well as his wife. The husband did not defend the suit, and the wife obtained a decree nisi on April 8, 1932, which decree was made absolute in October, 1932. On Sept. 28, 1932, the wife took out a maintenance petition, and on Nov. 17 the husband answered that petition. In para. 10 of his answer he said:

> "At the hearing of the petition for permanent maintenance the following facts and circumstances should be taken into consideration,"

and he set out in fifteen sub-paragraphs a great many of the charges which he had made originally in the answer to the petition for restitution of conjugal rights, and some additional ones. They include the word "cruelty," and adultery is charged. Thereupon the wife took out a summons before the registrar to strike out the whole of para. 10, in which the husband is stating that he will rely on the question of the conduct of the parties, and he has given a long list of particulars which might well have been set up (apparently, for all I know, with success, as he uses the words "cruelty" and "adultery") as an answer to the petition for divorce by the wife. He did not choose to do so then, no doubt for very good reasons, but he now chooses to do so and says he is entitled to do so under s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925.

In *Restall* v. *Restall* (1) the petition was for nullity, and the husband was met with a petition for maintenance by the wife, and he made serious allegations against her, both before and after the marriage. The Court of Appeal in that case dealt with s. 190 and interpreted it. The court decided that the conduct of the wife, both before and after marriage, is a matter which is probably pleadable. I think I am bound to follow that decision. It was a decision on the section. It seems to me to be directly in point, and no distinction was made in that case, as counsel for the wife tries to make in this case, that it was a nullity petition as distinct from a divorce petition. The section is in terms perfectly plain. It is not limited in any way. It simply says that such matters may be raised.

Further, a good many of these allegations in para. 10 go to the question of whether a dum casta clause should be inserted or not. Therefore, it is impossible to say that they may not be raised: I am not asked to distinguish between these particulars as to which are good and which are bad; I am merely asked to strike out the whole of this paragraph. I do not think that can be done. How far the other matters may have a bearing upon it I do not know at present. Counsel for the wife seeks to distinguish *Restall* v. *Restall* (1), not only on the ground that that was a suit for nullity and not divorce, but also because, he says, all these matters which are now set up in this answer could have been pleaded in the divorce suit and might well have been a bar to the decree. He says it is not right that the respondent should have the benefit of an undefended decree and then be allowed to set up what would possibly have been a good defence to the petition. I agree with him to a very large extent that it is most inconvenient and very unsatisfactory that such should be the case, but it seems to me I am obliged to follow the decision in *Restall* v. *Restall* (1).

Counsel also says that as these matters could have been raised by him on the divorce petition the husband is estopped now from setting them up. I cannot see any estoppel. The matter has never been decided. He says it is estoppel by implied res judicata. The matter has never been investigated. It is quite true that if the husband had appeared he might have gone into these matters. How far these may be matters going to the question of amount or going to the question of a dum casta clause in a maintenance petition has never been decided, and I do not see how he can be estopped from raising them now.

The other point counsel for the wife makes is that it is in the discretion of the registrar and that I ought not to interfere with it. It may be that it is to a certain extent within the discretion of the registrar to strike out a pleading or not, but I think that that discretion must be exercised in accordance with the decisions that have been given; and much as I regret that this method of dealing with the case should be allowed, I think I am bound to allow it, although I think that it is most inconvenient and undesirable that a husband should be allowed to lay by, with all these charges, until the maintenance petition comes on to be heard. It leads, at any rate in my view, to something very like collusion, although it may not perhaps amount to it in this case.

It means that the registrar will have to try what is practically a divorce case in going into all these matters, though no doubt the conduct of the husband in laying by like this may be a matter which will have to be considered when the whole case comes to be dealt with.

On the doctrine of estoppel I have been referred to *Henderson* v. *Henderson* (6) (3 Hare at p. 115), and to SPENCER BOWER ON RES JUDICATA. I have also been referred to *Scott* v. *Scott* (7) and *Winstone* v. *Winstone* (5), but neither of these two later cases seems to me to have any real bearing on the matter that I have to try. It seems to me that where you have a different proceeding, as a petition for maintenance is, although it is in the same suit, there is no difficulty whatever under the section in saying that the conduct of the parties, which has to be taken into consideration, may be pleaded. Therefore I must reverse the order of the registrar.

Registrar's order reversed.

Solicitors: *Shelton, Cobb & Co.*, for *Shelton, Wearing, & Bates*, Wolverhampton; *J. Carnegie*, for *Hatwell, Pritchett & Co.*, Birmingham.

[*Reported by* WILLIAM LATEY, ESQ., *Barrister-at-Law.*]

Re TALBOT. JUBB *v.* SHEARD

[Chancery Division (Maugham, J.), May 24, 1933]

[Reported [1933] Ch. 895; 102 L.J.Ch. 362; 149 L.T. 401;
49 T.L.R. 462; 77 Sol. Jo. 388]

Perpetuities—Will—Gift over—"In case . . . the said chapel should become merged in or united with some other religious body"—Statutory merger of chapel and modification of trust—Validity and effect of gift over—Methodist Church Union Act, 1929 (19 *&* 20 *Geo.* 5, *c. lix*), *s.* 18.

Will—Gift over—Statutory modification of trust—Legacy settled upon charitable trusts for the benefit of the ministers of a chapel of the United Methodists—Gift over in the event of the chapel ceasing to be used for teaching the doctrine of the United Methodists or being united with some other religious body—Statutory amalgamation of the United Methodist Church with the Wesleyan Methodist Church and the Primitive Methodist Church—Gift "deemed . . . to be held in trust for . . . the Methodist Church . . . nevertheless in other respects upon the same trusts . . . as . . . previously"—The Methodist Church Union Act, 1929 (19 *&* 20 *Geo.* 5, *c. lix*), *s.* 18.

Section 18 of the Methodist Church Union Act, 1929, provides that "all personal property . . . at the date of union . . . held in trust for or on behalf of . . . the United Methodist Church . . . or for the purposes of any . . . charity subsidiary or ancillary [thereto] . . . shall as from that date be deemed to . . . be held in trust for . . . the purposes of the Methodist Church or the . . . charity subsidiary or ancillary to the Methodist Church nevertheless in other respects upon the same trusts . . . as those . . . upon . . . which the same were previously held so far as circumstances will permit." In 1932 the United Methodist Church became merged in and united with the Methodist Church under the provisions of the Act.

T., who died in 1928, bequeathed £2,000 to his trustees upon trust to apply the income thereof towards the augmentation of the salaries of the ministers of the chapel of the United Methodists at Batley, and provided that in case the said chapel should cease to be used for the preaching of the doctrines of the United Methodists or should become merged in or united with some other religious body, then the said sum should be held upon trust for his nephews and nieces.

Held: the trust continued in operation, notwithstanding the effect of the union, but subject to the modifications necessary to give effect to s. 18 because (i) the testator's gift was a gift to effect a particular mode of charity, the will manifested no general charitable intent, and, therefore, apart from the Act, there was no ground for the application of the cy près doctrine; (ii) apart from the operation (if any) of the proviso, the effect of s. 18 was to modify and continue the trust as a trust subsidiary or ancillary to the purposes of the Methodist Church; (iii) the trust as so modified was not a gift of income for a particular period; (iv) the proviso, therefore, could have effect only as a clause of defeasance, and so was void for perpetuity.

Observations of Stirling, J., in *Re Bowen* (1), [1893] 2 Ch. 491, and of Sargant, J., in *Re Peel's Release* (2), [1921] 2 Ch. 218, 224, 225, applied; *Re Randell* (3) (1888), 38 Ch.D. 213, and *Re Blunt's Trusts* (4), [1904] 2 Ch. 767, considered and distinguished.

Notes. Applied: *Gibson* v. *South American Stores* (*Gath and Chaves*), *Ltd.*, [1949] 2 All E.R. 985. Referred to: *Re Whittaker, Noble* v. *A.-G.* (1951), 95 Sol. Jo. 727.

As to the effect of the Methodist Church Union Act, 1929, s. 18, see 13 Halsbury's Laws (3rd Edn.) 534, para. 1146; as to the period allowed by the rule against perpetuities for the suspension of vesting of an interest, see 25 HALSBURY'S LAWS (2nd Edn.) 92, para. 179; as to the avoidance, by the rule, of rights of entry on breach of a common law condition subsequent, see ibid. 102, para. 189; as to interests given by operation of law and the rule, see ibid. 122, para. 218; and for cases on these perpetuity points see 37 DIGEST 55, *1* et seq., and ibid. 72–73, *133–139*.

Cases referred to:

(1) *Re Bowen, Lloyd-Phillips* v. *Davis*, [1893] 2 Ch. 491; 62 L.J.Ch. 681; 68 L.T. 789; 41 W.R. 535; 9 T.L.R. 380; 37 Sol. Jo. 386; 3 R. 529; 8 Digest (Repl.) 441, *1309*.

(2) *Re Peel's Release*, [1921] 2 Ch. 218; 90 L.J.Ch. 369; 127 L.T. 123; 65 Sol. Jo. 580; 8 Digest (Repl.) 442, *1318*.

(3) *Re Randell, Randell* v. *Dixon* (1888), 38 Ch. D. 213; 57 L.J.Ch. 899; 58 L.T. 626; 36 W.R. 543; 4 T.L.R. 307; 8 Digest (Repl.) 435, *1253*.

(4) *Re Blunt's Trusts, Wigan* v. *Clinch*, [1904] 2 Ch. 767; 74 L.J.Ch. 33; 91 L.T. 687; 68 J.P. 571; 53 W.R. 152; 20 T.L.R. 754; 48 Sol. Jo. 687; 2 L.G.R. 1295; 8 Digest (Repl.) 435, *1254*.

(5) *Pearks* v. *Mosely* (1880), 5 App. Cas. 714; 50 L.J.Ch. 57; 43 L.T. 449; 29 W.R. 1, H.L.; 37 Digest 68, *98*.

The testator, George Bennington Talbot, had, in the events which had happened, a general power of appointment over property settled under the will of his father. The testator, in exercise of this general power, bequeathed a sum of £2,000 to his trustees, and he directed them to hold this sum from and after the death of his wife

> "upon trust to invest and to pay and apply the income in and towards the augmentation of the salaries of the ministers officiating at the Chapel of the United Methodists at Batley aforesaid called Zion Chapel in such proportions that 45 per cent. thereof shall be paid to the senior of them 30 per cent. to the next senior and 25 per cent. to the junior of them such income to be paid to and distributed by the trustees for the time being of the said chapel for the purposes aforesaid by equal half-yearly payments on the 30th day of June and the 31st day of Dec. in every year and their receipt shall be a sufficient discharge for the same."

Then followed a clause which is hereinafter called "the proviso":

> "Provided always and I hereby declare that in case the said chapel and property connected therewith shall in the opinion and absolute discretion of the trustees or trustee for the time being of the said will at any time cease to be used for the preaching and teaching the doctrine of the said United Methodists or for any other reason the said chapel and property shall cease to exist for the said purpose or the said United Methodists at Batley shall become merged in or united with some other religious body then the said sum of £2,000 shall be held upon trust for such of my nephews and nieces [other than two named persons] as shall be living at my death in equal shares and as to all the rest residue and remainder of my share estate and interest under the said will I further appoint and direct that the same shall be held upon trust"

for such of the said nephews and nieces as should be living at his death. The testator gave the residue of his own property to his wife absolutely.

The testator died on Nov. 14, 1928, and his wife on Dec. 13, 1929. On May 10, 1929, the Methodist Church Union Act, 1929, was passed. This Act contained provisions under which the three churches, the Wesleyan Methodist Church, the Primitive Methodist Church, and the United Methodist Church, the doctrines of which were in substance identical, but of which the internal organisations differed rather widely, were to be empowered at certain conferences or assemblies to unite and form one church or denomination under the name of "the Methodist Church." "The date of union" was defined as the date on and from which the three churches should become by virtue of the Act united in one church or denomination under A the name of "the Methodist Church." Section 3 of the Act provided for the three churches to unite as one conference which was to operate as a united conference. By s. 7 it was lawful for the united conference to resolve on the union of the three churches, and by s. 8 to adopt a deed poll setting forth the basis of the union. Section 10 provided that on and from the date of the execution of the deed of union the three churches were to become and to form one united church or denomination B under the name of "the Methodist Church."

Section 18 of the Act provided that:

> "All personal and moveable property (other than chattels real or the several funds mentioned in the section of this Act . . .) at the date of union belonging to or held in trust for or on behalf of or in connection with or for any of the purposes of the Wesleyan Methodist Church the Primitive Methodist Church C or the United Methodist Church respectively or for the purposes of any society institution or charity subsidiary or ancillary to any of the said churches or denominations shall as from that date be deemed to belong to or to be held in trust for or for the purposes of the Methodist Church or the corresponding society institution or charity subsidiary or ancillary to the Methodist Church nevertheless in other respects upon the same trusts and with and subject to D the same powers and provisions as those upon with and subject to which the same were previously held so far as circumstances will permit."

The Wesleyan Methodist Church, the Primitive Methodist Church and the United Methodist Church, in fact, under and by virtue of the Act, became united as from Sept. 20, 1932. E

This summons was taken out by a trustee of the testator's will to have it determined, whether by reason of the union of the United Methodist Church with the other churches pursuant to the Act of 1929, (a) the said trust in favour of the trustees of the said chapel for the purposes aforesaid continued in operation and the gift over in the said will had not taken effect; or (b) the said gift over was valid as from Sept. 20, 1932, or from some other and what date and the said fund F was as from that date held in trust for the testator's nephews and nieces in his will referred to; or (c) the said trust in favour of the said chapel came to an end as from the date aforesaid, and the said investments and income thereof formed part of the testator's residuary estate.

Wilfrid M. Hunt for the plaintiff, a trustee of the testator's will.

A. Guest Mathews for the nephews and nieces entitled under the gift over. G

E. M. Winterbotham for the widow's personal representatives.

H. B. Vaisey, K.C., and *J. V. Nesbitt* for the trustees of the church.

MAUGHAM, J.—The question that arises for decision in this case is whether a trust in favour of the augmentation of the salaries of ministers officiating at the chapel of the United Methodists at Batley called Zion Chapel is one that continues in operation notwithstanding the effect of the union of the United Methodist H Church with the churches called the Wesleyan Methodist Church and the Primitive Methodist Church, pursuant to the Methodist Church Union Act, 1929. [His Lordship stated the facts and continued:] The said churches, in fact, under and by virtue of the Act, became united as from Sept. 20, 1932. The result is that as from that day the United Methodist Church became merged in and united with the Methodist Church, one of the events which is mentioned in the proviso as one I the result of which was that the property was to be held in trust for the testator's nephews and nieces. Another result was that the income of the £2,000 could no longer be applied towards the augmentation of the salaries of those ministers whose continuance as ministers of the Zion Chapel was contemplated by the testator, since it ceased to be a chapel of the United Methodists at Batley and became a chapel of the Methodist Church. The question, as I have stated, is, what is the result of that: does that charity come to an end—because a gift for the augmentation of the stipends of religious ministers is obviously in the nature of a charity—or does the charity continue in substitution of the Methodist Church for the United Methodists so far as necessary to give effect to the words of the gift in the will?

There are four authorities in relation to such a case as seems to arise under this will, the effect of which I ought shortly to state. The first is *Re Randell* (3), a decision of North, J. The testatrix, in that case, bequeathed a certain sum on trust to pay the income to the incumbent of the Church of Holy Trinity at Hawley, and to his successors as incumbents so long as he and his successors should permit the sittings to be occupied free, and there was a direction or declaration that in case any such incumbent should make any claim for or receive payment in respect of the sittings in the said church, from thenceforth the said trust moneys should fall into the residuary personal estate of the testatrix and be dealt with accordingly. North, J., held, firstly, that there was no general charitable intent, and, secondly, that it was a charity for a particular limited purpose, and that as soon as that particular purpose came to an end, the fund necessarily fell into residue. The direction that the fund was to fall into residue was only a statement of the way in which the fund would go in the absence of such direction, and accordingly that gift was not obnoxious to any rule of law, because if the gift had to be relied on as a clause of defeasance or a gift over it would have been void for perpetuity. The learned judge accordingly held that the direction that the trust moneys were to be dealt with as part of the residuary personal estate of the testatrix was not void for perpetuity. It will be noted that the gift there was expressly a gift so long as the incumbent should permit the sittings to be occupied free of charge.

That case was followed by a decision of Buckley, J., in *Re Blunt's Trusts* (4). There the testatrix gave to trustees a sum sufficient to produce £20 a year, and directed them

> "to pay such income to the treasurer for the time being of the Bicknor National Schools for the support of the schools so long as they shall be carried on under the conditions contained in the deed of trust of the schools, and the funds necessary for so carrying them on shall be supplied by voluntary contributions";

and she then declared that the gift should be void if any one of three events should happen in her lifetime, namely, (i) if a school board for the parish should be formed; (ii) if the fund necessary for carrying on the schools should be raised under the power contained in any Act of Parliament; and (iii) if trusts should be created and sufficient funds set apart for carrying on the schools under the conditions of the aforesaid deed of trust; and she further declared that, if either of the two first-mentioned events should happen after her death, the payment of the annuity should cease, and the fund which produced the sum was to fall into her residuary estate. In the year 1904, after her death, which happened in 1900, the Board of Education issued a final order for the appointment of foundation managers of the school, with the result that the school could no longer be carried on under the provisions of the trust deed. Buckley, J., held that the school was no longer carried on under the conditions contained in the trust deed, and that the annuity had therefore come to an end, and that the second condition (that with reference to funds being raised under powers contained in an Act of Parliament) had also been satisfied. He then held that the annuity fund fell into the residue by operation of law, and that it was unnecessary to consider whether the gift over of the residue was void as an infringement of the rule against perpetuities. The learned judge followed the decision of North, J., in *Re Randell* (3). He did not express an opinion whether there was a general charitable intent, although I incline to the view that he must have considered there was not such an intent shown on the will as a whole. Following *Re Randell* (3) he came to the conclusion that the conditions contained in what was called the defeasance clauses of the will had taken effect, that the gift of the annuity therefore ceased to operate, that the fund had fallen into residue by operation of law, and that there was no necessity to resort to the gift over. It will be observed that in that case, as in *Re Randell*

(3), the trusts were trusts expressly declared to operate for a time, namely, they were declared to run so long as the schools should be carried on under certain conditions.

However, there are two cases where the decision turned on the terms of the will or deed in question which are in the other direction. The first is the decision of STIRLING, J., in *Re Bowen* (1). The testator there bequeathed two sums of money to trustees upon trust to establish schools in certain parishes and to continue the same schools for ever thereafter. He then declared that

> "if at any time hereafter the Government of this kingdom shall establish a general system of education, the several trusts of [those sums, naming them] shall cease and determine";

and he bequeathed "the said several sums in the same manner" as he had bequeathed the residue of his personal estate. The learned judge, after pointing out that the rule against perpetuities had no application to the transfer in a certain event of property from one charity to another, stated that that principle did not apply to cases where a gift in favour of a charity was followed by an executory gift in favour of private individuals, and accordingly an executory gift, after a gift in favour of a charity, in favour of private individuals is within the rule.

> "On the other hand, [he pointed out] as property may be given to a charity in perpetuity, it may be given for any shorter period, however long; and the interest undisposed of, even if it cannot be the subject of a direct executory gift, may be left to devolve as the law prescribes,"

and he cited *Re Randell* (3) with approval as an example of that rule. Then he said:

> "The question which I have to decide, therefore, appears to me to reduce itself to one of the construction of the testator's will—i.e., whether the testator has given the property to charity, in perpetuity, subject to an executory gift in favour of the residuary legatee, or whether he has given it for a limited period, leaving the undisposed of interest to fall into residue."

On that point he cited *Pearks* v. *Mosely* (5), and said that the sums in question were bequeathed to trustees who were obviously selected with a view to the efficient administration of the trusts and the testator directed the trustees "to establish certain schools, 'and to continue the same schools for ever thereafter,' " and upon those considerations the learned judge thought that on the true construction of the will there was "an immediate disposition in favour of charity in perpetuity, and not for any shorter period. That is followed by a gift over if at any time the Government should establish a general system of education; and under that gift over the residuary legatees take a future interest conditional on an event which need not necessarily occur within perpetuity limits. It follows that the gift over is bad."

The last decision to which I have to refer is that of SARGANT, J., in *Re Peel's Release* (2). There the learned judge had to deal with a deed dated in 1837 by which certain land was granted and released to trustees

> "upon trust to permit and suffer the same to be 'for ever thereafter' used as and for a place for the instruction of seventy poor children [describing them] 'in the principles of the Church of England as by law established, and in reading, writing, casting accounts and other proper, useful and common learning for poor children.' "

Then the deed provided that if by any law or statute or otherwise, the release should, as to the charitable purposes thereby intended to be made and established,

> "either not take effect, or, having taken effect, shall afterwards cease or determine or be defeated, or, the precise objects of these presents being for the education of poor children in the principles of the Church of England, become prevented,"

A then the trustees for the time being should stand seised of the land and the schoolhouse, if any, to be built thereon in trust for Peel, his heirs and assigns. The school was built and carried on until 1920, when, the income of the fund being insufficient for the maintenance of a schoolmistress, the school became "practically derelict." It was held by the learned judge that the event contemplated by the clause of reverter had arisen, but that the clause was void as a perpetuity, and B that, the original gift being expressed to be perpetual, there could be no reverter or resulting trust to Robert Peel's heir or personal representatives, either of the school and site or of the endowment fund. He followed *Re Bowen* (1) and distinguished *Re Randell* (3) and *Re Blunt's Trusts* (4).

It is a little unfortunate from my point of view that the two cases in favour of the one result are cases where the gift was expressly for a limited purpose and C that the two cases in favour of the other result are cases of gifts expressly in perpetuity. The present case is one where under the will there is no express gift for a limited time, and on the other hand, there is no express gift in perpetuity.

The form of the gift, in my opinion, is such that, having regard to the will as a whole, it is a gift to effect a particular mode of charity in a case where there is no general charitable intent, with the result that, apart from the operation of the D Act of Union, there would be no ground for the application of the cy près principle. In considering whether there is or is not a general charitable intent, a thing which is not capable of exact definition, the court has to consider the whole scope and effect of the will and may well rely on a proviso of the nature of a defeasance clause, whether or not such a clause is open to objection on the ground of perpetuity.

E In my opinion, however, in the present case the effect of s. 18 of the Methodist Church Union Act, 1929, is that the trust will continue, apart from the operation (if any) of the proviso, as a trust subsidiary or ancillary to the purposes of the Methodist Church, and accordingly would, again apart from the effect of the proviso, be a charity for the augmentation of the salaries of the ministers of the Methodist Church at Zion Chapel, which has become a chapel of the Methodist F Church; and the same provision would apply except that the ministers would be ministers of the United Church instead of ministers of the United Methodist Church. What, then, is the effect, if any, of the proviso? As a clause of defeasance, if it is to be so construed, it is void for perpetuity. I accept entirely what SARGANT, J., observed in the case of *Re Peel's Release* (2), following the words of STIRLING, J., in *Re Bowen* (1), that the question is reduced to one of G construction of the will,

> " 'whether the testator has given the property to charity, in perpetuity, subject to an executory gift in favour of the residuary legatee, or whether he has given it for a limited period, leaving the undisposed of interest to fall into residue.' "

H In considering that question it seems to me I must bear in mind the fact that the trust is one which, under s. 18 of the Act of Union, must be deemed, as from the date of union, to be a trust for the purposes of the Methodist Church or the corresponding charity subsidiary or ancillary thereto. The effect of the Act is to modify the trust contained in the will, and I do not think I am justified in coming to the conclusion that the testator, having regard to that fact, must be treated as having I given the income for a limited period since he has not expressly limited the period. Apart from the section, having regard to the fact that I have mentioned, that this is a gift for a particular or special kind of charity, without any general charitable intent, it might well be that the result which would follow would be that in *Re Randell* (3) and *Re Blunt's Trusts* (4), but I am of the opinion that the effect of the Act is to modify the trust contained in the will, and, with that in mind, I cannot hold that the testator, who has not expressly limited the period of the trust, must be treated as having given the income until the United Methodists shall become united with some other religious body. My conclusion is that the proviso, in view of the Act, can have effect, if at all, only as a clause of defeasance. So regarded, it is void for perpetuity, and the trust will continue in operation subject to the modifications necessary to give effect to the provisions of s. 18 of the Methodist Church Union Act, 1929.

Solicitors: *Gibson & Weldon*; *Walker, Rowe, & Clark*, for *W. Gledhill*, Dewsbury; *Jacques & Co.*, for *Hick & Hands*, Scarborough; *Torr & Co.*, for *Donald G. Ineson*, Cleckheaton.

[*Reported by* Miss B. A. Bicknell, *Barrister-at-Law.*]

FARROW *v.* ORTTEWELL

[Court of Appeal (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), February 21, 22, 1933]

[Reported [1933] 1 Ch. 480; 102 L.J.Ch. 133; 149 L.T. 101; 49 T.L.R. 251]

Estoppel—Landlord and tenant—Notice to quit given by purchaser before purchase completed—Notice acted on by tenant.

Agriculture—Agricultural holding—Notice to quit—Notice given by purchaser before purchase completed—Notice acted on by tenant—Estoppel—Jurisdiction of court to determine validity of notice—Agricultural Holdings Act, 1923 (13 & 14 *Geo.* 5, *c.* 9), *s.* 12 (1), *s.* 16 (1), *s.* 54, *s.* 57 (1).

The tenant of two farms held them on a yearly tenancy from Oct. 11, 1918. The owner of the farms died in 1928, and his legal personal representative entered into a contract with a purchaser to sell to him the two farms. The date for completion was Sept. 15, 1930, but completion was not effected until Oct. 11, 1930. On Oct. 9, 1930, the purchaser sent a notice to the tenant to quit the farms on Oct. 11, 1931, or at the expiration of his yearly tenancy. After receiving the notice to quit the tenant took various steps—selling cottages which he had bought for the use of workers on the farms, selling stock, and buying another farm—which would be to his detriment if in fact he was still tenant of the farms. The tenant gave up possession on Oct. 11, 1931, and claimed compensation from the purchaser under the Agricultural Holdings Act, 1923, s. 12. The purchaser disputed the tenant's right to compensation on the ground that, the notice having been given before the date of completion, he (the purchaser) had not then the legal estate in the farms, and, therefore, was not the "landlord" within s. 12 of the Act of 1923 with the result that the notice was not a good and effective notice within s. 12.

Held: (i) the purchaser, by serving the notice to quit on the tenant, must be taken to have intended that it should be acted on, and he had caused the tenant to believe that the notice was a good notice and had induced him to act on that belief so as to alter his previous position, and, therefore, the purchaser was estopped from denying the validity of the notice;

(ii) having regard to s. 54 of the Act, the question of the validity of the notice was not a matter which must be referred to arbitration under s. 16 of the Act so as to oust the jurisdiction of the court.

Per **Bennett, J.**: on construction of the contract of purchase the defendant, on Oct. 9, 1930, was entitled, not in law, but in equity, to receive the rents and profits of the farms since he was entitled to the rents and profits from the day fixed in the contract for completion, namely, Sept. 15, and so he was a

A "landlord" within s. 57 of the Act, but that did not render him capable of giving a valid notice to quit within s. 12.

Notes. Section 12 of the Act of 1923 has been replaced by s. 34 of the Agricultural Holdings Act, 1948; s. 16 by s. 70; and s. 54 by s. 101.

Referred to: *Re Swanson's Agreement, Hill* v. *Swanson*, [1946] 2 All E.R. 628.

B As to compensation on quitting an agricultural holding, see 1 HALSBURY'S LAWS (3rd Edn.) 304 et seq., and for cases see 2 DIGEST 41 et seq. As to estoppel in general, see 15 HALSBURY'S LAWS (3rd Edn.) 223 et seq., and for cases see 21 DIGEST 287 et seq.

Cases referred to:

C (1) *De Tchihatchef* v. *Salerni Coupling, Ltd.*, [1932] 1 Ch. 330; 101 L.J.Ch. 209; 146 L.T. 505; Digest Supp.

(2) *Pickard* v. *Sears* (1837), 6 Ad. & El. 469; 2 Nev. & P.K.B. 488; Will. Woll. & Dav. 678; 112 E.R. 179; 21 Digest 290, *1032*.

(3) *Freeman* v. *Cooke* (1848), 2 Exch. 654; 6 Dow. & L. 187; 18 L.J.Ex. 114; 12 L.T.O.S. 66; 12 Jur. 777; 154 E.R. 652; 21 Digest 287, *1019*.

D (4) *Lowther* v. *Clifford*, [1927] 1 K.B. 130; 95 L.J.K.B. 576; 135 L.T. 200; 90 J.P. 113; 42 T.L.R. 432; 70 Sol. Jo. 544; 24 L.G.R. 231; 31 Digest (Repl.) 60, *2175*.

(5) *Barraclough* v. *Brown*, [1897] A.C. 615; 66 L.J.Q.B. 672; 76 L.T. 797; 62 J.P. 275; 13 T.L.R. 527; 8 Asp.M.L.C. 290; 2 Com. Cas. 249; 30 Digest (Repl.) 175, *243*.

E **Action** for declaration.

The plaintiff, the tenant of two farms, held them on a yearly tenancy from April 24, 1918. The owner of the farms, Mr. Eyre, died in 1928, and his legal personal representative entered into a contract with a purchaser, the defendant, to sell to him the two farms. The date for completion was Sept. 15, 1930, but completion was not effected until Oct. 11, 1930. On Oct. 9, 1930, the purchaser sent F a notice to the tenant to quit the farms on Oct. 11, 1931, or at the expiration of his yearly tenancy. The tenant gave up possession on Oct. 11, 1931, and claimed compensation from the purchaser under the Agricultural Holdings Act, 1923. After giving up possession the tenant took various steps to his own detriment if, in fact, he were still tenant of the property. The purchaser disputed the tenant's right to compensation on the ground that, the notice having been given before the G date for completion, the purchaser had not the legal estate in the farms, and, therefore, the notice was not a good and effective notice within s. 12 of the Agricultural Holdings Act, 1923. This action was commenced by the tenant against the purchaser claiming a declaration (i) that the notice was valid; (ii) that the defendant was estopped from denying its validity; and (iii) that the tenant was entitled to compensation under the provisions of the Act.

H *J. F. W. Galbraith, K.C.*, and *A. J. Spencer* for the plaintiff.

S. O. Henn Collins, K.C., and Guy Aldous for the defendant.

BENNETT, J. [after stating the facts, continued:] The first question that has been argued between the plaintiff, on the one side, and the defendant, on the other, is whether the notice dated Oct. 9, 1930, was a valid notice and one which I put an end to the tenancy of the plaintiff on Oct. 11, 1931, having regard to the fact that, when it was given, the defendant had not completed the purchase of the Moreton Hall estate. The plaintiff bases his contention upon the language of the Agricultural Holdings Act, 1923, and, in particular, upon the language of s. 57, which defines certain terms which are to be found in the Act, and s. 12, which gives the tenant in certain events a right to compensation for disturbance.

So far as material, s. 57 provides:

> "In this Act, unless the context otherwise requires, 'Landlord' means any person for the time being entitled to receive the rents and profits of any land."

The first point made on behalf of the plaintiff is that the defendant satisfies that definition, and that he was, on Oct. 9, 1930, the person entitled to receive the rents and profits of Eldo House Farm and Mount Farm, although he had not, on Oct. 9, 1930, completed the purchase. As a matter of construction of the contract, in my judgment, Mr. Orttewell, on Oct. 9, 1930, was a person entitled, not at law, but in equity, to receive the rents and profits of the land, that is to say, of the two farms, because by the terms of the contract he was entitled to the rents and profits from the day fixed for completion, namely, Sept. 15, 1930. Then the argument is that, being the landlord within the meaning of s. 57, when you come to look at s. 12 the only conclusion that can be arrived at is that he was the landlord within the meaning of that section, and that the notice given by him terminated the tenancy, with the result that the tenant became entitled to the compensation for disturbance which s. 12 gives him provided that the other conditions in the section are fulfilled. The section opens in this way:

> "Where the tenancy of a holding" [and the two farms in question are a holding within the meaning of the section] "terminates by reason of a notice to quit given by the landlord, and in consequence of such notice the tenant quits the holding, then" [unless certain things happen with which we are not concerned] "compensation for the disturbance shall be payable by the landlord to the tenant in accordance with the provisions of this section."

The argument is that on Oct. 9, 1930, the defendant was the landlord, and that the plaintiff's tenancy terminated by reason of the notice which the defendant gave him, with the statutory consequences.

The answer which the defendant makes to that contention is that s. 12 does not confer upon a person who has no power to determine a tenancy a power so to do, and that the section is based upon the view that the tenancy has been determined by somebody who, quite apart from any of the provisions contained in the statute, has the right to determine it, and that, if and when you have arrived at the conclusion that the tenancy has been determined, and that the person by whom it has been determined is the landlord, then and only then the tenant's right to compensation for disturbance arises. Those are the two opposing contentions, and, so far as I know, there is no express authority upon the point. It does not seem to me that in any of the cases which counsel for the plaintiff cited to me that particular question arose for consideration. Although I have had, I confess, considerable difficulty in arriving at a conclusion, the conclusion at which I have arrived is that the argument of the defendant ought to prevail on this part of the case. It does not seem to me that the Act of 1923 was intended to give or did give to anybody who had no power to determine a tenancy a power to determine one if the tenancy was an agricultural tenancy. Therefore, it seems to me that the first claim advanced by the plaintiff based on the effect of the Act fails.

But then the plaintiff says there is a question of estoppel. He says: "By the notice which the defendant gave me on Oct. 9, 1930, he represented to me that he was my landlord, and thereafter on the faith of that representation, and, believing that the defendant was my landlord and was a person who was in a position to determine my tenancy, and that the notice of Oct. 9, 1930, was a notice which did put an end to my tenancy on Oct. 11, 1931, I altered my position and took various steps which were to me detrimental if the notice of Oct. 9 was, in fact, invalid. In those circumstances, and on those facts, the defendant cannot be heard to say, or to give evidence to the effect, that he was not on Oct. 9, 1930, my landlord." On that footing a claim is made for a declaration that the defendant is estopped from denying that on Oct. 10, 1930, he was the landlord of the plaintiff and entitled at law to determine the plaintiff's tenancy under the provisions of the agreement of April 24, 1918. I have no doubt that the notice of Oct. 9, 1930, did represent to the plaintiff that the defendant was on that day his landlord.

As regards the question whether or not the plaintiff was of the belief from the time he received the notice until a date in August, 1931, that the defendant was his landlord and that the notice was a valid and effective one, there has been, between the plaintiff, on the one side, and the defendant and his witnesses, on the other, an acute conflict of testimony. The plaintiff has sworn that he never knew anything about the completion by the defendant of his contract to buy the Moreton Hall estate until some date which he puts in August, 1931, and that until that date, with the exception of some conversation which passed between him and the defendant's solicitor, Mr. Chamberlayne, on Feb. 13, 1931, he had no reason to doubt but that the defendant was on Oct. 9, 1930, his landlord, and that he had no reason to doubt but that the notice was a valid and effective notice intended to be acted on by the defendant. On the other hand, evidence has been given for the defendant by Mr. Scott, who had acted as the defendant's agent in the purchase of the property, that at some date between October, 1930, and Christmas of 1930, the plaintiff came to him and told him that he knew the notice to quit was an invalid notice, because the defendant had not, on Oct. 9, 1930, completed his purchase, and that he, the plaintiff, was not going to quit the farm on Oct. 11, 1931. Evidence has been given by Mr. Chamberlayne, the defendant's solicitor, that in October, 1930, after the plaintiff had received the notice to quit, he, in the course of a conversation on the Bury St. Edmunds Corn Exchange, told the plaintiff that the notice was bad because the defendant had not completed his purchase at the time the notice was given. It has not been an easy matter to decide, and I must not be regarded as coming to a conclusion that anybody who has given evidence has endeavoured wilfully to mislead the court, because I am not satisfied that he has. The conclusion at which I have arrived, after considering the evidence as a whole and the other matters to which I have referred, is that the plaintiff's evidence is to be accepted, and that he believed when he received the notice on Oct. 10, 1930, and continued in the belief right up to the month of August, 1931, that the notice was a valid notice, that the defendant was his landlord, and a person in a position to give a valid notice, and that the notice was one which compelled him to give up his holding on Oct. 11, 1931. I am also satisfied in point of fact that in that belief the plaintiff, on Feb. 3, 1931, orally agreed to become the tenant of a farm called Gazeley Farm, that he took steps, as he was bound to do under the provisions of the tenancy agreement of April 24, 1918, to leave the land which he had taken from the owner of the Moreton Hall estate at the end of his tenancy, namely, Oct. 11, 1931, on the four-course shift, that he sold cottages which he was using for the purpose of housing workmen employed by him on the Eldo House and Mount Farms, that he bought a blacksmith's shop in the vicinity of Gazeley Farm, and that he got rid by auction of stock for which, having regard to the fact that his tenancy of the Eldo House and Mount Farms was coming to an end, he might have no use after Oct. 11, 1931. I have come to the conclusion on the evidence that he did those things on the representation made to him by the defendant when he gave him the notice on Oct. 9, 1930.

The question is whether, in those circumstances, it is open to the defendant to deny that he was the landlord of the plaintiff on Oct. 9, 1930, or that the notice to quit was valid. There have been a very large number of authorities referred to. I think there is a broad principle stated by LUXMOORE, J., in *De Tchihatchef* v. *Salerni Coupling, Ltd.* (1) ([1932] 1 Ch. at p. 342), which affords a sufficient basis for the conclusion at which I have arrived, which is that there should be a declaration substantially in the form the plaintiff asks. LUXMOORE, J., in the course of his judgment says:

> "If a person authorises or permits another to make a representation for the purpose of it being acted upon, and it is acted upon, that person cannot afterwards be heard to say that the representation is not true."

That is the basis upon which I decide in favour of the plaintiff. It seems to me that Mr. Orttewell, when he sent to the plaintiff the notice to quit on Oct. 9, 1930, represented to him that he was the landlord and that he was putting an end to his (the plaintiff's) tenancy. I am satisfied that in point of fact the plaintiff acted

A upon that representation to his detriment in the respects which I have stated, and, accordingly, I propose to make a declaration that the defendant is estopped from denying the validity of the notice, and that the plaintiff is entitled to compensation subject to and in accordance with the provisions of the statute.

Feb. 21. The defendant appealed.

B *S. O. Henn Collins, K.C.*, and *Guy Aldous* for the defendant.

J. F. W. Galbraith, K.C., and *A. J. Spencer* for the respondent.

The arguments are set out in the judgments.

LORD HANWORTH, M.R.—We have come to the conclusion that this appeal fails and must be dismissed with costs.

C The claim in the action was a claim for a declaration that a notice to quit given to the plaintiff by the defendant was an effective notice to quit, and, alternatively, that the defendant is estopped from denying that the notice was a good and effective notice to quit, and that the plaintiff quitted the farms in consequence thereof for the purposes of s. 12 of the Agricultural Holdings Act, 1923, and a declaration that the plaintiff, having quitted in consequence of the notice, is entitled to compensation subject to and in accordance with the provisions of that Act of 1923. D The learned judge found in favour of the plaintiff and made the declarations which are to be found in the order, which leave the plaintiff to prove what compensation he is entitled to recover under and by virtue of the terms of the Act of 1923. Against that decision of BENNETT, J., an appeal is taken to this court. BENNETT, J., found that, with regard to the first declaration, he was unable to grant it because he held that the notice to quit in question was not valid and effectual at law, but E he found, in reference to the second declaration asked for, that the defendant was estopped as claimed in that declaration, and it was upon that estoppel that the learned judge founded the plaintiff's right to the relief which he granted him.

It seems that there was some land belonging to a Mr. Eyre in Suffolk, part of which included two farms, Eldo House Farm and Mount Farm, of which the plaintiff was tenant. He held as from Oct. 11, 1918; it would, therefore, be a F tenancy within the Agricultural Holdings Act, 1923, a tenancy of which, if it was to be determined by notice, there would have to be a notice to quit expiring on Oct. 11 in any particular year. On July 17, 1930, the executors of Mr. Eyre, for he died in the meantime, entered into a contract with the present defendant, Mr. Richard Orttewell, to sell him the land which was subject to the plaintiff's tenancy. The original date fixed for the completion of the contract was Sept. 15, but in fact G it was postponed, and it was not until Oct. 11 that completion took place, and the conveyance of the land was executed. Mr. Orttewell tells us that he is a partner in a business of making agricultural implements; he is a partner in the firm of Dupont and Orttewell, and he lives at Saxmundham House, Swanage. He tells us also that, except for some small holding he had had before, he had not become the owner in fee of any large or considerable area of land previously. He tells us that, H as there was some uncertainty as to the holding of the plaintiff (as to which part was held under a particular agreement or which part was held under another agreement), he was minded to give notice to the plaintiff to quit. Whatever his reason was, it was the fact that he got Mr. Lacey Scott to draw a notice to quit, and on Oct. 9, by registered letter, he served this notice to quit upon the plaintiff. The notice to quit was good in form. It was, as it stood, sound, and could not I be contested by the tenant, and there was no reservation upon it or letter accompanying it; it was simply and plainly a notice that the plaintiff should quit on Oct. 11 of the following year. In fact, inasmuch as Mr. Orttewell had not, by Oct. 9, completed the purchase of this farm, for as I have said, the completion was delayed until Oct. 11, although in equity he was the owner, he was not the legal owner of the farm, and he had not any right at that time, namely, Oct. 9, to issue a notice to quit to the tenant. The learned judge has held that that disqualification has prevented him from making the first declaration asked in the prayer of the plaintiff's statement of claim, and from that decision there is no

A cross-appeal to this court, but the learned judge has held that, although the notice to quit was invalid in law, yet the circumstances were such that it is impossible for Mr. Orttewell to contest that Mr. Farrow was given notice to quit, and, inasmuch as Mr. Farrow had acted in accordance with it, Mr. Orttewell is estopped from denying that the relationship between him, as landlord, and Farrow, as tenant, has been severed, with the consequence that Mr. Orttewell is a landlord B and Mr. Farrow is a tenant within the terms of the Agricultural Holdings Act, 1923.

It is upon this finding—that Mr. Orttewell is estopped—that the main argument in the appeal has been addressed to us so strenuously. I must, therefore, recount the circumstances which are material to this. Let me take the outline first. It is true that before the notice of Oct. 9 was served, Mr. Orttewell had been introduced to the plaintiff Farrow by Mr. Lacey Scott, and introduced to him as the C landlord who had become the owner, and thus the landlord under whom Mr. Farrow would continue to hold as tenant. There were some interviews (which I will refer to again) before Christmas, but the matter stands in this way—that the notice had been given. There are a few letters which are of great importance in this case, for there was a sharp issue raised upon the evidence given before BENNETT, J., and where a sharp issue is raised in that way it is always of importance D to look at the documents which passed at the time in writing. In August, before any notice had been given—and, indeed, before the personal introduction had been made—there is a letter from Messrs. Lacey Scott & Sons, the agents, to Mr. Farrow:

> "We have seen the owner of this estate and he wishes to give the tenant the first offer of the shooting, and we should be glad to know if you would care to E make us an offer for it. We are advertising the shooting to let."

After the notice had been given a letter is sent on Jan. 26 by the solicitors who were acting for Mr. Orttewell, a firm of Messrs. Woolnough, Gross, Son, & Chamberlayne. Mr. Chamberlayne was the partner who had seizin of this matter, and he was called as a witness at the trial; and the letter written on behalf of F Mr. Orttewell, the defendant, to Mr. Farrow, the plaintiff, on Jan. 26, is as follows:

> "We enclose a letter from Messrs. Witham, Roskell, Munster, & Weld," [who had been the solicitors for the vendors], "authorising you to pay to Mr. Orttewell all rent accruing due as from Oct. 11 last. We thought probably you would like to have this before settling up with Mr. Orttewell."

G The letter which was enclosed was a letter of Oct. 31 to Mr. Farrow:

> "Our clients have sold the Moreton Hall estate to Mr. Richard Orttewell, of Oakwell, Maldon, Essex, and you should pay your rent of Mount Farm and Eldo House Farm as from April 6 last, and your rent of the grazing rights as from Oct. 11, 1929, and all future rent to him."

On March 9 another letter is written by the same solicitors to Mr. Farrow:

H

> "Our client Mr. Orttewell has asked us to remind you that the rent due up to Michaelmas last has not yet been paid. We make the amount payable £375. You have probably lost sight of the fact that when Mr. Orttewell completed this matter he had to pay rent up to Sept. 14 without having received it from you, and he is, therefore, suffering considerable loss. We shall be grateful if I you can let us have a cheque during this week, without fail."

It is noticeable, though perhaps no great emphasis need be laid upon it, that the date at which Mr. Orttewell had to pay rent up to was referred to as Sept. 14. It is obvious that that date is before the date of the notice to quit, which was Oct. 9. It certainly does not state what the date was at which Mr. Orttewell became the legal owner of the estate, but it does emphasise that Mr. Orttewell has become, and is, the landlord to whom the rent is to be paid. If I recollect the evidence aright, upon receipt of that letter, or shortly afterwards, a sum of £150 was paid to Mr. Orttewell or to the solicitors, and a further sum shortly afterwards. Then on March 13 Messrs. Greene & Greene, acting on behalf of Mr. Farrow, wrote a letter: A

> "Moreton Hall Estate.—Our client Mr. E. S. Farrow asks us to write to you in this matter. He understands that you are likely soon to sell the Moreton Hall estate, of the greater part of which he is your tenant, and you will no doubt wish to give vacant possession. Mr. Farrow, therefore, wishes us to B inform you that he has taken another farm and that he agrees that the notice to quit which you gave him, dated Oct. 9, 1930, shall be valid, notwithstanding any sale you may make. This is, of course, without prejudice to the claim for disturbance to which the notice will entitle him."

The statement that the notice shall be valid was of value and importance because of s. 26 of the Agricultural Holdings Act, 1923, which says: C

> "On the making of any contract for sale of a holding or any part of a holding by a tenant from year to year any then current and unexpired notice to determine the tenancy of the holding given to the tenant either before or after the commencement of this Act shall, if the contract for sale is made by the person by whom the notice to quit was given, be null and void unless the D tenant has, after Aug. 19, 1919, and prior to such contract of sale, by writing, agreed that such notice shall be valid."

The fact that that letter is sent, the agreement that the notice to quit is to stand valid, shows that Messrs. Greene & Greene were properly advising their client. There is no question that that letter was received, and it clearly indicates that Mr. Farrow had taken another farm, that he was going to make a claim for disturbance E in consequence of his leaving under the notice to quit, but no notice of that letter was taken; it was received by Mr. Orttewell, and Mr. Orttewell excuses himself, and, so far as I know, it may be a valid excuse, on the ground that his memory is not very good, that he did not read the letter with any care, and that it was some two months before he placed that letter in the hands of his legal advisers, but, from the point of view of Mr. Farrow, the letter had done all that F it was necessary for him to do; it had indicated in clear and unmistakable terms that he was leaving, that the notice to quit was accepted by him as valid, and that he intended to make a claim for disturbance.

One more point must be made at this juncture. It will be observed that the letter says: "He understands that you are likely soon to sell the Moreton Hall estate." Now in the country, where people go to market week by week, where G there is the opportunity of intercourse at the market, news of matters which affect the holding of tenancies, and the transfer or conveyance of land, travel quickly; and we know now that a letter was written on March 11 (two days before the letter to which I have been referring) to Messrs. J. D. Wood & Co., the land agents, in reference to a proposed contract which was then suggested whereby Mr. Orttewell should sell this Moreton Hall estate to some persons who were minded H to set up upon it a canning industry. The letter says:

> "With reference to the conversation we had on the telephone to-day with Mr. Hocombe, we herewith enclose draft form of contract for the consideration of the purchaser, and, as further mentioned, we had some little difficulty in persuading the vendor to accept this offer as he is not too anxious to sell at the price given, but in the end he agreed. It will be seen that we have I referred to the notice to quit given to the tenant by the vendor. This notice was given after the contract was signed by the vendor, but before he was able to complete his purchase, and there is, of course, the question whether such notice is valid, and we have, therefore, had to disclose this fact, but we do not think the purchasers need attach any importance to this fact, because Mr. Farrow, the tenant, has taken a farm the other side of Bury, some considerable way away, and was actually in this office to-day, and informed us that he intended to have a sale before moving to this new farm. Further, we believe

> that the proposed purchasers have interviewed Mr. Farrow, with reference to giving vacant possession of some portion of the land at an early date."

It is plain, therefore, that not only was Mr. Farrow acting according to his rights in the letter of March 13, but the observation that it appeared likely that Mr. Orttewell would be selling a part of the estate of which he was the tenant was well founded, and also that Mr. Orttewell's advisers, Messrs. Chamberlayne, were satisfied that little danger would arise on the question of the validity of the notice to quit because they were conscious, and so advised the possible purchaser through Messrs. Wood & Co., that Mr. Farrow was acting as a tenant who had received a valid notice to quit would act.

There are one or two more intervening facts before I come to August. It appears that instructions were given, and there was a sale of some of the cottages which were held and used by Mr. Farrow in conjunction with his holding of this farm on the Moreton Hall estate—some were sold privately, and some were sold at a sale which took place in June, but they were sold by reason of the fact that, as he was moving to a more distant farm, those cottages would no longer serve his purpose. There is also the fact that he had agreed (verbally) to take the Gazeley Farm on Feb. 3, and on July 31 Mr. Farrow signed the contract to take that other farm. So we come to the letter which passed in August. On Aug. 5 Messrs. Greene & Greene enclose in a registered letter a notice of Mr. Farrow's intention to claim compensation for disturbance upon quitting the Eldo House and Mount Farms. Some observation was made as to why that claim had not been sent in earlier. Such an observation, to my mind, is ill-founded. Mr. Farrow had made his intention plain in the letter of March 13 that there would be such a claim, and I should have thought that the early part of August was quite the earliest time at which the actual concrete claim could be embodied in a form and sent on to the defendant landlord. Also a copy of that is sent to Mr. Chamberlayne as the solicitor for Mr. Orttewell, and they write back: "Thanking you for your letter with the notice." Then comes Mr. Chamberlayne's letter of Aug. 8:

> "Referring to the notice served by you which we acknowledged in our letter of yesterday. We have to-day seen our client, who instructs us to notify you that as he was not the owner of the property at the time the notice was served, he was not in a position to give notice, and he cannot admit the claim. We thought it only right to notify you of this fact immediately."

I attach importance to that word "immediately." What does it mean? Surely it means "as soon as we possibly could; as soon as we were informed that the defendant intended to take up that point that he was not in a position to give notice, and to dispute the validity of it." A good reason is found for it not having been disputed earlier when you keep in mind the letter of March 11 to Messrs. J. D. Wood & Co. which Messrs. Chamberlayne had written in the terms which I have quoted, telling them how Mr. Farrow had actually been in their office and informed them that he intended to have a sale before moving to his new farm. It was inducing Messrs. Wood & Co. to pass on the information to their client on the basis that Mr. Farrow was quitting. I have in mind this letter saying: "We thought it only right to notify you of this fact immediately." To my mind, that is an indication that this point was then taken, and I think for the first time taken. On Aug. 12 Messrs. Greene & Greene write and put a certain number of interrogatories, among which is to be found this:

> "If Mr. Orttewell was not the owner, why did he sign the notice to quit as owner? On what day did Mr. Orttewell become the owner? If Mr. Orttewell was not the owner on Oct. 9, 1930, was the notice to quit given by him with the authority of and on behalf of the actual owners? Why has Mr. Orttewell re-let the Eldo Farm and 450 acres to Mr. Marfleet as from Michaelmas, 1931, if the notice to quit is invalid?"

And then comes the answer: "This portion is only provisionally let"; if he was not the owner, the answer is: "No, he was not the owner, and it was not sent on behalf of the actual owner," but here it is "It has only been provisionally let . . . your client is voluntarily leaving these farms." I confess I have grave difficulty in reconciling that statement by Messrs. Woolnough, Gross, Son, & Chamberlayne with the letter they wrote to Messrs. Wood on March 11 in that same year. Then Messrs. Greene write on the 14th:

> "With regard to your suggestion that he was well aware that the notice was invalid, we should be glad if you would let us know your reasons for making this statement, as Mr. Farrow has received no communication to this effect."

In reply they say:

> "We must say further that about a month ago Mr. Farrow was aware that the question now at issue might be raised."

Other letters passed, into which I forbear to go, which ultimately end in some letters passing without prejudice; but there is one further fact which I have not referred to, and that is this. An agreement was made on July 21 whereby Mr. Orttewell agreed to let this farm again to a Mr. Marfleet. He met him at Messrs. Chamberlayne's office, they had a conversation, and details were arranged of a very particular nature; there were to be repairs, there were to be all sorts of small matters attended to, including such matters as a lavatory, and the like. All this was agreed, and Mr. Marfleet, if I recollect rightly, signed the agreement. It is the document of July 21, and this is it:

> "Mr. Orttewell agrees to let and Mr. Marfleet to take 477·823 acres for the term of three years from Oct 11, 1931, at the rental of £300 per annum the particulars being set out in the plan coloured pink annexed hereto,"

and then comes the detailed agreement. It is said, and we are asked to believe, that Mr. Marfleet had been into this position: that he was only to take, if Mr. Farrow went out, and that he, Mr. Marfleet, as from July 1, was prepared to live in a state of suspense without knowing whether or not Mr. Farrow was going out or otherwise. It was very unfair to Mr. Marfleet, and I cannot understand why he should accept that position. It seems really only consonant with the view at that time held by Mr. Orttewell and his advisers, that the notice to quit stood good and was being acted upon.

It is said against these facts, which point all in one direction and are confirmed by the written documents, that there are some matters which the landlord is entitled to rely upon, and which show that Farrow knew that the notice to quit was bad, and that this conduct on his part was mere acting, and that he had no right to accept the notice to quit, and if he went out on Oct. 1, 1931, as he did, it was a voluntary act on his part. As I have pointed out, the documents do not establish that. There was no notice given to Mr. Farrow to tell him that he was misled, but it was said that from February onwards he knew that completion had not been carried out, that in July he knew it, and again in August. With regard to the conversations which took place between Mr. Chamberlayne and Mr. Farrow in the Corn Exchange in September and October, I can attach really no weight to those. Mr. Chamberlayne agrees, and he says in his evidence that he was not authorised at that time to withdraw the notice, he had got no right to withdraw the notice to quit. If one turns to his evidence, he says he had not been dealing himself with the matter of the completion, and he says:

> "Whether I be right or wrong, that was what I said to Mr. Farrow. Notice to quit could not be given in effect because the purchase had not been completed. (Q.) You do not suggest you had any authority from Mr. Orttewell to make that statement? (A.) Mr. Orttewell lives at Swanage; I do not know. I had not seen Mr. Orttewell. (BENNETT, J.): The notice to quit was not sent from Swanage? (A.) He came over every Wednesday. I had not seen Mr. Orttewell from the time he sent that notice until I saw Mr. Farrow." [It is plain enough, and again,] "It was quite a casual conversation; I will give you that, with Mr. Farrow, I had no instructions from Mr. Orttewell to say

> so, and, as you say, it was merely a casual conversation, call it gratuitous if you like."

That means this. Mr. Chamberlayne, who knew the countryside well, and knew how stupid it was of anybody to get rid of a good tenant, was saying—if it is what he did say, and of that I am not sure—he thought it was a very stupid action to think of turning Mr. Farrow out of Eldo House. So far from that being a withdrawal of the notice to quit, or a withdrawal of it on which Mr. Farrow ought to have acted, it is nothing of the sort. Then he says this: "I had done the best I could to get him to stop; that is in a general way." Then he says: "Farrow was an excellent tenant and I did not want him to leave." When we come to February, it was said that at a dance these two gentlemen, neither of them being expert at dancing owing to their years, had a chat about this matter, but, so far as I can see, that is not confirmed in any way, and it ought to have been confirmed if Mr. Farrow was to act upon it; and when we come to July and August, to my mind, that is quite too late, because we come to the principles upon which the estoppel is based.

The general rule is laid down by LORD DENMAN in *Pickard* v. *Sears* (2) (6 Ad. & El. at p. 474):

> "But the rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

In *Freeman* v. *Cooke* (3) (2 Exch. at p. 663), which is always associated with *Pickard* v. *Sears* (2), PARKE, B., with regard to the term "wilfully," explaining what LORD DENMAN said, said this:

> "By the term 'wilfully,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth."

What is the meaning of the estoppel? That the estoppel was one which prevented the landlord, Mr. Orttewell, from disputing the validity of the notice to quit, for he had caused, and caused to his knowledge, Mr. Farrow to act upon it; and the acting upon it was treating it as a valid notice requiring Mr. Farrow to give up the farm in October. It is far too late to say in August, after another farm has been taken, after the sale of the cottages, after the sale of the stock, "You need not have gone out of Eldo Farm in October, for you knew in August what the position was." But, from the point of view of Mr. Farrow, he had been acting in consequence of the notice which ripened and was complete in October, and Mr. Orttewell could not withdraw from that position, which continued right up until October—it was not alterable by Mr. Orttewell after the position of Mr. Farrow had been altered in consequence of the currency of the notice which ran, and must still be held to be running, right up to October. That is the real answer to the point that was made by counsel for the defendant. There cannot be a reorganisation of the positions between the parties, because the effect of what had happened was that the notice to quit stood good, not merely at the moment in August, but right up to the expiration of its currency in October. It appears to me upon those facts that the learned judge was not only abundantly justified, but absolutely forced, to come to the conclusion which he did. I think, if ever there was a clear case where the doctrine of estoppel was necessary to do justice, it is the present case. I should be sorry to think that for a technicality raised, as I believe it was, in August, it was not possible for the court to do justice in a case which loudly called for it upon the facts.

I come now, therefore, to the point that is taken, that the jurisdiction of this court is ousted by reason of the terms of the Act of 1923, which, by s. 16, does provide a method of arbitration and a method of arbitration on a large number of questions. I adhere precisely to the judgment which I delivered in *Lowther* v. *Clifford* (4), taking note of the observations that were made by Scrutton, L.J., and also Sargant, L.J., and without going so far as saying that s. 16 is only to be taken as a mode of procedure. In contrast to the suggestion that is now made, I think that s. 16 is to be treated as laying down a mode of procedure that does not in any way oust the jurisdiction of the court, which is preserved, in cases which are not specifically embraced in the arbitration clause, s. 54. But there is another point on which the argument presented to us breaks down (the argument based on *Barraclough* v. *Brown* (5), and that is this. Section 57 is the interpretation clause, and it tells what is the meaning of the word "landlord" and what is the meaning of the word "tenant" in relation to the provisions of the Agricultural Holdings Act, 1923. Ere ever, therefore, the Act can apply, it must be determined who is the landlord and who is the tenant. I can well understand the question arising (it might have arisen here) were Mr. Eyre's executors or was the defendant Orttewell, the landlord. Equally, a question might arise as to who was the tenant, and the question may arise outside s. 16 and outside s. 12 (because s. 12 applies where a tenancy terminates by reason of a notice to quit given by the landlord and in consequence of such notice the tenant quits), whether the tenancy was terminated by a landlord within the meaning of this statute. Was it given to a tenant within the meaning of the statute, and did the tenant quit within the meaning of the statute? Those are matters which lie in limine before the operation of the statute can begin, and equally it seems to me that the jurisdiction of the court is not ousted, but saved under s. 54 upon the question whether or not there was a notice to quit which was given and acted upon, and which cannot be treated otherwise than as valid, as between the landlord and the tenant. That is a question which now is outside s. 16 and is not submitted to any other jurisdiction than that of the ordinary courts. In other words, for the purposes of this case, and upon the question which now arises, it seems to me that the jurisdiction of the court is not excluded by s. 16, and I think that the words of Scrutton, L.J., in *Lowther* v. *Clifford* (4) ([1927] 1 K.B. at p. 147) are wise words:

> "Section 54 of the Act provides that, except as in this Act expressed, nothing in this Act shall prejudicially affect any power, right, or remedy of a landlord in respect of a contract of tenancy. We have, therefore, to look for express destruction of the right of the King's subjects to enforce lawful contracts in the King's courts."

In the present case it seems to me that the questions we have got to decide really fall to be tried in the King's courts and are not expressly reserved for arbitration under the Act.

For these reasons, it appears to me that Bennett, J., was right, and the appeal must be dismissed with costs.

LAWRENCE, L.J.—I agree. Having read and carefully considered the correspondence and the shorthand notes of the evidence, I have arrived at the clear conclusion that Bennett, J., was right in finding on the facts that the defendant was estopped from denying the validity of the notice to quit which he had given to the plaintiff, and also that the plaintiff had quitted his holding in consequence of that notice. The result of these findings is that the tenancy of the plaintiff's holding was duly terminated on Oct. 11, 1931, and, accordingly, that the plaintiff was then a tenant entitled to compensation for disturbance within the meaning of s. 12 of the Agricultural Holdings Act, 1923.

With regard to the question of jurisdiction, raised for the first time in this court, it is enough for me to say that, whatever may be the true construction and scope

A of s. 16 of the Act, the question whether the tenancy had in fact terminated or not is a question which, having regard to s. 54 of the Act, the court has ample jurisdiction to decide. The appeal, therefore, in my opinion, fails and must be dismissed.

ROMER, L.J.—I agree. On the question of estoppel I do not wish to add B anything to what has fallen from the other members of the court, except to say that it appears to me to be the clearest case of estoppel which has come before the courts for a very long time.

I only wish to add this as to the argument founded upon the Agricultural Holdings Act, 1923. It was said by counsel for the defendant that the jurisdiction of the court in such a matter as this has been ousted by s. 16 of that Act. What- C ever may be the proper limitation to put upon the operation of that section, and giving for the moment to the section the widest possible operation for which anyone has ever contended, it is, to my mind, plain that the jurisdiction of the court to decide the issue that had arisen between the parties at the time the writ in this action was issued is unimpaired. It is necessary just to glance for a moment at the correspondence that took place in August, 1931, before this action was instituted, D and we find in a letter from the plaintiff's solicitors to the defendant's solicitors, dated Aug. 12, written after they had been informed by the defendant's solicitors that he contended the notice to quit was invalid, this phrase:

> "If the notice to quit is invalid and Mr. Farrow remains tenant of the Mount and Eldo Farms, he will be involved in very considerable expense and loss,"

E which, of course, was perfectly obvious. It is not denied by the defendant's solicitors, but on Aug. 20 they wrote as follows:

> "Since writing our letter of the 13th inst., we have taken the opinion of counsel, Mr. Hanbury Aggs, and this is to the effect that the notice which our client signed on Oct. 9, 1930, was invalid as a notice to quit or for any other purpose, and that your client's tenancy will continue after next Michaelmas. F Accordingly, we shall feel obliged by your informing us what your client's intentions are, as, if he proposes abandoning the farms, our client will forthwith commence proceedings for a declaration that the notice to quit was invalid and that nothing has occurred to determine the tenancy."

In other words, the defendant was asserting that the relation of tenant and landlord continued to exist as between the plaintiff and himself, involving, of course, G the plaintiff in liability to pay rent, and other liabilities that fall upon a tenant under a yearly tenancy. How it can be suggested that this court is precluded from determining whether the defendant's contention in that respect was right or wrong passes my comprehension. It is nothing to do with the Agricultural Holdings Act at all—this question whether the plaintiff was liable as a tenant after Oct. 11, 1931.

H I only want to add this further. It was argued that, whatever jurisdiction the learned judge had to make a declaration that the tenancy had come to an end and that the relationship of tenant and landlord did not continue to exist between the parties after Oct. 11, 1931, he was not entitled to declare that the plaintiff had quitted the tenancy in consequence of the notice to quit. It was said that, inasmuch as in August, 1931, the plaintiff was informed of the circumstances as I to the completion by the defendant of the purchase of the land not taking place until Oct. 11, 1930, it cannot be said that the plaintiff left the premises in consequence of the notice to quit. It was, indeed, suggested by counsel for the defendant that for the purpose of considering whether a tenant leaves in consequence of a notice to quit you must disregard any effect it may have on his mind. The section, he says, does not say: "In consequence of the effect which the notice to quit has on the tenant's mind," but "in consequence of the notice to quit." As I venture to point out, any tenant who leaves his premises after receiving notice to quit, with the intention of leaving them, must be leaving because of the consequence of the notice to quit upon his mind. If the notice to quit had no effect on his mind, he would not move, and he would eventually be turned out by force. I am not prepared to put a construction upon s. 12 which would confine its operation to where a tenant was forcibly ejected at the end of his tenancy. The truth of the matter is that the plaintiff left in October, 1931, because he had taken other premises and had sold his cottages on this holding. He had, before August, 1931, made arrangements for the sale of his stock; he had bought a blacksmith's shop upon the new tenancy he had taken; he had done all those things; and the estoppel at that time was complete. He did those things because of and in consequence of the notice to quit, and, therefore, it necessarily follows he quitted his holding in consequence of the notice. For these reasons, in addition to those given by the other members of the court and by BENNETT, J., I agree that this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Kingsford, Dorman & Co.*, for *Woolnough, Gross, Son, & Chamberlayne*, Bury St. Edmunds; *Whites & Co.*, for *Greene & Greene*, Bury St. Edmunds.

[*Reported by* J. H. G. BULLER, ESQ., *and* G. P. LANGWORTHY, ESQ., *Barristers-at-Law.*]

THE EDISON

[COURT OF APPEAL (Scrutton, L.J., Greer, L.J., and Slesser, L.J.), December 9, 10, 11, 1931, February 1, 1932]

[HOUSE OF LORDS (Lord Buckmaster, Lord Warrington, Lord Tomlin, Lord Russell of Killowen and Lord Wright), January 26, 27, February 28, 1933]

[Reported [1932] P. 52; 101 L.J.P. 12; 147 L.T. 141; 48 T.L.R. 224; 37 Com. Cas. 182; 18 Asp.M.L.C. 276, C.A.; [1933] A.C. 449; 102 L.J.P. 73; 149 L.T. 49; 77 Sol. Jo. 176; 38 Com. Cas. 267; 49 T.L.R. 289; 18 Asp.M.L.C. 380, H.L.]

Shipping—Collision—Damages—Measure—Loss of vessel—Delay in performance of contract.

The plaintiffs' dredger, the L., was sunk in a collision with the defendants' steamship, for which the defendants admitted liability. At the time of the loss the plaintiffs were performing certain works in the harbour at P., under contract with the harbour commissioners, and the dredger was employed in essential dredging operations connected with the performance of the contract. After the collision the plaintiffs were unable, owing to their lack of financial resources, to purchase another dredger, and, in consequence, various delays involving loss and expense were incurred. Subsequently, the plaintiffs hired another dredger, which they ultimately purchased. The registrar, in his report, allowed a sum for the value of the dredger, and also sums for the losses and expenses incurred during the delay, including the cost of hire of the substituted dredger, the extra cost of dredging with the substituted dredger as compared with the lost dredger, and loss of profit and incidental losses, such as salaries, rent, and interest, incurred during the period when the contract could not be performed owing to the loss of the dredger.

Held: the plaintiffs were entitled to the value of the L. at P. as a going concern at the time and place of the loss, together with interest at 5 per cent. as from the date of the loss until payment, and that value must be assessed by taking into account (i) the market price of a comparable dredger in sub-

A stitution; (ii) costs of its adaptation to make it fit for the performance of the contract work and of its transport to P., insurance, &c.; and (iii) compensation for disturbance and loss in carrying out the contract over the period of delay between the loss of the L. and the time at which the substituted dredger could reasonably have been available for use in P., including in that loss such items as overhead charges, expenses of staff, and equipment thrown away, but B excluding any loss due to the appellants' financial position and their consequent inability at once to buy a substitute dredger and the resulting delay in proceeding with the work as (a) being damage which did not flow from the defendants' tort, or (b) if it did, was too remote.

Notes. Considered: *The Arpad*, [1934] All E.R. Rep. 326. Referred to: *The* C *Castor*, [1932] P. 142; *Simon* v. *Pawson and Leafs, Ltd.* (1932), 148 L.T. 154; *Buckland* v. *R.* (1933), 102 L.J.K.B. 404; *Rose* v. *Ford*, [1937] 3 All E.R. 359; *Bourhill* v. *Young*, [1942] 2 All E.R. 396; *Duncan* v. *Cammell Laird, Ltd.*, *Craven* v. *Cammell Laird, Ltd.*, [1944] 2 All E.R. 159; *Pilkington* v. *Wood*, [1953] 2 All E.R. 810.

As to measure of damages generally, see 11 HALSBURY'S LAWS (3rd Edn.) 233 D et seq., and in maritime collision cases see 30 HALSBURY'S LAWS (2nd Edn.) 855 et seq. For cases see 17 DIGEST (Repl.) 90 et seq., and 41 DIGEST 800 et seq.

Cases referred to:

(1) *Hadley* v. *Baxendale* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 17 Digest (Repl.) 91, *99*.

E (2) *The Notting Hill* (1884), 9 P.D. 105; 53 L.J.P. 56; 51 L.T. 66; 32 W.R. 764; 5 Asp.M.L.C. 241, C.A.; 17 Digest (Repl.) 114, *272*.

(3) *Polemis* v. *Furness, Withy & Co.*, [1921] 3 K.B. 560; 90 L.J.K.B. 1353; 126 L.T. 154; 37 T.L.R. 940; 15 Asp.M.L.C. 398; 27 Com. Cas. 25, C.A.; 36 Digest (Repl.) 38, *185*.

(4) *The Philadelphia*, [1917] P. 101; 86 L.J.P. 112; 116 L.T. 794; 14 Asp.M.L.C. F 68, C.A.; 41 Digest 809, *6708*.

(5) *The Racine*, [1906] P. 273; 75 L.J.P. 83; 95 L.T. 597; 22 T.L.R. 575; 10 Asp.M.L.C. 301, C.A.; 41 Digest 809, *6707*.

(6) *The Argentino* (1888), 13 P.D. 191; 58 L.J.P. 1; 59 L.T. 914; 37 W.R. 210; 6 Asp.M.L.C. 348, C.A.; affirmed (1889), 14 App. Cas. 519; 59 L.J.P. 17; 61 L.T. 706; 6 Asp.M.L.C. 433, H.L.; 17 Digest (Repl.) 80, *27*.

G (7) *The Amerika*, [1917] A.C. 38; 86 L.J.P. 58; 116 L.T. 34; 33 T.L.R. 135; 61 Sol. Jo. 158; 13 Asp.M.L.C. 558, H.L.; 36 Digest (Repl.) 207, *1084*.

(8) *Gee* v. *Lancashire and Yorkshire Rail. Co.* (1860), 6 H. & N. 211; 30 L.J.Ex. 11; 3 L.T. 328; 6 Jur.N.S. 1118; 9 W.R. 103; 158 E.R. 87; 17 Digest (Repl.) 117, *292*.

(9) *The Mediana*, [1900] A.C. 113; 69 L.J.P. 35; 82 L.T. 95; 48 W.R. 398; 16 H T.L.R. 194; 44 Sol. Jo. 259; 9 Asp.M.L.C. 41, H.L.; 41 Digest 811, *6733*.

(10) *Hobbs* v. *London and South Western Rail. Co.* (1875), L.R. 10 Q.B. 111; 44 L.J.Q.B. 49; 32 L.T. 252; 39 J.P. 693; 23 W.R. 520; 17 Digest (Repl.) 115, *274*.

(11) *Speake* v. *Hughes*, [1904] 1 K.B. 138; 73 L.J.K.B. 172; 89 L.T. 576, C.A.; 32 Digest 174, *2135*.

I (12) *H.M.S. London*, [1914] P. 72; 83 L.J.P. 74; 109 L.T. 960; 30 T.L.R. 196; 12 Asp.M.L.C. 405; 17 Digest (Repl.) 116, *283*.

(13) *Admiralty Comrs.* v. *S.S. Valeria*, [1922] 2 A.C. 242; 92 L.J.K.B. 42; 128 L.T. 97; 16 Asp.M.L.C. 25, H.L.; 17 Digest (Repl.) 102, *173*.

(14) *Weld-Blundell* v. *Stephens*, [1920] A.C. 956; 89 L.J.K.B. 705; 123 L.T. 593; 36 T.L.R. 640; 64 Sol. Jo. 529, H.L.; 17 Digest (Repl.) 142, *438*.

(15) *The Empress of Britain* (1913), 29 T.L.R. 423; 41 Digest 810, *6714*.

(16) *Banco de Portugal* v. *Waterlow & Sons, Ltd.* (1931), 100 L.J.K.B. 465; 145 L.T. 362; 47 T.L.R. 359, C.A.; on appeal, [1932] A.C. 452; 101 L.J.K.B.

417; 147 L.T. 101; 48 T.L.R. 404; 76 Sol. Jo. 327, H.L.; 17 Digest (Repl.) 98, *147*.

(17) *James Finlay & Co.* v. *N.V. Kwik Hoo Tong H.M.*, [1929] 1 K.B. 400; 98 L.J.K.B. 251; 140 L.T. 389; 45 T.L.R. 149; 34 Com. Cas. 143; 17 Asp.M.L.C. 566, C.A.; Digest Supp.

(18) *The Columbus* (1849), 3 Wm. Rob. 158; 6 Notes of Cases, 671; 13 Jur. 285; 17 Digest (Repl.) 80, *29*.

(19) *The City of Rome* (1887), 80 L.T. 426, n; 8 Asp.M.L.C. 542, n; 41 Digest 809, *6705*.

(20) *The Anselma de Larrinaga* (1913), 29 T.L.R. 587; 17 Digest (Repl.) 124, *348*.

(21) *The Kate*, [1899] P. 165; 68 L.J.P. 41; 80 L.T. 423; 47 W.R. 669; 15 T.L.R. 309; 8 Asp.M.L.C. 539; 41 Digest 809, *6706*.

(22) *The Harmonides*, [1903] P. 1; 72 L.J.P. 9; 87 L.T. 448; 51 W.R. 303; 19 T.L.R. 37; 9 Asp.M.L.C. 354; 41 Digest 810, *6710*.

(23) *Thames and Mersey Marine Insurance Co.* v. *British and Chilian Steamship Co.*, [1916] 1 K.B. 30; 85 L.J.K.B. 384; 114 L.T. 34; 32 T.L.R. 89; 13 Asp.M.L.C. 221; 21 Com. Cas. 150, C.A.; 29 Digest 292, *2379*

(24) *Société Anonyme de Remorquage à Hélice* v. *Bennetts*, [1911] 1 K.B. 243; 80 L.J.K.B. 228; 27 T.L.R. 77; 16 Com. Cas. 24; 41 Digest 803, *6636*.

(25) *Davis* v. *Oswell* (1837), 7 C. & P. 804; 173 E.R. 351, N.P.; 43 Digest 521, *590*.

(26) *Bodley* v. *Reynolds* (1846), 8 Q.B. 779; 15 L.J.Q.B. 219; 7 L.T.O.S. 61; 10 Jur. 310; 115 E.R. 1066; 17 Digest (Repl.) 78, *19*.

(27) *France* v. *Gaudet* (1871), L.R. 6 Q.B. 199; 40 L.J.Q.B. 121; 19 W.R. 622; 17 Digest (Repl.) 75, *7*.

(28) *San Gregorio* (1922), 12 Ll.L. 249.

(29) *The Susquehanna*, [1925] P. 196; 95 L.J.P. 39; 134 L.T. 45; affirmed, [1926] A.C. 655; 95 L.J.P. 128; 135 L.T. 456; 42 T.L.R. 639; 17 Asp.M.L.C. 81; 33 Com. Cas. 1, H.L.; 41 Digest 802, *6624*.

(30) *The Chekiang*, [1926] A.C. 637; 95 L.J.P. 119; 135 L.T. 450; 42 T.L.R. 634; 17 Asp.M.L.C. 74; 32 Com. Cas. 91, H.L.; 41 Digest 805, *6663*.

(31) *The Greta Holme*, [1897] A.C. 596; 66 L.J.P. 166; 77 L.T. 231; 13 T.L.R. 552; 8 Asp.M.L.C. 317, H.L.; 17 Digest (Repl.) 83, *56*.

(32) *The Marpessa*, [1907] A.C. 241; 97 L.T. 1; 23 T.L.R. 572; 51 Sol. Jo. 530; 10 Asp.M.L.C. 464; 76 L.J.P. 128, H.L.; 17 Digest (Repl.) 102, *170*.

(33) *Reid* v. *Fairbanks* (1853), 13 C.B. 692; 21 L.T.O.S. 166; 1 C.L.R. 787; 138 E.R. 1371; 22 L.J.C.P. 206; 17 Jur. 918; 17 Digest (Repl.) 394, *1975*.

(34) *British Columbia Saw Mill Co.* v. *Nettleship* (1868), L.R. 3 C.P. 499; 37 L.J.C.P. 235; 18 L.T. 291, 604; 16 W.R. 1046; 3 Mar.L.C. 65; 41 Digest 556, *3820*.

(35) *Cobb* v. *Great Western Rail Co.*, [1893] 1 Q.B. 459; 62 L.J.Q.B. 335; 68 L.T. 483; 57 J.P. 437; 41 W.R. 275; 9 T.L.R. 253; 37 Sol. Jo. 248; 4 R. 283, C.A.; affirmed, [1894] A.C. 419; 63 L.J.Q.B. 629; 71 L.T. 161; 58 J.P. 636; 10 T.L.R. 508; 6 R. 203, H.L.; 8 Digest (Repl.) 82, *544*.

(36) *Horne* v. *Midland Rail. Co.* (1873), L.R. 8 C.P. 131; 42 L.J.C.P. 59; 28 L.T. 312; 21 W.R. 481, Ex. Ch.; 8 Digest (Repl.) 153, *964*.

(37) *Borries* v. *Hutchinson* (1865), 18 C.B.N.S. 445; 5 New Rep. 281; 34 L.J.C.P. 169; 11 L.T. 771; 11 Jur.N.S. 267; 13 W.R. 386; 114 E.R. 518; 39 Digest 673, *2590*.

(38) *Clippens Oil Co., Ltd.* v. *Edinburgh and District Water Trustees*, [1907] A.C. 291; 76 L.J.P.C. 79, H.L.; 17 Digest (Repl.) 179, *745*.

(39) *The Northumbria* (1869), L.R. 3 A. & E. 6; 39 L.J.Adm. 3; 18 W.R. 188; 3 Mar.L.C. 314; 41 Digest 812, *6739*.

(40) *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.*, [1926] A.C. 108; 95 L.J.P.C. 71; 134 L.T. 227; 42 T.L.R. 86; 16 Asp.M.L.C. 585; 31 Com. Cas. 80, P.C.; 41 Digest 321, *1800*.

(41) *Clyde Navigation Trustees* v. *Bowring S.S. Co.*, 1929 S.C. 715; 32 Ll.L. 35; 34 Ll.L. 319; Digest Supp.

A (42) *The Pacaure* (1912), Shipping Gazette (Dec. 1912).

(43) *The Kong Magnus*, [1891] P. 223; 65 L.T. 231; 7 Asp.M.L.C. 64; 41 Digest 812, *6740*.

Appeal from an order of LANGTON, J.

B The plaintiffs, owners of the dredger *Liesbosch*, claimed damages for the loss of the *Liesbosch* as the result of a collision with the defendants' steamship *Edison*, which took place in the harbour of Patras on Nov. 26, 1928. The defendants admitted liability for the collision. At the time of the collision the owners of the *Liesbosch* had entered into a contract with the harbour commissioners at Patras for the excavation of the basin of the harbour and for a trench for the laying of C foundations of new moles, together with the construction of piers, &c., and other work. The contract was originally for the sum of 36,540,000 drachmas, one of its terms being that the work should be completed within three years, and it was subsequently enlarged to 68,000,000 drachmas, covering a period of five years. The plaintiffs, owing to lack of financial resources, were unable to purchase a dredger to take the place of the *Liesbosch*, but they ultimately hired the Italian D dredger *Adria*, which arrived at Patras on June 16, 1929. The *Adria* was on hire to the plaintiffs until July 3, 1930, when the plaintiffs purchased her for 3,442,320 drachmas. They claimed expenses incurred between Nov. 26, 1928, and June 16, 1929, which was the period from the date when the *Liesbosch* was lost until the *Adria* was obtained, during which work was suspended. The amount claimed in respect of these expenses, which represented salaries, wages, rent, insurance, and E interest on capital, amounted to 4,626,314·35 drachmas, of which the registrar allowed 4,007,476·45 drachmas. The plaintiffs further claimed expenses of hiring the *Adria*, i.e., cost of transporting, travelling expenses, &c., amounting to 7,606,257·30 drachmas, of which the registrar allowed 6,888,790·45 drachmas. The cost of operating the *Adria* as compared with the *Liesbosch*, amounting to 157,037·50 drachmas, was also claimed and allowed in full. The plaintiffs claimed 882,568 F drachmas for loss of profit owing to cessation of all work under the contract from Nov. 26, 1928, to June 16, 1929. The registrar allowed 294,189·33 drachmas. LANGTON, J., affirmed the report. The defendants appealed.

Dickinson, K.C., and *Main Thompson* for the defendants.—The damage in respect of which damages have been awarded was not the natural and reasonable G consequence of the collision, but arose solely from the respondents' lack of financial resources. The losses which have been sustained are not, therefore, the natural consequences of the negligence of the appellants. The registrar and LANGTON, J., misdirected themselves in holding that any damages beyond the value of the vessel together with interest from the date of the loss could be awarded. [They referred to *Hadley* v. *Baxendale* (1), *The Notting Hill* (2), *Polemis* v. *Furness Withy & Co.* H (3),*The Philadelphia* (4), *The Racine* (5), *The Argentino* (6), *The Amerika* (7), *Gee* v. *Lancashire and Yorkshire Rail. Co.* (8), *The Mediana* (9), *Hobbs* v. *London and South-Western Rail. Co.* (10), *Speake* v. *Hughes* (11), *H.M.S. London* (12), *The Valeria* (13), *Weld-Blundell* v. *Stephens* (14), *The Empress of Britain* (15), *Banco de Portugal* v. *Waterlow & Sons, Ltd.* (16), *James Finlay & Co.* v. *N.V. Kwik Hoo Tong H.M.* (17), *The Columbus* (18), *The City of Rome* (19), and *The Anselma de* I *Larrinaga* (20).]

Raeburn, K.C., and *Noad* for the plaintiffs.—The decision of the registrar and of LANGTON, J., was right. The question is not really a question of remoteness: the real question is whether the plaintiff took reasonable steps to minimise the damage. If such steps were taken the expenses incurred in so doing are recoverable. The plaintiffs have not really been allowed any substantial sum for loss of profit, but they have been allowed expenses, e.g., the hire of the dredger, which they reasonably incurred in order to protect their profit. [They referred to *The Kate* (21), *The Harmonides* (22), *Thames and Mersey Marine Insurance Co.*

v. *British and Chilian Steamship Co.* (23), *Société Anonyme de Remorquage à Hélice* v. *Bennetts* (24), *Davis* v. *Oswell* (25), *Bodley* v. *Reynolds* (26), and *France* v. *Gaudet* (27).] A

Dickinson, K.C., replied.

Cur. adv. vult.

Feb. 1. The following judgments were read: B

SCRUTTON, L.J.—This is an appeal from a decision of LANGTON, J. ([1931] P. 230), affirming the decision of the Admiralty registrar as to the amount of damages to be paid by an American shipowner for sinking a dredger near the Port of Patras. The dredger was at the time employed by its owner in carrying out part of a contract with the Patras harbour authorities to build a large line of quay, quay wall and mole in the harbour of Patras. The dredger was not under any special C charter; no special sum was to be paid for its services; the owner might have taken it away and substituted another dredger without any breach of contract; the specification in the harbour contract was mainly concerned with the building construction, but it was essential to the building of the quay walls that the dredger should remove soil to a specified depth so that the foundations might be laid for the quay wall. D

This is not a case of partial damage, which can be repaired, and a claim for the loss while the vessel was being repaired. It is a case of total loss, and in such a case the measure of damage laid down in *The Philadelphia* (4) is

> "the value of the vessel at the time of her loss, plus the proper net sum for profits or freights at the end of her existing charter."

E

I discuss later the question whether those sums should not be included in the value of the ship at the time of her loss, instead of being added to it.

The actual figures awarded seem to me to suggest strongly that something has gone wrong in the working out of principles. LANGTON, J., says in his judgment:

> "I can imagine few things more maddeningly provocative than to be called upon, as a consequence of sinking a somewhat elderly dredger, to pay a sum amounting to more than twice her value when generously computed." F

The dredger *Liesbosch* was built in 1924 and purchased by her present owner in Holland in October, 1927, for £4,000, £2,000 further being spent in getting her out to Patras. She began work in Patras in September, 1927, and was sunk in November, 1928, being at that time insured by her owner for £5,250. The registrar has assessed her value at the time of loss—November, 1928—at a little over £9,000, G and has reached that conclusion by taking the figure for which, in June, 1930, nineteen months after the loss, the Patras Harbour Board purchased a much older but larger dredger *Adria*, in order to sell her for the same sum to the plaintiffs, they paying the price in instalments spread over four years. Why this sum is selected as the value of the *Liesbosch* in November, 1928, I find it difficult to understand. Instead of giving interest on the value of the *Liesbosch* in November, H 1928, till the time of payment, which is one measure of damages, the registrar then gives interest on the sums he awards from May 11, 1929, to the time of payment. This date is taken as being the date when the owner signed a contract to hire the *Adria*, he having no money to buy her. Taking this date, the claimant does not get interest on the value of the dredger at the time of the loss from the date of the loss for the six-and-a-half months till he signs the contract for the hire I of the *Adria*; but he does get interest from May 11, 1929, on a number of sums which he did not pay till long after, for instance, on the hire of the *Adria* from May 11, 1929, to July 3, 1930. The oddities do not stop there, for the registrar then awards, in addition to the £9,000 value of the *Liesbosch* at the time of the loss, a sum of £10,000 roughly more, or over 100 per cent. of the value, apparently as loss sustained in the working of the construction contract.

The plaintiffs' claim is under five heads.

I is said to be the value of the *Liesbosch* at the time of loss, but is in fact the

A price of the *Adria* about twenty months later plus the expenses incurred in purchasing her. I have already said I do not see how this can be the value of the *Liesbosch* at the time of her loss.

II is the plaintiffs' expenses as contractors from the loss of the *Liesbosch* in November, 1928, to the hire of the *Adria* in May, 1929. Of those about 400,000 drachmas are allowed, roughly a little over £1,000. These damages seem in fact B to be that the staff and implements for the construction contract were lying idle during this period. On the evidence work could have been done in preparing the blocks for the quay walls, but the harbour authority would not allow it to be done because it would lock up capital by premature payments for the work done. This seems to me to be too remote a consequence of the loss of the *Liesbosch*, and to make the wrongdoer liable for the loss on a contract not exclusively concerned with C the employment of the dredger. I deal with this later.

III Expenses incurred during the hiring of the *Adria*. It is clear that the plaintiffs hired the *Adria* because they had no money to buy her. In doing so they spent in fourteen months about £5,000, more than half the value assigned to the *Liesbosch*, and then had after all to buy the *Adria* at the end of the fourteen months at a price which must have been larger because its payment was spread over D four years.

IV The extra cost of working the *Adria* over the *Liesbosch*. On this head I do not understand how a claimant who has been given the value of his ship lost can also be given an extra sum because in working the ship which he buys he does not get the value of the old ship. The figure given for him for total loss should have taken into account all the direct loss he suffered by losing his ship and not E have added to this part of the loss he claimed to have suffered by working his contract with the substituted ship. This might be relevant in cases of partial loss, but seems to me to have no relevance in cases of total loss.

V Lastly, the plaintiffs claimed a proportion of the profit they expected to make under their construction contract lost because they were delayed six months in receiving it. The registrar has very properly cut down this claim substantially F by only giving them a sum to compensate them for delay in receipt of profits, and not a sixth share of the profits themselves, arrived at by contrasting six months' delay with three years' contract construction time, but, as appears hereafter, I do not understand how the construction contract, which has no special terms relating to the remuneration for the work done by the *Liesbosch*, comes into this matter at all.

G I have repeatedly said that, so far as questions of fact are concerned, the court should be very slow to interfere with the decision of the very experienced registrar and merchants: *The San Gregorio* (28), *The Susquehanna* (29); but it is also clear that, if the registrar purports to act on any principle of which the court disapproves, or if his decision of fact obviously conflicts with some principle of assessment, the court should interfere. It is, unfortunately, also true that until recently, possibly H even at the present day, there is no very clear statement of the principles on which damage caused by collision is to be assessed in spite of a number of decisions on the point of the highest tribunal. I am emboldened to make this remark by the fact that as late as 1927 LORD SUMNER in *The Chekiang* (30) recognises the justice of a similar criticism, and devotes some time to the exposition of the measure of damages in the case of ships owned by the Crown or public bodies, I usually not employed commercially. Having read the authorities I agree with LORD ATKIN'S remark in *The Susquehanna* (29) ([1925] P. at p. 210):

> "This is one of those cases dealing with damages which, in my experience, I have found to be a branch of the law in which one is less guided by authority laying down definite principles than in almost any other matter that one can consider."

I also note the remark of LORD SUMNER in *The Susquehanna* (29) ([1926] A.C. at p. 664) that, though in theory one would consider the loss of the shipowner, by inveterate practice which cannot be disturbed the ship is treated as the claimant A and an isolated account taken as if the injured ship were the whole business of the shipowner. But generally, however, it is clear on the authorities that the measure of damages is the same in Admiralty and common law, and that it is the same in tort and breach of contract, except that in the latter case damages can be given in respect of circumstances which were in the contemplation of the parties at the making of the contract, which damages would not be given in tort. B

The claims for damage to a ship by collision fall into two classes. (i) Where the ship is not lost but damaged so that for a time she cannot be used. (ii) Where the ship is totally lost.

In each of these cases there may be a subdivision according as the injured ship is one commercially used for profit or is a ship used by bodies which do not carry on business to earn commercial profits, such as a dredger owned by a harbour C board, and used in their own work: *The Greta Holme* (31), *The Marpessa* (32), a lightship, *The Mediana* (9), or a King's ship, *The Chekiang* (30), *The Susquehanna* (29). I refer to LORD DUNEDIN's and LORD SUMNER's judgments for the discussion of these cases, and confine myself to the cases of ships commercially used whether for carriage of goods or for dredging.

Take, first, the case of damage to the ship other than total loss. The claimant D is entitled to the cost of repairing the damage. But, besides the actual damage done to the ship, he has been prevented from using the ship to earn profits till the damage is repaired. How is this loss to be measured? This was the question considered by the House of Lords in *The Argentino* (6). At the time of the collision the *Argentino* had an oral engagement to go to Messrs. Westcott's berth for a Black Sea round to Batoum, which engagement, owing to the collision, she E could not fulfil, but when repaired she was put on Messrs. Westcott's Black Sea berth for Odessa, and a sum was claimed which was arrived at by estimating how much less the *Argentino* had earned by reason of the change of berths. The registrar and LORD ESHER thought this damage too remote. The President, and the majority of the Court of Appeal—BOWEN and LINDLEY, L.JJ.—held that it could be considered. BOWEN, L.J., stated the principle thus: F

> "The damages recoverable from a wrongdoer in cases of collision at sea must be measured according to the ordinary principles of the common law. Courts of Admiralty have no power to give more, they ought not to award less. Speaking generally as to all wrongful acts whatever arising out of tort or breach of contract, the English law only adopts the principle of restitutio in integrum, subject to the qualification or restriction that the damages must not G be too remote, that they must be, in other words, such damages as flow directly and in the usual course of things from the wrongful act. To these the law superadds in the case of a breach of contract (or, to speak according to the view taken by some jurists, the law includes under the head of these very damages, where the case is one of breach of contract) such damages as may reasonably be supposed to have been in the contemplation of both parties H at the time they made the contract as the probable result of its breach. With this single modification or exception, which is one that applies only to cases of breach of contract, the English law only permits the recovery of such damages as are produced immediately and naturally by the act complained of.
>
> A collision at sea caused by the negligence of an offending vessel is a mere tort, and we have only, therefore, to consider what has been in the particular I case its direct and natural consequence. This consequence (in the case of an innocent ship which is disabled by an accident) is that its owner loses for a time the use which he otherwise would have had of his vessel. There is no difference in principle between such a loss and the loss which the owner of a serviceable threshing machine suffers from an injury which incapacitates a machine, or the loss which a workman suffers who is prevented from earning money by the wrongful detention of plant which cannot at once be replaced. A ship is a thing by the use of which money may be ordinarily earned, and

> A the only question in case of a collision seems to me to be, what is the use which the shipowner would, but for the accident, have had of his ship, and what (excluding the element of uncertain and speculative and special profits) the shipowner, but for the accident, would have earned by the use of her. It is on this principle alone that it is habitual to allow in ordinary cases damages for the time during which the vessel is laid up under repair in addition to the B cost of the repairs themselves. But this is merely an application of the general principle, and is not the measure in all cases of the loss. It might conceivably, upon the one hand, be the fact that the damaged ship would not and could not have earned anything at all while laid up for repairs, though such a case must necessarily be exceptional. In such circumstances nothing ought to be allowed for demurrage. Upon the other hand, the direct conse- C quences of the accident might be that the injured vessel was necessarily thrown out of her employment, not merely during the period of repair, but for a longer period still. In such a case the loss could not properly be measured by the time taken in repairs alone."

It will be noticed that BOWEN, L.J., excludes "uncertain and speculative and special profits which are sometimes described as too remote." This is the reason D why fishing vessels are not allowed the profits they might have made on the voyage which the collision prevented them from making, and why in *The Philadelphia* (4) the claimant was not allowed anything for the fact that if the ship had completed the voyage which she was making at the time of the collision, she would have been in a place at a time when her market value was in fact much higher than it was at the time and place of the collision. Rise or fall of market is generally E uncertain and speculative. I understand LORD HERSCHELL, in affirming the decision of the majority of the Court of Appeal, to approve BOWEN, L.J.'s language, but to point out that the claimants could not have both the profits lost and demurrage for the days under repair, for this would be to give the same amount twice.

In the case of total loss of the ship the case seems to me quite different. The F claimant has lost his ship and is entitled to be paid the value of his ship at the time of the loss, plus interest from the time of the loss, till he receives payment. And the value of the ship is not necessarily limited to the market value of the ship, the price at which it could be sold at the time of the loss. This is well illustrated by the judgment of LORD GORELL in *The Harmonides* (22). That vessel was a liner of peculiar construction profitably employed in a well-known line; but evidence G was filed, and was probably accurate, that if put up for sale she would fetch £16,000; the owners said that to them, with that profitable line, and as a vessel suited to that line, she was worth £31,000. LORD GORELL said:

> "The real test is what is the value of the vessel to the owners as a going concern at the time the vessel was sunk."

H I should add "at that place," for if the vessel had to be replaced at Patras expense and time might have been added to the cost of the vessel replaced.

But if this is the value of the ship to which the claimant is entitled, payable at the time of the loss, I do not see any room for the addition of profits on an existing contract which would have been made but for the loss. Suppose the lost ship is under a ten years' charter, is the claimant to have both the value of the I ship as a going concern at the time of the loss, and the profits he would have made under the ten years' charter? The value of the ship is an estimate, or rough capitalisation, of the earning power of the ship for its life. You cannot give both the value of the ship and the profits it would probably earn. As LORD HERSCHELL said in *The Argentino* (6), this would be giving the same amount twice. The fact that there is a ten years' charter, of course, must be considered in fixing the value of a going concern. It gives more certainty to the value, but is subject to the possibilities that the ship may be lost or the charterer go bankrupt. As MAULE, J., remarks in *Reid* v. *Fairbanks* (33):

> "The value of the ship is £3,000, because she is capable of earning money by carrying goods or freight. When you pay a man for his ship you pay him for what it can or may, or shall do to produce profit." A

In the present case the registrar has added to the value of the ship roughly 100 per cent. for loss of profit caused by its loss. Now it is to be noticed that this is not a case of a ship under a definite engagement at a fixed rate. The dredger B has no charter and no time rate of remuneration. The owner had a profitable contract to do a large constructional work, some part of which required the use of a dredger, but he was under no obligation to employ this dredger; he could have sent her elsewhere and employed another dredger. A dredger was necessary to excavate a trench in which a wall could be built. Payment will be made according to work done, cubic measurement of earth excavated. There is not any time rate C of payment for the dredger. This is very different from a profitable charter of the dredger. It is merely part of the plant, with a diver, a floating crane, and other machinery, employed in the performance of a much larger contract for an unseverable work. It is like the shaft of a mill in *Hadley* v. *Baxendale* (1), or in *British Columbia Saw Mill Co., Ltd.* v. *Nettleship* (34), where loss of or delay to the shaft was not held to involve liability for the loss of profits to the mill, of D whose machinery the shaft formed part.

Another marked point of difference between the present case and the ordinary claim for total loss is that the owners adopted a very unusual and extravagant way of replacing the lost dredger. They at first could not afford, had not sufficient money, to pay for another dredger, and hired one at a very high rate compared with the assessed value of the lost dredger. After paying this high rate of hire for E a considerable time they then bought the dredger they had hired at a price higher than the ordinary price, because payment was spread over four years. I am not aware that the poverty of the injured person has ever been allowed to increase damages for loss of property before. In cases of failure to deliver goods the measure of damage is the difference between contract and market price. I have never heard it suggested that if the injured person is too poor to pay the market F price he can, therefore, increase his damages.

The learned registrar has found that the owners, in their "lack of liquid resources," took reasonable steps to perform their construction contract, and that such steps, and the attendant expenses, were direct and natural consequences of the collision.

LANGTON, J., treats the dredger as the main item of the owners' plant for the G construction contract. Having carefully read the contract, I cannot understand this finding. The contract work largely consists of construction in which the dredger is not employed at all, once the foundation trench has been excavated. He holds the proper test to be what the plaintiff has lost, and whether the sums he has lost are the result of operations properly incurred. But what the owner has lost is his dredger. If the court gives him the value of his dredger at the time H and place of the loss as a profit-earning dredger, and gives him interest on that value from the time of the loss till payment, I do not see any room for a further award of profits he has lost because he cannot effectively replace the dredger by reason of his poverty, or because a contract which requires the use of a dredger becomes less profitable because the owner is too poor to replace the dredger on ordinary market terms. I am of opinion that neither sums due to the existence I of such a contract, nor extra expenditure due to the owners' poverty, are direct and natural consequences of the collision. Further, to give such sums, in addition to the value of the dredger as defined above, appears to me to be giving the value of the ship twice over, once in the capitalised value of the earnings of the ship, estimated at its present value, once as the extra expense incurred by the loss of the ship, which, in my view, is cured by giving the ship at the time of the loss its value at the time of the loss. If the owner says: "I have lost the ship, give me restitutio in integrum," the answer is: "You cannot have the ship back, it is

A lost, but you have 'its value to you as a going concern.' This restores you in integrum."

What, then, is to be done in this case? The registrar has given the owner a value of the ship, £9,000—half as much again as her original cost to him at Patras, more than half as much again as her insured value. This seems to me an ample measure of the dredger's value as a going concern. If, in addition, the owner is B given interest from the time of the loss till the time of payment of the value, he is, in my opinion, replaced in his original condition; any further payment arises from circumstances which are too remote to be the direct and natural consequences of the loss; circumstances and profits which are, in the language of LORD BOWEN, "uncertain and speculative and special profits."

As to costs, the defendants made no tender or payment into court, and must C pay the costs of the reference. They must pay the assessed value of the *Liesbosch*, together with interest thereon from the time of loss to the time of payment. The defendants must have the costs of this appeal, and of the appeal to LANGTON, J.

GREER, L.J.—In my judgment, this appeal must be allowed, and judgment entered as hereinafter stated. With all respect to the learned registrar and the D judge, I think they have misconceived and misapplied the rules of law as to the measure of damages recoverable. Their judgments appear to me to be based on the assumption that a plaintiff who has suffered injury by tort is entitled to recover all the damage he has in fact suffered, diminished only to the extent to which he could by reasonable steps reduce such damage. In my opinion, the true rule was as stated in his argument by counsel for the appellants. The damages E recoverable in an action based on a tort whereby the owner of a chattel has been wholly deprived of it do not differ from the damages recoverable for breach of contract for non-delivery of a chattel, except that in the latter case they may be increased by the application of the second rule in *Hadley* v. *Baxendale* (1). In *Cobb* v. *Great Western Rail. Co.* (35) ([1893] 1 Q.B. at p. 464) BOWEN, L.J., states the law as follows:

> F "The law is that the damages must be the direct and natural consequence of the breach of obligation complained of. The law is the same in this respect with regard both to contracts and to torts, subject to the qualification that in the case of the former the law does not consider too remote damages which may reasonably be supposed to have been in the contemplation of the parties when the contract was made":

G see also the judgment of the same Lord Justice in *The Argentino* (6). It is also well established that the principles which apply at common law to the measure of damage in cases of negligence apply just as much to the ascertainment of damages for negligence in the Admiralty Court as they do in the King's Bench Division. In *The Argentino* (6) BOWEN, L.J., uses these words (13 P.D. at p. 200):

> H "The damages recoverable from a wrongdoer in cases of collision at sea must be measured according to the ordinary principles of the common law. Courts of Admiralty have no power to give more; they ought not to award less. Speaking generally as to all wrongful acts whether arising out of tort or breach of contract, the English law only adopts the principle of restitutio in integrum, subject to the qualification or restriction that the damages must not be too I remote, that they must be, in other words, such damages as flow directly and in the usual course of things from the wrongful act."

And he also says (13 P.D. at p. 202):

> "The questions, therefore, to be inquired into are two: the first, to what extent, if any, the vessel has been thrown out of employment by the accident; the second, what would have been the fair earnings of a vessel such as the *Argentino* advertised to sail, as was the *Argentino*, on Messrs. Westcott and Laurence's line to Batoum, excluding, as I have said, everything in the nature of uncertain and speculative profits?"

In *The Susquehanna* (29) LORD DUNEDIN says ([1926] A.C. at p. 661):

> "There is no difference in this matter between the position in Admiralty law and that of the common law, and the common law says that the damages due either for breach of contract or for tort are damages which, so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act";

and at p. 669 LORD BLANESBURGH refers to the rule of the common law "which must be followed in such matters": see also the speech of LORD SUMNER in *The Amerika* (7).

If we apply in the present case, as we must, the rules of the common law applicable to damages occasioned by the plaintiffs being deprived by a breach of contract of the possession or use of a chattel, it seems to me that we must exclude from the computation all the losses which the plaintiffs sustained by reason of the fact that they were using and required their dredger for the purpose of performing a very special contract which they had made with the port committee of Patras.

The facts in *Hadley* v. *Baxendale* (1) are conveniently summarised in MAYNE ON DAMAGES (10th Edn.) at p. 10:

> "The plaintiffs owned a steam mill. The shaft was broken, and they gave it to the defendant, a carrier, to take to an engineer as a model for a new one. On making the contract the defendant's clerk was informed that the mill was stopped, and that the shaft must be sent immediately."

The defendant delayed its delivery, and in an action for breach of contract the plaintiffs claimed as specific damages the loss of profits while the mill, as a result of delay, was idle. It was held that the defendant was not so liable, he not having been informed that a loss of profits would result from delay, or that the want of the shaft was the only thing that would keep the mill idle. It is quite clear in this case that the loss occasioned by the delay was the actual result of the delay in the circumstances in which the plaintiff was placed at the time of the breach of contract, and the case involves a decision that a result cannot be treated as a natural and direct result of the breach unless it is of a kind which would so result in the ordinary course of things.

What is known as the rule in *Hadley* v. *Baxendale* (1) is laid down in these terms:

> "We think the proper rule in such a case as the present is this: where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and reasonably be considered arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

The second portion of the test has, of course, as BOWEN, L.J., pointed out in the case already mentioned, no bearing on damages for tort. Applying this rule to the present case, I think it would exclude from consideration all the special damages claimed in respect of the loss occasioned to the plaintiffs by their inability to proceed with their contract, those being damages such as would not arise naturally according to the usual course of things from their being deprived of a dredger. This principle was applied in the case of *Gee* v. *Lancashire and Yorkshire Rail. Co.* (8) to a case where a claim was made for damages for delay in the delivery of cotton to a cotton mill, which in the circumstances in which the owner was placed at the time resulted in his mill being idle until the cotton was delivered. It was held that the plaintiff's inability to run his mill, though in fact it was the result of the breach, was not either the natural result in the usual course of things, or such as might reasonably have been supposed to have been in the contemplation of the parties.

A The common law case which seems to be nearest to the present case is *Horne* v. *The Midland Rail. Co.* (36). The facts are sufficiently stated in the headnote in these words:

> "The plaintiffs, being shoe manufacturers at Kettering, were under a contract to supply a quantity of military shoes to a firm in London for the use of the French army at 4s. a pair, an unusually high price. The shoes were to be B delivered by Feb. 3, 1871, and the plaintiffs accordingly sent them to the defendants' station at Kettering for carriage to London in time to be delivered there in the usual course in the evening of that day, when they would have been accepted and paid for by the consignees. Notice was given to the station-master (which for the purpose of the case was assumed to be notice to the company) at the time that the plaintiffs were under a contract to deliver the C shoes by Feb. 3, and that, unless they were so delivered, they would be thrown on their hands, but he was not informed that there was anything exceptional in the character of the contract. The shoes were not delivered in London till Feb. 4, and were consequently not accepted by the consignees, and the plaintiffs were obliged to sell them at 2s. 9d. a pair, which, in consequence of the cessation of the French war, was, apart from the previously-mentioned con- D tract, the best price that could have been obtained for them, even if they had been delivered on the evening of Feb. 3 instead of the morning of the 4th."

The defendants paid into court a sum which was sufficient to cover any loss which would occur in the ordinary course of things, but the plaintiffs further claimed the loss they had sustained by their inability to use the goods for the purpose of E implementing their contract for shoes to be used for the French army. It was held by the majority of the court that this was not recoverable, as it was not such damage as might reasonably be considered as arising naturally from the defendants' breach of contract. LORD BLACKBURN (then BLACKBURN, J.), in the course of his judgment, says:

> "If a man contracts to carry a chattel and loses it, he must pay the value, F though he may discover that it was more valuable than he had supposed. But when the damages sought to be recovered are not those which in the ordinary course of things would naturally arise, but are of an exceptional nature, arising from special and peculiar circumstances, it is clear that in the absence of any notice to the defendant of any such circumstances such damages cannot be recovered."

G It is to be observed that in all these cases the damages which were sought to be recovered, and were disallowed, were damages which in fact the plaintiff suffered in the circumstances in which he was in fact placed at the time when the wrongful act was committed which deprived him of the use of his chattel, but it was held that as those damages were of an exceptional nature arising from special and peculiar circumstances, they were not recoverable.

H It seems to me that all the damages claimed by the plaintiffs arising out of the hindrance occasioned to them by the loss of their dredger in performing their contract with the Patras Port Committee were, to use the words of LORD BLACKBURN, of an exceptional nature arising from special and peculiar circumstances and they are irrecoverable in an action of tort, and would only be recoverable in an action for breach of contract if the party breaking the contract had notice at the I time of the contract that such damages would be the probable result of a breach.

So far I have dealt only with the case at common law. I do not think there is anything in the decisions in the Admiralty Court inconsistent with the rule in *Hadley* v. *Baxendale* (1). If a shipowner be deprived of a ship which has a special value to him because he has got the benefit of a charter at a good rate of freight, and is not entitled to substitute another vessel to perform that charter, the damage which he suffers by losing his ship, and, therefore, losing his charterparty freight, is damage which arises naturally in the usual course of things, because it is the usual course of things for vessels to be chartered. The vessel's engagements at the time of the loss are part of the value of that vessel to the owner. In the strict sense of the words a vessel like a dredger has not got a market value. You cannot go into the market on any day and buy an exact substitute for it, especially if you lose it when it is in the middle of the Mediterranean Sea. If a seller of goods which cannot be obtained in the market fails to perform his contract, the buyer may use a sub-contract of sale which he has made at an enhanced price as evidence of the value to him of the article which by the seller's breach of contract he has been deprived of: see *Borries* v. *Hutchinson* (37). It is clear that if a vessel which has been destroyed or delayed by the negligence of a defendant is under charter, what it would earn under the charter may be taken into account in estimating the loss occasioned to the owner by the temporary or permanent loss of his vessel: see *The Philadelphia* (4); *The Argentino* (6).

It seems to me that the right method of estimating the damages in this case is that the tribunal should ascertain the value to the owner of his vessel at the date of the loss, taking into account that it is a tool of his trade ordinarily used for the purposes of profit, and taking into account, if such be the fact, the existing engagements of the owner with respect to the particular vessel, but excluding, to use the words of BOWEN, L.J., everything in the nature of uncertain and speculative profits. The above method of estimating damages was the one which I think was used by GORELL BARNES, J., in *The Harmonides* (22), and by SIR FRANCIS JEUNE in *The Kate* (21), and the one which ought to have been adopted in the case under appeal. I do not think there is anything in *Polemis* v. *Furness Withy & Co.* (3) inconsistent with the above view. That case was concerned with the direct consequences of the wrongful act which occurred immediately after the act of negligence complained of. It was not concerned with consequences arising out of contracts made by a shipowner of a special nature giving rise to uncertain and speculative profits.

In my judgment, the plaintiffs will be adequately compensated in accordance with the rules of law applicable to their claim for damages if they receive the sum of £9,000 as the value to them of the dredger at the date of its loss, together with interest at 5 per cent. to the date of judgment. I think the appeal should be allowed, the judgment set aside, and judgment entered for the sum arrived at by adding to the £9,000 5 per cent. interest up to the date of this judgment, and that the plaintiffs should be allowed their costs of the appeal to the judge, and of the appeal from the judge to this court. Where I think the learned judge missed his true course in his very breezy judgment was that he paid no attention to the two principles which I have stated in the early part of this judgment, and seems to have thought that in questions relating to the measure of damage the Admiralty Court might pursue a course of its own.

SLESSER, L.J.—I have read the judgments of SCRUTTON, L.J., and GREER, L.J., in this case. I agree with their conclusions and the reasons for those conclusions by them stated, which I do not repeat. In my opinion, it is impossible to say, in the circumstances of this case, that more should be taken into account as the direct, natural, and unexceptional consequences of the defendants' wrongful acts than the actual value to the plaintiffs of the dredger as such at the date of its loss, together with interest as stated by SCRUTTON, L.J. The appeal, consequently, must be allowed on the terms stated.

The plaintiffs appealed to the House of Lords.

W. N. Raeburn, K.C., and *Lewis Noad, K.C.*, for the appellants.

James Dickinson, K.C., and *Main Thompson* for the respondents.

The House took time for consideration.

Feb. 28. The following opinions were read:

LORD WRIGHT.—On Nov. 26, 1928, the respondents' steamship *Edison*, in proceeding to sea from the port of Patras, fouled the moorings of the appellants' dredger *Liesbosch* and did not free them until she had carried the *Liesbosch* into the open sea, where the *Liesbosch*, being without crew on board, filled with water in the heavy sea which was running, sank, and became a total loss. The appellants issued a writ in the Admiralty Division, and when the respondents admitted sole liability for the collision and loss (which they did not do until May 7, 1930) the claim was referred to the registrar and merchants to assess the damages.

The appellants, who are civil engineers, had entered into a contract, dated March 4, 1927, with the harbour board of Patras for the construction, under heavy penalties, of piers and quay walls at Patras. The work involved, among other things, a considerable amount of dredging; for this work at the date of the accident the appellants were using the *Liesbosch*, which they had purchased in October, 1927, in Holland, for £4,000, to which must be added as part of the cost the sum of £2,000 expended in fitting her out and transporting her to Patras. She was insured for £5,520. There was evidence that in Holland there were available for purchase by the appellants in and about December, 1928, one or more dredgers by which the *Liesbosch* might have been replaced, but the appellants did not then take steps to purchase a dredger in substitution for the *Liesbosch*, all their liquid resources being engaged in the contract undertaking and in the deposit which under the contract they had made. In January, 1929, the Patras harbour authorities threatened to cancel the contract and forfeit the deposit unless the *Liesbosch* were replaced within a certain time. The appellants, owing to their financial embarrassments being unable to buy a dredger, decided to hire one in the Mediterranean, and on May 11, 1929, hired from Ancona, in Italy, a dredger called the *Adria*, at a high rate of hire. The *Adria* was somewhat larger than the *Liesbosch*, but more expensive to work, and in order to obtain her the appellants were compelled along with her also to take on hire a tug and two hopper barges. On June 17, 1929, the *Adria* and her attendant fleet arrived at Patras and commenced to work on the contract; until then work had been suspended since the date when the *Liesbosch* was lost, as the harbour board would not let the appellants do other work until dredging was resumed. The monthly rate of hire of the *Adria* proved so burdensome to the appellants that the harbour board, in order to help them, purchased the *Adria*, under a contract dated June 30, 1930, from the Italian owners for a sum in cash, and re-sold her to the appellants for the same sum, payable in forty-eight monthly instalments at 6 per cent. interest.

The amended claim of the appellants before the registrar and merchants was filed on Nov. 14, 1930. It was presented in five parts, which were as follows: Part I was for the price paid for the substituted *Adria*, namely, £9,177 3s. 4d., and £882 7s. 2d. for expenses connected with the purchase. Part II was for £2,922 1s. 2d. for overhead charges and interest on capital invested, as being thrown away during the period when work was stopped—that is, from the date when the *Liesbosch* was lost until the *Adria* commenced work. Part III was for £6,836 9s. 8d., being for hire paid for the *Adria* and her satellites from May 4, 1929, to July 3, 1930. Part IV was for £1,078 16s. 1d., being for the extra expense in working the *Adria* while on hire over what would have been the cost of working the *Liesbosch*. Part V was for £2,353 10s. 3d. for profit alleged to have been lost owing to the stoppage of work under the contract between the date of the loss of the *Liesbosch* and the date when the *Adria* recommenced work.

On this claim the registrar made his report on May 7, 1931. In substance he admitted the appellants' claim, though he reduced it from £23,000 odd to £19,820; in particular, under Part V he held that, as the appellants were able, after the *Adria* arrived, to resume the contract, there was no loss of profit during the period of delay, but merely a loss of interest, which he put at rather over £700. The claim was put forward in drachmas, but I have taken the agreed rate of exchange. He made no finding as to the value of the *Liesbosch* at the date of the collision, but held in effect that:

> "Having regard to all the existing circumstances, such as the severe terms of their contract in regard to penalties and their want of liquid resources,"

the plaintiffs had acted reasonably and that the hiring of the *Adria* to complete an important contract with a public body was a direct and natural result of the collision. He did not in terms find that, but for financial reasons, the *Liesbosch* could have been replaced by purchasing an equivalent dredger, say, in Holland, at a reasonable price and with little delay, but his finding that it was admitted by the appellants that they had not then the means to purchase a dredger does not contradict the evidence led by the respondents that there were in Holland at the date of the collision suitable dredgers for sale.

On objections being taken to the registrar's report, LANGTON, J., before whom the matter came, disallowed the respondents' objections that the damages claimed were too remote and confirmed the report, with a trifling variation. On appeal, the Court of Appeal allowed the appeal, with costs, holding that the registrar had proceeded on a wrong basis in allowing damages which were too remote in law, and ordered a judgment to be entered for £9,177 3s. 4d., with interest, from Nov. 26, 1928, to the date of their order, at 5 per cent. From this order the matter comes before your Lordships' House.

The substantial issue is what in such a case as the present is the true measure of damage. It is not questioned that when a vessel is lost by collision due to the sole negligence of the wrong-doing vessel the owners of the former vessel are entitled to what is called restitutio in integrum, which means that they should recover such a sum as will replace them so far as can be done by compensation in money, in the same position as if the loss had not been inflicted on them, subject to the rules of law as to remoteness of damage. The respondents contend that all that is recoverable as damages is the true value to the owners of the lost vessel, as at the time and place of loss. Before considering what is involved in this contention, I think it desirable to examine the claim made by the appellants, which found favour with the registrar and LANGTON, J., and which in effect is that all their circumstances, in particular their want of means, must be taken into account, and hence the damages must be based on their actual loss, provided only that, as the registrar and the judge have found, they acted reasonably in the unfortunate predicament in which they were placed, even though but for their financial embarrassment they could have replaced the *Liesbosch* at a moderate price and with comparatively short delay.

In my judgment, the appellants are not entitled to recover damages on this basis. The respondents' tortious act involved the physical loss of the dredger; that loss must somehow be reduced to terms of money. But the appellants' actual loss in so far as it was due to their impecuniosity arose from that impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort; the impecuniosity was not traceable to the respondents' acts, and, in my opinion, was outside the legal purview of the consequences of these acts. The law cannot take account of everything that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection, because "it were infinite to trace the cause of causes," or consequences of consequences. Thus, the loss of a ship by collision due to the other vessel's sole fault may force the shipowner into bankruptcy, and that, again, may involve his family in suffering, loss of education, or opportunities, in life, but no such loss could be recovered from the wrongdoer. In the varied web of affairs the law must abstract some consequences as relevant, not, perhaps, on grounds of pure logic but simply for practical reasons. In the present case, if the appellants' financial embarrassment is to be regarded as a consequence of the respondents' tort, I think it is too remote, but I prefer to regard it as an independent cause, though its operative effect was conditioned by the loss of the dredger.

The question of remoteness of damage has been considered in many authorities and from many aspects, but no case has been cited to your Lordships which would justify the appellants' claim. A dictum was quoted by counsel for the appellants from the speech of LORD COLLINS in *Clippens Oil Co., Ltd.* v. *Edinburgh and District Water Trustees* (38) ([1907] A.C. at p. 303):

> "It was contended that this implied that the defenders were entitled to measure the damages on the footing that it was the duty of the company to do

> all that was reasonably possible to mitigate the loss, and that if, through lack of funds, they were unable to incur the necessary expense of such remedial measures the defenders ought not to suffer for it. If this were the true construction to put upon the passage cited, I think there would be force in the observation, for, in my opinion, the wrongdoer must take his victim talem qualem, and if the position of the latter is aggravated because he is without the means of mitigating it, so much the worse for the wrongdoer, who has got to be answerable for the consequences flowing from his tortious act.''

But as I think it is clear that Lord Collins is here dealing not with measure of damage, but with the victim's duty to minimise damage, which is quite a different matter, the dictum is not in point.

Polemis v. *Furness, Withy & Co.* (3), a case in tort of negligence, was cited as illustrating the wide scope possible in damages for tort. That case, however, was concerned with the immediate physical consequences of the negligent act, and not with the co-operation of an extraneous matter such as the plaintiffs' want of means. I think, therefore, that it is not material further to consider that case here. Nor is the appellants' financial disability to be compared with that physical delicacy or weakness which may aggravate the damage in the case of personal injuries, or with the possibility that the injured man in such a case may be either a poor labourer or a highly paid professional man. The former class of circumstances goes to the extent of actual physical damage, and the latter consideration goes to interference with profit-earning capacity; whereas the appellants' want of means was, as already stated, extrinsic.

I agree with the conclusion of the Court of Appeal that the registrar and Langton, J., proceeded on a wrong basis, and that the damages must be assessed as if the appellants had been able to go into the market and buy a dredger to replace the *Liesbosch*. On that basis it is necessary to decide between the conflicting views put forward, on the one hand, by the respondents, that all that is recoverable is the market price of the dredger, together with cost of transport to Patras, and interest, and, on the other hand, by the appellants, that they are also entitled to damages in addition for loss during the period of inevitable delay before the substituted dredger could arrive and start work at Patras. The respondents, in support of their contention, relied on *The Columbus* (18), in which Dr. Lushington refused in respect of a fishing vessel any compensation save on the basis of the smack's market value, with interest; he gave as an illustration of the same principle the case of an East Indiaman with a valuable freight on board, sunk in collision by a wrong-doing vessel; in that case, as in the case of the humble fishing vessel, the compensation would, in his opinion, be thus limited. He said:

> ''The true rule of law in such a case would, I conceive, be this, namely, to calculate the value of the property destroyed at the time of the loss and to pay it to the owners as full indemnity to them for all that may have happened, without entering for a moment into any other consideration. If the principle contended for by the owners of the smack were once admitted, I see no limit in its application to the difficulties which would be imposed upon the court. It would extend to almost endless ramifications, and in every case I might be called upon to determine, not only the value of the ship but the profits to be derived on the voyage in which she might be engaged, and, indeed, even to those of the return voyage, which might be said to have been defeated by the collision.''

But, for all the eminence of Dr. Lushington, the simple but arbitrary rule which he thus enunciated has not prevailed, at least as regards ships under profitable freight engagement. Perhaps, it was felt that, in the words afterwards used by Lord Sumner in *The Chekiang* (30) ([1926] A.C. at p. 643),

> ''The measure of damages ought never to be governed by mere rules of practice, nor can such rules override the principles of the law on this subject.''

LORD SUMNER also distinguishes "a rule of thumb" from what is binding law. In these cases the dominant rule of law is the principle of restitutio in integrum, and subsidiary rules can be justified only if they give effect to that rule. A view of the practice of the Admiralty Court differing from that of DR. LUSHINGTON was stated by SIR ROBERT PHILLIMORE in *The Northumbria* (39), and in *The Kate* (21) it was expressly held that in the case of a vessel being totally lost by collision, while on her way in ballast to load under a charter, the proper measure of damages against the vessel solely liable for the collision was the value of the vessel at the end of her voyage, plus the profits lost under the charterparty. The same principle was extended in *The Racine* (5) to a vessel sunk while on her voyage under charter from her home port to a foreign port, from which port she was chartered to proceed to another port, from which again she was chartered back to her home port; it was held that the owner was entitled to recover the presumed net loss of freight on all three charters, less 10 per cent. for contingencies and her value on her return to the home port at the end of the three charters. But in *The Philadelphia* (4) it was decided that the value must be determined as at the time of the loss (the market had in that case risen between the date of the loss and the presumed date of her arrival at the end of the voyage), together with the proper net sum in respect of her existing charters, subject to allowance for contingencies.

It is now clear, accordingly, that the arbitrary rule suggested by DR. LUSHINGTON is not law, though the decisions just cited, however just in the result, cannot be regarded as logical or complete. The true rule seems to be that the measure of damages in such cases is the value of the ship to her owner as a going concern at the time and place of the loss. In assessing that value regard must naturally be had to her pending engagements, either profitable or unprofitable. The rule, however, obviously requires some care in its application; the figure of damages is to represent the capitalised value of the vessel as a profit-earning machine, not in the abstract, but in view of the actual circumstances. The value of prospective freights cannot simply be added to the market value, but ought to be taken into account in order to ascertain the total value for purpose of the damage, since, if it is merely added to the market value of a free ship, the owner will be getting pro tanto his damages twice over. The vessel cannot be earning in the open market, while fulfilling the pending charter or charters. Again, the present valuation of a future charter becomes a matter of difficulty in the case even of successive charters, still more in the case of long charters, such, for instance, as that in *Lord Strathcona Steamship Co., Ltd.* v. *Dominion Coal Co., Ltd.* (40), which was for ten St. Lawrence seasons, with extension at the charterers' option for further eight seasons.

The assessment of the value of such a vessel at the time of loss, with her engagements, may seem to present an extremely complicated and speculative problem. But different considerations apply to the simple case of a ship sunk by collision when free of all engagements, either being laid up in port or being a seeking ship in ballast, though intended for employment, if it can be obtained, under charter or otherwise. In such a case the fair measure of damages will be simply the market value, on which will be calculated interest, at and from the date of loss, to compensate for delay in paying for the loss.

The contrasted cases of a tramp under charter or a seeking tramp do not, however, exhaust all the possible problems in which must be sought an answer to the question what is involved in the principle restitutio in integrum. I have only here mentioned such cases as the step to considering the problem in the present case. Many, varied and complex are the types of vessels and the modes of employment in which their owners may use them. Hence the difficulties constantly felt in defining rules as to the measure of damages. I think it impossible to lay down any universal formula. A ship of war, a supply ship, a lightship, a dredger employed by a public authority, a passenger liner, a trawler, a cable ship, a tug boat (to take a few instances), all may raise quite different questions before their true value can be ascertained. The question here under consideration is again different; the *Liesbosch* was not under charter nor intended to be chartered, but, in fact, was being employed by the owners in the normal course of their business as civil engineers, as an essential part of the plant which they were using in performance of their contract at Patras. Just as, in the other cases considered, what must be ascertained is the real value to the owner as part of his working plant and ignoring remote considerations at the time of loss; if it were possible without delay to replace a comparable dredger exactly as and where the *Liesbosch* was at the market price, the appellants would have suffered no damage save the cost of doing so—that is, in such an assumed case the market price, the position being analogous to that of the loss of goods for which there is a presently available market. But that is in this case a merely fanciful idea. Apart from any consideration of the appellants' lack of means, some substantial period was necessary to procure at Patras a substituted dredger. Hence, I think, the appellants cannot be restored to their position before the accident unless they are compensated, if I may apply the words of LORD HERSCHELL in *The Greta Holme* (31) ([1897] A.C. at p. 605): "In respect of the delay and prejudice caused to them in carrying out the works entrusted to them." He adds: "It is true these damages cannot be measured by any scale." LORD HERSCHELL was there dealing with damages in the case of a dredger which was out of use during repairs, but in the present case I do not think the court is any the more entitled to refuse, on the ground that there is difficulty in calculation, to consider as an element in the value of the dredger to the appellants the delay and prejudice in which its loss involved them; nor is it enough to take the market value—that is, the purchase price (say, in Holland), even increased by the cost of transport—and add to that 5 per cent. interest as an arbitrary measure. It is true that the dredger was not named in the contract with the Patras harbour authority, nor appropriated to it; but it was actually being used, and was intended to be used, by the appellants for the contract work.

I am not clear if that view is what is meant by SCRUTTON, L.J., in his judgment in this case when he quotes the words of GORELL BARNES, J., in *The Harmonides* (22) ([1903] P. at p. 6):

> "The real test is: What is the value of the vessel to the owners as a going concern at the time the vessel was sunk?"

and continues:

> "I should add at that place, for if the vessel had to be replaced at Patras expense and time might have been added to the cost of the vessel replaced."

In *The Harmonides* (22) GORELL BARNES, J., had to consider in the case of an Atlantic passenger liner not her mere value in the general market, but her actual value to her owner in a business sense; he refused to confirm the registrar's report putting her value in the market at £18,000, but heard fresh evidence and fixed the value at £31,000, as being the real value to the owners. The problem there was in principle the same as the problem in this case. A nearer parallel is afforded by *Clyde Navigation Trustees* v. *Bowring Steamship Co.* (41), in which the Court of Session in Scotland, affirming LORD MORISON, held that the plaintiffs, whose dredger had been rendered a total loss by the negligent navigation of the defendants' vessel, were entitled, if they were to be placed in the same position as if the injury had not been done them, to have a value placed on their dredger as the value to them, based on three elements: (i) The cost of procuring a comparable dredger; (ii) the cost of adapting it to their requirements; (iii) compensation for loss of user. The court rejected the contention that there was any absolute rule fixing the compensation at the market value, with interest, from the date of the collision. The late MR. REGISTRAR ROSCOE, in his valuable work on DAMAGES IN MARITIME COLLISION (3rd Edn., p. 42), cites *The Pacaure* (42), a lightship which was sunk in collision. The owners, the Mersey Docks Harbour Board, were allowed, in addition to the value of the sunken vessel, the cost of a substituted vessel for 366 days. I should prefer to state that such extra cost was an element in assessing the loss of value to the owners of the lightship, though it may be that no different A result would follow from the difference in statement.

In my judgment, similar principles are applicable to the present case; the difficulty in applying them is that the evidence called before and the findings made by the registrar and merchants were directed, as explained above, to a different measure of damage. SCRUTTON, L.J., thus sums up the position:

B

> "But what the owners have lost is their dredger. If the court gives them their dredger at the time and place of loss as a profit-earning dredger, and gives them interest on that value from the time of the loss to the judgment, I do not see any room for a further award of profits";

and he goes on to describe the indirect losses which they claim in expense thrown away over the whole period they were without a dredger, and the heavy outlay C incurred in hiring and working the *Adria*, and for loss of profits. What SCRUTTON, L.J., in fact, awards as the value of the dredger to the appellants at the time and place of loss is £9,177, which was what was paid for the *Adria* in September, 1930, but, as the lord justice points out, that fact is not evidence of the market value of the *Liesbosch* in November, 1928, when the *Liesbosch* was lost, any more than is the cost to them of the *Liesbosch* when they bought her or the amount for which D she was insured. It might seem to follow that SCRUTTON, L.J., is intending to give some compensation, beyond the actual cost of replacing the *Liesbosch*, for delay and prejudice in the contract work; if not I do not see how he is giving the value of the dredger to the owner at Patras as a factor in his business as a going concern. It is on the true value so ascertained that the interest at 5 per cent. from the date of the collision will run, as further damages, on the principles of E the Court of Admiralty stated by SIR CHARLES BUTT in *The Kong Magnus* (43)—that is, damages for the loss of the use of the money representing the lost vessel as from the date of the loss until payment.

Counsel for the appellants has pressed that the matter should be sent back to the registrar and merchants for the amount of damages to be assessed on the principles accepted by this House. I have felt grave doubts about this as I am F not quite sure on what principle the Court of Appeal have arrived at the sum they awarded. But the best opinion that I can form is that they intended to give simply the replacement cost, without including in the value any allowance for disturbance and prejudice during the necessary period of delay. If that is so, though I agree with their disallowance of the claim as put forward, I do not agree with the disallowance, in ascertaining the value, of anything beyond the cost of G replacement. I do not think, in a case like this, interest is a compensation for that factor, because I think that factor must be something to be taken into account in arriving at the figure of value on which interest must run. On the whole, I think that counsel is right in urging that the matter should be referred back to the registrar and merchants to ascertain the true value on the principles I have stated. From these principles it follows that the value of the *Liesbosch* to the H appellants, capitalised as at the date of the loss, must be assessed by taking into account: (i) the market price of a comparable dredger in substitution; (ii) costs of adaptation, transport, insurance, &c., to Patras; (iii) compensation for disturbance and loss in carrying out their contract over the period of delay between the loss of the *Liesbosch* and the time at which the substituted dredger could reasonably have been available for use in Patras, including in that loss such items I as overhead charges, expenses of staff and equipment, and so forth, thrown away, but neglecting any special loss due to the appellants' financial position. On the capitalised sum so assessed interest will run from the date of the loss.

The result is that the appellants have substantially failed in the appeal because they have failed in their claim that the judgment of LANGTON, J., should be restored, and accordingly they should pay to the respondents three-quarters of their costs of this appeal. The order of the Court of Appeal will be varied by substituting for the judgment for £9,177 3s. 4d. a judgment for such sum as the registrar and merchants may find on reference back to them. Save as so varied the order of the Court of Appeal will stand. I cannot help expressing a hope that the parties may now compose this remaining difference without further proceeding in the registry.

LORD BUCKMASTER, LORD WARRINGTON, LORD TOMLIN, and **LORD RUSSELL OF KILLOWEN** concurred.

Order varied.

Solicitors: *William A. Crump & Son*; *Thomas Cooper & Co.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

Re WALTER SYMONS, LTD.

[Chancery Division (Maugham, J.), October 16, 1933]

[Reported [1934] Ch. 308; 103 L.J.Ch. 136; 150 L.T. 349; [1933] B. & C.R. 237]

Company—Winding-up—Rights of preference shareholders—Memorandum giving right to "a fixed cumulative preferential dividend" ranking "both as regards dividends and capital in priority to the ordinary shares"—No dividend declared—Right of preference shareholders to payment of arrears of dividend in priority to repayment of capital to ordinary shareholders.

A company's capital was divided into preference and ordinary shares. Its memorandum of association provided that the preference shares "shall confer the right to a fixed cumulative preferential dividend at the rate of twelve per cent. per annum . . . and shall rank both as regards dividends and capital in priority to the ordinary shares." The company's articles of association provided, inter alia, that the company in general meeting might declare a dividend to be paid to its members and that no larger dividend should be declared than that recommended by the directors, but that the company in general meeting might declare a smaller dividend, and, further, that no dividend should be payable except out of the profits of the company and that no dividend should carry interest as against the company.

No dividend was declared or paid for the years ending March 31, 1931, and March 31, 1932, respectively, or for the period from April 1, 1932, to September 30, 1932, when a resolution for winding-up was passed. After payment of the company's debts and repayment of the preference capital there remained a further sum for distribution.

Held: the words "and shall rank both as regards dividends and capital in priority to the ordinary shares" entitled the preference shareholders to receive both repayment of their capital and their arrears of dividend at twelve per cent., even though such dividends had not been declared, in priority to the repayment of the capital paid up on the ordinary shares.

Notes. Distinguished: *Re Wood, Skinner & Co.*, [1944] Ch. 323. Applied: *Re F. De Jong & Co.*, [1946] Ch. 211; *Re E. W. Savory, Ltd.*, [1951] 2 All E.R. 1036.

As to the position of preference shareholders in a winding-up, see 6 Halsbury's Laws (3rd Edn.) 680, para. 1346, and for cases on the subject see 10 Digest (Repl.) 1067–1074, *7401–7432*.

Cases referred to:

(1) *Re W. J. Hall & Co., Ltd.*, [1909] 1 Ch. 521; 78 L.J.Ch. 382; 100 L.T. 692; 16 Mans. 152; 10 Digest (Repl.) 1011, *6952*.

(2) *Re New Chinese Antimony Co., Ltd.*, [1916] 2 Ch. 115; 85 L.J.Ch. 429; 114 L.T. 989; 60 Sol. Jo. 513; [1916] H.B.R. 8; 10 Digest (Repl.) 1070, *7414*. A

(3) *Re Springbok Agricultural Estates, Ltd.*, [1920] 1 Ch. 563; 89 L.J.Ch. 362; 123 L.T. 322; 64 Sol. Jo. 359; [1920] B. & C.R. 107; 10 Digest (Repl.) 1070, *7415*.

(4) *Re Roberts and Cooper, Ltd.*, [1929] 2 Ch. 383; 98 L.J.Ch. 450; 141 L.T. 636; [1929] B. & C.R. 74; Digest Supp. B

(5) *Re William Metcalfe & Sons, Ltd.*, [1933] Ch. 142; 102 L.J.Ch. 121; 148 L.T. 82; 49 T.L.R. 23; [1933] B. & C.R. 35, C.A.; 10 Digest (Repl.) 1072, *7428*.

(6) *Re Dominion Tar and Chemical Co., Ltd.*, [1929] 2 Ch. 387; 98 L.J.Ch. 448; 142 L.T. 5; 45 T.L.R. 601; [1929] B. & C.R. 71; 10 Digest (Repl.) 1071, *7417*. C

(7) *Re Crichton's Oil Co.*, [1902] 2 Ch. 86; 71 L.J.Ch. 531; 86 L.T. 787; 18 T.L.R. 556; 9 Mans. 402, C.A.; 10 Digest (Repl.) 1068, *7406*.

Summons in a Winding-up.

Walter Symons, Ltd., was incorporated in 1906 under the Companies Acts, 1862 to 1900. On Sept. 30, 1932, a special resolution was passed at an extraordinary general meeting of the company that it be wound up, and the applicant on this summons was appointed liquidator. At this date the company's nominal capital was £10,000 divided into 12,000 preference shares of 10s. each, all issued and fully paid up, and 16,000 ordinary shares at 5s. each. D

The company's memorandum of association in force at the commencement of the winding-up provided by cl. 5 that the preference shares E

> "shall confer the right to a fixed cumulative preferential dividend at the rate of 12 per cent. per annum on the capital for the time being paid up thereon, and to half the distributable surplus profits which in respect of each year shall remain after paying or providing for the payment of a dividend for such year at the rate of 10 per cent. per annum on the capital for the time being paid up on the ordinary shares, and shall rank both as regards dividends and capital in priority to the ordinary shares, but shall not confer the right to any further participation in profits or assets. . . ." F

The company's articles of association in force at the date of the resolution to wind-up provided (inter alia) as follows:

> Article 98: ". . . the profits of the company, which it shall from time to time be determined to divide in respect of any year or other period shall be applied (first) in paying to the holders of the preference shares a fixed cumulative preferential dividend at the rate of 12 per cent. per annum, (secondly) in paying a dividend at the rate of 10 per cent. per annum on the capital paid up on the ordinary shares, and thirdly, as to one-half of such distributable surplus profits in paying a further dividend to the holders of the preference shares, and as to the other half of such distributable surplus profits in paying a further dividend to the holders of the ordinary shares." G H
>
> Article 99: "Where capital is paid up on any shares in advance of calls upon the footing that the same shall carry interest, such capital shall not whilst carrying interest confer a right to participate in profits."
>
> Article 100: "The company in general meeting may declare a dividend to be paid to the members according to their rights and interests in the profits." I
>
> Article 101: "No larger dividend shall be declared than is recommended by the directors, but the company in general meeting may declare a smaller dividend."
>
> Article 102: "No dividend shall be payable except out of the profits of the company, and no dividend shall carry interest as against the company."

Dividends at the full rate were paid on the company's preference shares up to and including the year ending March 31, 1930. No dividend was paid on these

A shares for the years ending March 31, 1931, and March 31, 1932, respectively, or from April 1, 1932, to the date of liquidation. After payment of the company's debts, the repayment of the capital paid up on the preference shares and making provision for the costs of the winding-up, the liquidator estimated that about £1,750 would remain for distribution. Certain preference shareholders claimed to be paid, out of this surplus, sums representing dividends on their shares for the B period since March 31, 1930, and (or) otherwise to share in these assets in priority to any repayment of capital to the ordinary shareholders.

The liquidator by this summons asked (inter alia) whether, upon the true construction of the company's memorandum and articles of association and in the events which had happened, the holders of preference shares at the date of liquidation were entitled to receive, in priority to the repayment of the capital paid up on C the ordinary shares, any and, if so, what sums in respect of dividend or arrears of dividend on their preference shares, or whether, after repayment of the capital paid up on the preference shares, the whole of the company's assets should be distributed among the company's ordinary shareholders, or how otherwise they should be dealt with.

D *H. S. G. Buckmaster* for the liquidator.

Wilfrid M. Hunt for the preference shareholders.—Clause 5 of the memorandum can be construed to mean that in a winding-up the preference shares rank in priority to the ordinary shares. [He referred to *Re W. J. Hall & Co., Ltd.* (1), *Re New Chinese Antimony Co., Ltd.* (2), *Re Springbok Agricultural Estates, Ltd.* (3), *Re Roberts and Cooper, Ltd.* (4), *Re William Metcalf & Sons, Ltd.* (5), and E *Re Dominion Tar and Chemical Co.* (6).]

D. Ll. Jenkins for the ordinary shareholders.—As there was no resolution for payment of arrears of dividend, the preference shareholders were not entitled to be paid such arrears: *Re Roberts and Cooper, Ltd.* (4), *Re Crichton's Oil Co.* (7). [He also referred to BUCKLEY ON THE COMPANIES ACTS (11th Edn., p. 449).]

F **MAUGHAM, J.**—The point that comes before me for decision is by no means free from doubt. It is only after some experience that one appreciates the infinite number of combinations and permutations that company draftsmen are capable of using in what are called their "capital clauses" in the drafting of company memoranda and articles.

In the present case the clause which falls for construction in the winding-up of G the company is cl. 5 of the memorandum. The company was formed in the year 1906 and it was wound up voluntarily in the year 1932. The clause in question confers on the preference shareholders

> "the right to a fixed cumulative preferential dividend at the rate of 6 per cent. [which has since been increased to 12 per cent.] per annum on the capital for the time being paid up thereon, and to half the distributable surplus profits H which in respect of each year shall remain after paying or providing for the payment of a dividend for such year at the rate of 10 per cent. per annum on the capital for the time being paid up on the ordinary shares,"

and provides that their shares

> I "shall rank both as regards dividends and capital in priority to the ordinary shares, but shall not confer the right to any further participation in profits or assets."

Together with that clause in the memorandum one has to consider the effect of the various articles as to dividends, and particularly arts. 98 to 101 inclusive. They are substantially in the ordinary form, having regard to cl. 5 of the memorandum. They provide, amongst other things, that the company in general meeting may declare a dividend to be paid to the members according to their rights and interests in the profits; that no larger dividend shall be declared than is recommended by the directors; but that the company in general meeting may declare a smaller dividend; that is art. 101. Article 102 is: A

> "No dividend shall be payable except out of the profits of the company, and no dividend shall carry interest as against the company."

It is clear that, but for the words "and shall rank both as regards dividends and capital in priority to the ordinary shares," the preference shareholders would not be entitled to claim in a winding-up payment of the arrears of fixed cumulative preferential dividend at the rate of 12 per cent. The question, therefore, is reduced to this: What is the true meaning of the words that I have last cited? To my mind, it is reasonably clear on consideration that they refer to something which is to take place in the winding-up. Not only does that appear from the word "rank," but it also appears from the reference to capital, which of course would not be distributable if the company were a going concern; and, finally, the words "but shall not confer the right to any further participation in profits or assets" seem to me to point very strongly in favour of the view that it is a clause which in this case is dealing with what is to happen in the winding-up. So reading it, I have the earlier part of the clause, which confers a cumulative preferential dividend at a fixed rate on the capital paid up on the preference shares and a right to half the distributable surplus profits of each year after paying 10 per cent. per annum for a particular year on the capital paid up on the ordinary shares. Then I read the subsequent clause, in effect, as if it said: "And in the winding-up the preference shares shall rank, both as regards dividends and capital, in priority to the ordinary shares." It is perfectly clear that no dividend has been declared in the case of this company for the years subsequent to March 31, 1930. It turns out that there is, as a result of the liquidation, a sufficient amount to pay the preference shareholders their capital in full, and there remains some £1,750 available for distribution among the persons entitled. I must also take it from the evidence that, at the date of the liquidation, there was a sum which had been put to general reserve account which might have been applied for the purposes of declaration of dividend on the preference shares, though, as I have already pointed out, no such dividend was declared or could be declared if the directors declined to recommend such a declaration. B C D E F

Now, how am I to construe the word "dividends" in the phrase "both as regards dividends and capital," regarding that, as I have said I do, as a phrase meaning "in the winding-up"? On the whole, though not without hesitation, I have come to the conclusion that the word "dividends" should be construed as meaning "arrears of fixed cumulative preferential dividend." This clause is dealing, at any rate in this place, with the rights of preference shareholders who are stated to be entitled as of right to a fixed cumulative preferential dividend. It is true that the directors had a power to withhold payment of that dividend, but without depriving the preference shareholders of their right at some future time to be paid. That is derived from the use of the word "cumulative," and I think the draftsman, when he penned this part of cl. 5, was regarding a right to that dividend as existing notwithstanding the winding-up, and he is here stating that both as regards the arrears of fixed cumulative preferential dividend and as regards capital the preference shareholder is entitled to priority over the ordinary shares and I so decide. G H

The cases which have been properly referred to are, every one of them, cases which depend on the particular language used, and I do not conceive that in coming to the conclusion at which I have arrived I am in any way departing from any principle which is laid down in any of those cases; nor do I think I should be performing a useful task if I stated the facts in regard to those cases, which, after all, can only be understood by very attentive consideration of the memoranda and articles which were concerned. I

I shall, therefore, decide that, upon the true construction, the holders of the preference shares are entitled to receive in priority to the repayment of capital

A paid up on the ordinary shares the arrears of dividend on their preference shares at 12 per cent.

Solicitors: *Hair & Co.*

[*Reported by* MISS B. A. BICKNELL, *Barrister-at-Law.*]

B

C COLCLOUGH *v.* COLCLOUGH AND FISHER

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), April 5, 6, 1933]

[Reported [1933] P. 143; 102 L.J.P. 87; 149 L.T. 287; 49 T.L.R. 434; 77 Sol. Jo. 338]

Variation of Settlement—Powers of appointment on spouses' second marriages— D *Child's interests—Limitation of powers of appointment by court—Supreme Court of Judicature (Consolidation) Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 192 *—Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 25.

A marriage settlement gave husband and wife each power, if there were only one child of the marriage, to withdraw two-thirds of their respective funds on re-marriage and to re-settle the sums withdrawn on the subsequent spouse E for life and then on the issue of the subsequent marriage, but so that no child of a subsequent marriage should take a larger interest than the child of the marriage. There was only one child of the marriage, which was dissolved, on the husband's petition, on the ground of the wife's adultery. The husband was given custody of the child.

Held: (i) it was unnecessary to interfere with the husband's power of F appointment in any way in order to secure the well-being of the child, and this power should, therefore, be left intact;

(ii) the wife's power of appointment should be limited to one-third of her fund: *Whitton* v. *Whitton* (1), [1901] P. 348, *Hodgson Roberts* v. *Hodgson Roberts and Whitaker* (2), [1906] P. 142, and *Prinsep* v. *Prinsep* (3), [1929] P. 225, applied; *Alston* v. *Alston* (4), [1929] P. 311, explained and not followed; G *Duchess of Marlborough* v. *Duke of Marlborough* (5), [1901] 1 Ch. 165, explained and distinguished.

Notes: Section 192 of the Judicature Act, 1925, has been replaced and reproduced by s. 25 of the Matrimonial Causes Act, 1950.

Referred to: *Egerton* v. *Egerton*, [1949] 2 All E.R. 238.

As to variation of powers of appointment on re-marriage, see 12 HALSBURY'S H LAWS (3rd Edn.) 456, para. 1024, and for cases on the subject see 27 DIGEST (Repl.) 654–656, *6153–6174*. For the Matrimonial Causes Act, 1950, s. 25, see 29 HALSBURY'S STATUTES (2nd Edn.) 412.

Cases referred to:

(1) *Whitton* v. *Whitton*, [1901] P. 348; 71 L.J.P. 10; 85 L.T. 646; 27 Digest (Repl.) 643, *6063*.

I (2) *Hodgson Roberts* v. *Hodgson Roberts and Whitaker*, [1906] P. 142; 75 L.J.P. 48; 94 L.T. 621; 22 T.L.R. 395; 27 Digest (Repl.) 652, *6138*.

(3) *Prinsep* v. *Prinsep*, [1929] P. 225; 98 L.J.P. 105; 141 L.T. 220; 45 T.L.R. 376; 73 Sol. Jo. 429; 27 Digest (Repl.) 646, *6098*.

(4) *Alston* v. *Alston*, [1929] P. 311; 98 L.J.P. 155; 141 L.T. 542; 45 T.L.R. 642; 73 Sol. Jo. 544; 27 Digest (Repl.) 655, *6168*.

(5) *Duchess of Marlborough* v. *Duke of Marlborough*, [1901] 1 Ch. 165; 70 L.J.Ch. 244; 83 L.T. 578; 49 W.R. 275; 17 T.L.R. 137; 45 Sol. Jo. 116, C.A.; 40 Digest 591, *1260*.

(6) *Hartopp* v. *Hartopp and Akhurst*, [1899] P. 65; 68 L.J.P. 33; 80 L.T. 297; 15 T.L.R. 168; 27 Digest (Repl.) 651, *6134*.

Cross-Motions for variation of a registrar's report on variation of settlements after a decree absolute of divorce.

The parties were married in June, 1928. On the husband's petition a decree nisi for the dissolution of his marriage was pronounced on May 25, 1932, and he was given the custody of the only child, a girl of two years. The decree was made absolute on Dec. 5, 1932. The husband then presented a petition for variation of an ante-nuptial settlement dated June 11, 1928, whereby he had transferred to the trustees £30,000 War Loan (called the husband's fund), and the respondent wife had covenanted to transfer to the trustees funds (now amounting to some £20,000 in possession and about £8,000 in reversion) on trust. The income of the husband's fund was to be paid on protective trusts to the husband for his life and on his death to the wife for her life if she should survive him; the income of the wife's fund was to be paid to the wife for her life and on her death to the husband for his life, on protective trusts, if he should survive her. There were also the usual trusts on the death of husband and wife both as to capital and income for the children or remoter issue of the marriage, with ultimate trusts in default of issue in favour of the husband and wife respectively. Power was also given both to the husband and the wife on marrying again to withdraw part of the settled funds, two-thirds if there should be one child of the marriage (now dissolved) who attained a vested interest, and one-half if there should be two or more such children; and there was power to settle the sum so withdrawn on a subsequent spouse for his or her life and then on the issue of such subsequent marriage, but so that no child of a subsequent marriage should take a larger interest than a child of the marriage now dissolved. The settlement did not contain the usual clause limiting the powers specified to a subsequent marriage after the death of a spouse.

In his report, dated March 14, 1933, the registrar said that the petitioner was then twenty-eight and the respondent twenty-two years of age. The income from the petitioner's fund was £1,050 gross, and the respondent was receiving £930 a year gross from her fund, subject to a charge of £287 a year. She would eventually receive about £400 a year in addition when certain reversions fell into possession. The petitioner prayed that the respondent's interest in his fund should be extinguished; that his power of appointment under the settlement on a subsequent marriage should remain unrestricted; and that the power of the respondent so to appoint should be restricted to the immediate appointment of one-third of her fund or to one-half in favour of a husband taken after the death of the petitioner and of the children of such marriage. The respondent prayed, the report continued, for power to appoint one-half of her fund on a subsequent marriage. On behalf of the child it was submitted that the husband's power of appointment on a subsequent marriage should be limited to one-half of his fund, and the respondent's power should be limited to one-third of her fund, and should be allowed only in favour of a husband taken after the death of the petitioner and of issue of such second marriage.

The registrar referred to the ages of the parties and the interests of the child, who would benefit from the variation proposed by the petitioner by the acceleration of her (the child's) interest in the petitioner's fund through the extinction of the respondent's interest in the petitioner's fund and the limitation on the respondent's power of appointment in her fund. He submitted, inter alia, (i) that the respondent's interest in the petitioner's fund should be extinguished as if she had died in the petitioner's lifetime; (ii) that the petitioner's power of appointment be limited to one-half of his fund; (iii) that the respondent's power of appointment be limited to one-third of her fund.

The petitioner moved to vary the report so that he should be at liberty on a subsequent marriage to withdraw and settle two-thirds of his fund in accordance with the settlement. On a cross-motion the respondent asked the court to vary the report so as to allow her to withdraw and settle on a subsequent marriage not less than one-half of her fund, and to do so notwithstanding that it might be in the petitioner's lifetime.

Fergus Morton, K.C., and *Bush James* for the petitioner, the husband.—On variation the court either restricts the power of a guilty party to withdraw funds from a settlement or extends the power of the innocent party to withdraw. I have been unable to find any contested case in which the power of an innocent petitioner has been so restricted. That the usual course is to impose no such restriction is supported in Rayden and Mortimer on Divorce (1922, 3rd Edn. at p. 406), and there is no suggestion in Browne and Latey on Divorce (1931, 11th Edn. at pp. 236–237) that there has been any inclination to interfere with the rights of an innocent party. The order is right in respect of the respondent's power because the child would benefit by the limitation of that power. But as regards the petitioner the settlement set up a contractual right, and I know of no authority to show that it could be interfered with. Though the registrar probably had in mind the interest of the child, it would not be right to penalise the interests of the husband and issue by a later marriage for the benefit of the one child of the marriage. The prevailing course, indeed, has been to extend the innocent party's power, as illustrated in *Whitton* v. *Whitton* (1), where a petitioner's power of settlement was accelerated so as to be effective on a second marriage during the respondent's lifetime. The present case would be on all fours if the husband's power were limited so as not to arise until after the death of the wife, and he asked for a concession. If the court would accelerate the innocent party's power in a proper case, a fortiori, it must be very far from the purpose of s. 192 of the Judicature (Consolidation) Act, 1925, to penalise the petitioner and postpone his power. In *Hodgson Roberts* v. *Hodgson Roberts and Whitaker* (2) the original power of the petitioner to resettle one-third of his fund if he survived the respondent was accelerated as to one-third during the respondent's lifetime. There is a well-known form in Key and Elphinstone's Forms (12th Edn., vol. 2, p. 570), in which a postponed power was given, as in the settlement in *Hodgson Roberts* v. *Hodgson Roberts* (2), but probably the form in the present case was taken from Prideaux (22nd Edn., vol. 3, p. 240), where a precedent was given for the creation of an immediate power. The petitioner's power of resettlement should be left intact, but otherwise the report should stand.

H. W. Barnard for the respondent wife.—The respondent's power to withdraw immediately from the settled fund does not depend on survivorship as between the spouses, and therefore the respondent's existing power should be retained and be made exercisable during her lifetime. She is engaged to another man who had nothing to do with the divorce, and the co-respondent has left the country. If no order were made and the respondent married again she could appoint two-thirds out of her fund. The registrar has limited the withdrawal to one-third. I am asking for one-half. In *Alston* v. *Alston* (4) the guilty spouse was allowed to withdraw a considerable part of the fund. The point was not seriously contested, but it showed that the court had a free discretion.

R. H. Bayford for the child.—In *Hartopp* v. *Hartopp and Akhurst* (6) Sir Gorell Barnes held that a child should be placed in as nearly as possible the same position as if the marriage had not been dissolved. In the present case, if there had been no divorce the child could not have lost more than two-thirds of one of her parents' fund, even if the surviving parent had remained, but, if the registrar's report were confirmed, the child would lose two-thirds of the respondent's fund if she were allowed to appoint, and probably two-thirds of the petitioner's fund as well. To put the child in the same position as if there had been no divorce, the court could cut down the respondent's power of resettlement, or in part the petitioner's power. With regard to the point raised that to limit the petitioner's power would be a breach of his contractual right, I submit that if this was an agreement which provided for the separation of the parties about to marry, it is invalid as against public policy, as suggested in *Duchess of Marlborough* v. *Duke of Marlborough* (5).

R. T. Monier-Williams for the trustees. The trustees support the limitation of the respondent's power, but never contemplated any limitation of the petitioner's.

Morton in reply.—In *Prinsep* v. *Prinsep* (3) ([1929] P. at p. 236), Hill, J., reiterated that settlements ought not to be interfered with further than was necessary for making proper provision for the injured spouse and children of the marriage.

Cur. adv. vult.

April 6. **LANGTON, J.**—The question of variation of the marriage settlement has been discussed before the registrar with both parties, the trustees, and the child of the marriage separately represented by counsel.

The quite short points of this motion are that the registrar recommends, in head 2 of his submissions, that

> "the power given to the petitioner to withdraw a portion of his fund and settle such portion upon a subsequent marriage be limited to one-half of his fund."

Under the marriage settlement the limitation was two-thirds, and all that the petitioner is asking for is that his power should not be in any way restricted, in a word, that he should be left as he was under the marriage settlement. No one denies that under s. 192 the court has ample power to deal with these matters in any way that seems to the court good and right for the benefit of the parties, but from time to time the judges of this Division have laid down what they think to be the wise and proper principles on which to proceed, and I see no reason why I should wish to depart from those principles in these cases. One expression with which I am in entire agreement is that of Sir Francis Jeune in *Whitton* v. *Whitton* (1), in which he said ([1901] P. at p. 353):

> "But one has in these cases to consider what is really for the benefit of the children, because I think the authorities show that nothing must be done that on the whole would be for the disadvantage of the children. This does not so much turn on the words of the Act of Parliament, but generally on the principle that the children, being innocent parties, ought not to have their interests injuriously affected by the conduct of either of their parents."

Nobody, I should think, would wish to dissent from that. Sir Gorell Barnes in *Hodgson Roberts* v. *Hodgson Roberts and Whitaker* (2) made this observation:

> "Where a younger life or lives is or are obliterated from consideration and the settled funds are cleared of that life or lives, it is not unreasonable that some benefit should be conferred on the innocent party which would not be a substantial detriment to the child and is the more reasonable from the fact of the petitioner being a comparatively young man."

In this case the petitioner is twenty-eight years of age and the respondent is twenty-two, and it might not, therefore, appear surprising if the petitioner had come to ask that his powers, instead of being curtailed, should be extended. He has not asked for anything of the kind. He has merely asked to be left as he was, and no case has been adduced to me save one, which I will notice in a moment, in which the innocent party in the case has suffered a curtailment of his powers. In that case, *Alston* v. *Alston* (4), the point was not seriously argued in court and may, therefore, have been the subject of compromise. Hill, J., made a general statement for guidance in these matters in *Prinsep* v. *Prinsep* (3). He says this ([1929] P. at p. 236):

> "The main object of variation is to make proper provision for the injured spouse and the children of the marriage, and primâ facie settlements ought not to be interfered with further than is necessary for that purpose. But the court which has annulled the marriage must not only protect the injured party, but also must be fair to the wrongdoing party."

I have cited those passages because they all seem useful to bear in mind in dealing with matters of this kind. It must not be supposed that, because I have

A arrived at a slightly different view to the view put forward by the registrar, I am suggesting that he has not acted in accordance with those passages, but I am impressed in this case with the fact that the original settlement reserved a certain power to the innocent petitioner, and I cannot see that it is necessary in order to secure the well-being of this child that the petitioner's power should in any way be interfered with. It seems to me that the child's position is sufficiently secured, B having regard to the ages of the parties, to the petitioner's position in life, and to the bulk of the fund that exists. They are, all of them, material matters, and the child's position with regard to all those matters is sufficiently secured without any variation of the husband's powers under the settlement.

I will now deal with the wife's side of the matter. The registrar has, in head 3 of his submission, limited the wife's power of withdrawal from originally two- C thirds to one-third. Having regard to the benefit which the child obtains from the more immediate opportunities of profit, I think that that, standing by itself, is right and sufficient, and quite enough to secure the child's interests, which have rightly been stated to be the principal concern of the court. Counsel argued, on behalf of the wife, that that was treating the wife too hardly. In this case I do not think the wife has been too hardly treated by that suggested variation. I D think that that is the proper variation under the circumstances.

There remains, therefore, only to be noted the ingenious argument put forward on another point by counsel for the child. He said: "If there was in this marriage settlement any suggestion of a contract which should have effect after the marriage had been dissolved, then it was an illegal contract, being against public policy, and that provision could have no effect." I have come to the conclusion that that is E not really a sound point. It is based on *Duchess of Marlborough* v. *Duke of Marlborough* (5). That case dealt only with the question of contemplation of separation, and it may well be—and I want nothing I say to suggest that it is not so—that an agreement in advance by the parties that something which has not got the sanction of the court should happen on a separation, may well be against public policy. It is not necessary that I should determine the point here and now, but F I can well understand that that may be so. However, the contemplation of a remarriage after the marriage in immediate contemplation has been dissolved does not seem to me to stand at all upon the same footing, and I am at a loss to see why any agreement made with that matter in contemplation should be against public policy.

The report of the learned registrar will be varied as regards head 2 in such a G way as to leave the petitioner in the position in which he was under the settlement.

Report varied.

Solicitors: *Withers & Co.*; *Gordon, Dadds & Co.*; *Trower, Still, & Keeling.*

[*Reported by* WILLIAM LATEY, ESQ., *Barrister-at-Law.*]

KNOTT *v.* LONDON COUNTY COUNCIL

[Court of Appeal (Lord Hewart, C.J., Lord Wright, and Slesser, L.J.), October 6, 20, 1933]

[Reported [1934] 1 K.B. 126; 103 L.J.K.B. 100; 150 L.T. 91; 97 J.P. 335; 50 T.L.R. 55; 31 L.G.R. 395]

Master and Servant—Liability of master for act of servant—Dog kept by servant with master's permission—Third person bitten by dog—Knowledge by servant that dog dangerous.

A master, who gives a general permission to his servant to keep a dog as a pet, and not for any purpose connected with the contract of service, and who does not own the dog nor keep it in his possession or under his control, is not responsible for injuries inflicted by a dog so kept on a third party, notwithstanding that the owner of the dog knew that it was prone to attack mankind.

Notes. The defence of common employment was abolished by the Law Reform (Personal Injuries) Act, 1948, s. 1 (1).

Considered: *Brackenborough* v. *Spalding Urban District Council*, [1940] 1 All E.R. 384; *Rands* v. *McNeil*, [1954] 3 All E.R. 593. Referred to: *Gould* v. *McAuliffe*, [1941] 1 All E.R. 515; *Brackenborough* v. *Spalding Urban District Council*, [1942] 1 All E.R. 34.

As to the liability of a master for the acts of his servant, see 22 Halsbury's Laws (2nd Edn.) 215 et seq., and for cases see 34 Digest 123 et seq.

Cases referred to:

(1) *Baldwin* v. *Casella* (1872), L.R. 7 Exch. 325; 41 L.J.Ex. 167; 26 L.T. 707; 21 W.R. 16; 2 Digest 246, *292*.

(2) *Styles* v. *Cardiff Steam-Boat Co.* (1864), 4 New Rep. 483; 10 L.T. 844; 28 J.P. 646; sub nom. *Stiles* v. *Cardiff Steam Navigation Co.*, 33 L.J.Q.B. 310; 10 Jur.N.S. 1199; 12 W.R. 1080; 8 Digest (Repl.) 105, *685*.

(3) *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274; Har. & Ruth. 243; 35 L.J.C.P. 184; 14 L.T. 484; 12 Jur.N.S. 432; 14 W.R. 586; affirmed (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 15 W.R. 434, Ex. Ch.; 36 Digest (Repl.) 46, *246*.

(4) *Mason* v. *Keeling* (1699), 1 Ld. Raym. 606; 12 Mod. Rep. 332; 91 E.R. 1305; 2 Digest 243, *274*.

(5) *Rylands* v. *Fletcher* (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; 12 Jur.N.S. 603; 14 W.R. 799, Ex. Ch.; affirmed (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 2 Digest 228, *195*.

(6) *May* v. *Burdett* (1846), 9 Q.B. 101; 16 L.J.Q.B. 64; 7 L.T.O.S. 253; 10 Jur. 692; 115 E.R. 1213; 2 Digest 237, *240*.

(7) *Baker* v. *Snell*, [1908] 2 K.B. 352, 825; 77 L.J.K.B. 1090; 99 L.T. 753; 24 T.L.R. 811; 52 Sol. Jo. 681; 21 Cox, C.C. 716, C.A.; 2 Digest 240, *254*.

(8) *Groves* v. *Lord Wimborne*, [1898] 2 Q.B. 402; 67 L.J.Q.B. 862; 79 L.T. 284; 47 W.R. 87; 14 T.L.R. 493; 42 Sol. Jo. 633, C.A.; 2 Digest 218, *1815*.

(9) *Lochgelly Iron and Coal Co.* v. *M'Mullan*, [1934] A.C. 1; 102 L.J.P.C. 123; 149 L.T. 526; 49 T.L.R. 566; 77 Sol. Jo. 539; 26 B.W.C.C. 463, H.L.; Digest Supp.

(10) *Applebee* v. *Percy* (1874), L.R. 9 C.P. 647; 43 L.J.C.P. 365; 30 L.T. 785; 38 J.P. 567; 22 W.R. 704; 2 Digest 246, *294*.

(11) *M'Kone* v. *Wood* (1831), 5 C. & P. 1; 2 Digest 239, *250*.

(12) *Jackson* v. *Smithson* (1846), 15 M. & W. 563; 4 Dow. & L. 45; 15 L.J.Ex. 311; 7 L.T.O.S. 231; 153 E.R. 973; 2 Digest 243, *273*.

(13) *North* v. *Wood*, [1914] 1 K.B. 629; 83 L.J.K.B. 587; 110 L.T. 703; 30 T.L.R. 258; 2 Digest 240, *255*.

(14) *Worth* v. *Gilling* (1866), L.R. 2 C.P. 1; 2 Digest 245, *285*.

Appeal by the plaintiff from an order of a Divisional Court (ACTON and GODDARD, JJ.) dismissing an appeal by the plaintiff from a decision in favour of the defendants given at Southwark County Court.

The plaintiff was employed as a cleaner in one of the defendants' schools, and while attending to her duties there was bitten by a dog belonging to one Frankland, who was the caretaker of the school and kept the dog as a pet. Frankland's duties were set out in a book of rules, which provided, inter alia, that he was allowed to keep a dog, for the proper control of which he was responsible. The county court judge found that Frankland had knowledge that the dog was prone to attack mankind, but that he had not communicated that knowledge to his employers, and he held that, as the plaintiff and Frankland were fellow servants, the doctrine of common employment applied, and he dismissed the action. The plaintiff's appeal to the Divisional Court was dismissed, and she now appealed to the Court of Appeal, and contended that the knowledge of the servant was the knowledge of the master, and that the dog was under the defendants' control. As the defendants were a corporation, knowledge of any servant whose duty it was to communicate it to the corporation affected the corporation. Alternatively, she said that, apart from negligence, the defendants had an absolute duty to her to protect her from the attacks of savage animals while on their premises, and the doctrine of common employment did not apply to the breach of an absolute duty. The defendants contended that the knowledge of Frankland was not the knowledge of the defendants, and, therefore, that the only breach of duty was on the part of Frankland, and that, as he was in common employment with the plaintiff, the defendants were not liable. They also contended that the only person responsible for the dog was its owner. If the dog had belonged to the defendants and they had delegated the duty of taking care of it to Frankland, they might have been liable, but here the dog was Frankland's pet, and the defendants had no connection with it at all, except that they had given him a general permission to keep a dog.

F. G. Paterson and *Norman E. Wiggins* for the plaintiff.

Monier-Williams for the defendant council.

Cur. adv. vult.

Oct. 20. The following judgments were read:

LORD HEWART, C.J.—This is an appeal from a judgment of the Divisional Court, dismissing an appeal from HIS HONOUR JUDGE MOORE, who gave judgment for the defendants in an action by the plaintiff to recover damages for injuries caused by the bite of a dog. The plaintiff was employed as a cleaner at a school owned by the defendants, the London County Council, and was somewhat severely bitten by a dog, an Airedale, while doing her work at the school.

The dog was owned and under the control of the schoolkeeper, who lived on the school premises, and was forbidden by the rules governing his employment to keep any domestic animal except a cat or a dog, and he kept the dog in question as a pet, and not for the purpose of guarding the premises or otherwise for the benefit of the defendants. The schoolkeeper was aware that on previous occasions the dog had attacked a boy, and the learned county court judge held that there was sufficient evidence of knowledge on the part of the schoolkeeper that it was accustomed to attack mankind to have rendered him liable for the injuries to the plaintiff if she had brought an action against him. But the defendants had no knowledge of the mischievous propensities of the dog or even of the fact that a dog was kept on the premises. It is said, however, that the knowledge of the schoolkeeper was equivalent to the knowledge of the defendants, who must, therefore, be taken to have known that a savage dog was being kept on the premises. It is quite true that the knowledge of a servant may be imputed to his master, but that is only when the knowledge is acquired by the servant as such in the course of his employment on the master's behalf. Here the knowledge was not acquired by the schoolkeeper as the servant of the defendants, but as the owner and keeper of the dog. The case is not like *Baldwin* v. *Casella* (1) where the master was the owner of the dog and the knowledge imputed to him was that of his coachman, A under whose care and control the dog was kept; nor like *Styles* v. *Cardiff Steam-Boat Co.* (2), where the dog was kept for guarding and protecting the premises of the corporation.

I do not think that the question of negligence or the doctrine of common employment arises in this case. The action is for keeping a dog which was known to be of a fierce and mischievous nature and accustomed to attack and bite mankind, B and in such an action negligence is not an issue. I can see no ground on which the defendants can be held liable for the injuries to the plaintiff, and I think that the appeal should be dismissed with costs.

LORD WRIGHT.—I agree. The facts in this case are simple. The plaintiff was a cleaner employed by the defendants at their school at Bethnal Green. While C sweeping out a room in the school she was attacked and badly injured by an Airedale, which was owned by the schoolkeeper, Frankland, who lived in dwelling quarters in the school premises. He kept the dog for his own private purposes as a pet; the licence was in his name. By the general rules of the council, caretakers were permitted to keep dogs on condition that they should keep them under proper control. It was found by the county court judge that Frankland had knowledge D that the dog was prone to attack mankind, as he found it was. Major White, the head of the council's staff of school cleaners, gave evidence that no complaints had been received by the council in respect of the dog kept by Frankland.

On these facts, the plaintiff brought her claim for damages against the council. The basis of her claim is in these terms:

> "The defendants caused or permitted the said caretaker, their servant or E agent, to keep on their premises the said dog, which was of a fierce and mischievous nature and accustomed to attack and bite mankind, and the defendants, their servant or agent, wrongfully kept the said dog, well knowing that it was of such a fierce or mischievous nature and so accustomed."

The claim so formulated is for breach of the strict or absolute duty to keep safely a dangerous animal. An alternative claim might have been put forward, F but was expressly disavowed—that is, a claim that the council had committed a breach of duty in failing to take reasonable care to ensure that the room to which the plaintiff had resorted for the purpose of doing work on their behalf was safe for her to work in. It is true that she was there on the business of the council and, if she had not been their servant, could have claimed as being an invitee, on the principles laid down by WILLES, J., in his leading judgment in *Indermaur* v. G *Dames* (3). But WILLES, J., excluded, inter alia, the case "of a servant and others who consent to incur a risk," no doubt in view of the doctrine of common employment. In the present case the failure to take reasonable care was the act and default of Frankland, the servant charged with the duty of keeping the school premises safe, in not seeing that the dog, which he knew to be dangerous, should not be at large where the plaintiff was working. Frankland was her fellow-servant, H and hence by the effect of the doctrine of common employment any claim so formulated was bound to fail, as the plaintiff's counsel frankly admitted. What was pressed was the claim as pleaded in the terms above set out, which was founded on a higher and more stringent duty—the absolute duty of keeping safely a dangerous animal. No doubt a dog is primâ facie mansuetæ naturæ, but it becomes in law a dangerous animal if it is proved to have the propensity to attack I mankind. Once knowledge of that propensity is brought home to the keeper of the dog he keeps the dog at his peril, so that if it escapes from his control and attacks and injures anyone he is liable apart from any question of negligence. It is true that it is not unlawful or wrongful to keep such an animal; the wrong is in allowing it to escape from the keeper's control with the result that it does damage. Damage is thus the gist of the action. A dog under these conditions comes to be classed for this purpose with beasts naturally savage, such as a lion or tiger. That such an absolute duty affects the keeper of such an animal once his knowledge (or what is called the scienter) of the animal's vice is established, has long been recognised to be the law. Thus, in *Mason* v. *Keeling* (4) Holt, C.J , said of animals:

> "If they are such as are naturally mischievous in their kind, he shall answer for hurt done by them without any notice; but if they are of tame nature there must be notice of the ill quality."

Dogs fall into the latter category, and, accordingly, in such a case, come within the rule of *Fletcher* v. *Rylands* (5), which deals with the strict or absolute liability for the safe keeping of things which are likely to do mischief if they escape; if they escape and cause damage the keeper is primâ facie answerable for all the damage which is the natural consequence of their escape. It is not material to allege or prove negligence in the defendant—as was held, for instance, with reference to a monkey, in *May* v. *Burdett* (6).

For the purposes of this case it is not material to examine what are the various exceptions to this liability, as, for instance, whether it is any excuse that there intervened the unauthorised and wilful act of a third party—a question which was discussed in the controverted case of *Baker* v. *Snell* (7). In the present case the plaintiff, on the assumption that the council are liable for the safe keeping of the animal, and have knowledge of its vicious character, goes on to claim that the defence of common employment cannot be invoked, any more than in the case of breach of an absolute statutory obligation, in regard to which cases it was held in *Groves* v. *Lord Wimborne* (8) that the defence did not apply. The principles of *Groves* v. *Lord Wimborne* (8) were recently discussed and approved by the House of Lords in *Lochgelly Iron and Coal Co., Ltd.* v. *M'Mullan* (9), but there is no precise authority for the extension of that rule of strict or absolute liability not under a statute but under the common law, such as for the keeping of dangerous animals. It may well be that in such cases the defence of common employment has no place. There is, however, no need here to decide that point, because the plaintiff must found her case on proof that the council were in any sense responsible for the dog, which she can only do by establishing, first, that it was the council's dog or kept by them, and, secondly, that they had actual or imputed notice of the dog's propensities.

In my opinion, the plaintiff's case breaks down on the first head. It was no part of Frankland's duty to his employer to keep the dog, nor was it incidental to his duty to them. He did not keep it in any sense for the purpose of watching or guarding the school premises, so that it need not be considered what in such a case the legal position of the council would be. It is expressly found that he kept it for his private purposes, because it was his personal pet. All that can be said to connect the council with the dog is that Frankland, like other schoolkeepers employed by the council, had a general licence to keep a dog or cat; but, in my judgment, Frankland, in keeping the dog as he did, did so on his own responsibility and as his own affair, and the position is not different from that of a chauffeur who keeps his dog in the room over the garage, or a groom who keeps his dog in his rooms over the stables. In such cases as *Baldwin* v. *Casella* (1) and *Applebee* v. *Percy* (10) the dog was owned by the defendant. It is true that the real test of responsibility is not ownership but possession and control, hence in *McKone* v. *Wood* (11) Lord Tenterden, in ruling before the jury, put as the test whether the defendant was "harbouring the dog." The ruling was a ruling at nisi prius, and the precise facts of the case are not very fully or precisely stated, but I understand Lord Tenterden was ruling on a case where a dog was allowed, with the defendant's knowledge, to live on his premises, where it had been left by a former servant on his going away. In such a case it might well be found in fact that there was possession and control in the occupier, there being no one else on the premises to exercise control or claim possession.

In *May* v. *Burdett* (6) Lord Denman, C.J., in stating the principle applicable to such cases, states it with reference to "whoever keeps an animal" under the material conditions; and Platt, B., in *Jackson* v. *Smithson* (12), speaks of the liability as attaching to "the act of keeping" such an animal. In *North* v. *Wood*

(13) the occupier of the premises on which there was a vicious dog, was held not responsible for the dog, though he knew it to be savage. The dog was owned by his daughter, who lived with her father and who paid for its food and for the licence, and was of sufficient age to control the dog. In my opinion, the true test of liability, namely, that of ownership or possession and control, was applied in that case having regard to the facts of the case as found by the county court judge. It may be noted that the Dogs Act, 1906, puts the liability under that statute for damage done by dogs to cattle on the "owner of the dog," with the proviso that the occupier of any premises where the dog was kept or permitted to live or remain shall be presumed to be the owner and shall be liable for the injury unless he proves that he was not the owner of the dog at the material time. I think both the common law and the legislature in the Dogs Act have recognised that a dog, which has been described as a "familiar animal," is naturally so associated with a particular master that responsibility for its acts should depend on ownership or possession and control, neither of which can be predicated, in regard to Frankland's dog, of the council. In my judgment, the council on this ground are not responsible and the action is not maintainable against them.

On the issue of scienter I need only add that there is no evidence that any responsible official of the council knew of the dog's savage disposition or even knew that it was kept by Frankland. In view of Frankland's relation to the dog and the fact that the council were not concerned with the dog and had neither property in nor possession of it and made no use of it, I can see no ground whatever for imputing Frankland's knowledge of its vicious propensities to the council, so that no possible ground remains to justify a holding that the council kept or harboured the dog.

For these reasons I agree with the Divisional Court that the appeal should be dismissed, and with the county court judge that the claim fails against the respondents.

SLESSER, L.J.—In this case the plaintiff seeks damages for personal injuries to her by the bite of a dog.

The plaintiff was a cleaner employed by the London County Council in one of their schools, and while she was performing her duties at the school she was attacked and badly bitten by a savage dog which was owned by another servant of the London County Council, the schoolkeeper, who kept it for his own private purposes. The learned county court judge has found as a fact that this schoolkeeper, Frankland, "had knowledge that the dog was prone to attack mankind; in other words, that scienter had been brought home to him." On this finding, it does not appear that the schoolkeeper, the owner of the dog, would have any defence to an action against him; but the action in the present case is, for obvious reasons, not against him, but is brought against the London County Council—his and the plaintiff's employers—the owners of the premises where the attack by the dog took place.

The plaintiff did not seek in her particulars of claim to found her action in the negligence of Frankland in failing to have the dog under proper control or otherwise so as to make the London County Council, as his employers, liable for that negligence because she would be met by the defence of common employment. We are told, however, that in the courts below the action was principally so founded in negligence, and from the judgments, both in the county court and in the Divisional Court, I can well believe that that was so. In any event, counsel for the plaintiff has admitted before us that the defence of common employment, even assuming that he could make the London County Council responsible for the negligence of their schoolkeeper, would be a complete answer to his case. He therefore attempts to succeed in his appeal by putting the case on the absolute duty to control the dangerous dog, that it is not necessary to invoke negligence at all, and in that way only is it necessary for us to consider the case.

I have no doubt that were the plaintiff proceeding against the owner of the dog, who was also its keeper and controller, she would be perfectly right in not founding her case in negligence. The duty of a keeper of a dog who knows it to be dangerous is an absolute one. In *May* v. *Burdett* (6) it was held that a person who keeps an animal accustomed to attack and bite mankind is primâ facie liable in an action on the case at the suit of any person attacked and injured by such animal without any averment in the declaration of negligence or default in the securing or taking care of it. The gist of the action is the failure to control the animal after knowledge of its mischievous propensities.

> "The owner must at his peril keep him safe from doing hurt, for though he uses diligence to keep him in, if he escape and do harm the owner is liable to answer in damages":

HALE'S PLEAS OF THE CROWN, vol. 1, p. 4306.

> "The keeper of a ferocious dog, if he knows it to be ferocious, is in exactly the same category as the keeper of a naturally wild animal":

per KENNEDY, L.J., in *Baker* v. *Snell* (7) ([1908] 2 K.B. at p. 834).

The duty to save a person from attack by a dog known to the keeper to be dangerous is clearly an absolute one, but it is necessary in the present case that the plaintiff should go further and apply that obligation to the London County Council, who are not the owners of the dog. The only connection between the London County Council and the dog is that by regulation dealing with the duties of schoolkeepers it is provided that the schoolkeeper, though not allowed to keep on the school premises domestic animals, such as rabbits, chickens, &c., may keep a dog or a cat, provided that, in the event of a dog being kept, the schoolkeeper will be held responsible for seeing that it is kept under proper control and that it is not allowed to run loose in the playground. Counsel for the plaintiff has cited to us, most of, if not all, the relevant cases in this matter. He points out that they establish that it is not essential that the defendant should be the real owner; that anyone who keeps the dog on his premises or allows it to resort there may be liable.

The case which has gone furthest in his favour is that of *M'Kone* v. *Wood* (11). The case is very shortly reported, and is no more than a direction to a jury of LORD TENTERDEN. He says, at p. 2:

> "It is not material whether the defendant was the owner of the dog or not; if he kept it, that is sufficient; and the harbouring of a dog about one's premises, or allowing him to resort there, is a sufficient keeping of the dog to support this form of action."

Counsel has argued that in so far as the London County Council allowed the owner to keep a dog they have allowed the dog to resort to their premises within the meaning of LORD TENTERDEN'S direction. This, I think, is inaccurate. There must be, in my view, something in the nature of the real keeping of a specific dog to make a person who is not the owner liable. The owner may appoint a servant to keep the dog for him: see *Styles* v. *Cardiff Steam-Boat Co.* (2); *Baldwin* v. *Casella* (1). But such cases, where a servant is keeping a dog for a master, are quite different from the present one where the servant kept the dog with the general permission of the master to keep dogs, but for the servant's own private purposes. Such a case resembles more closely the decision of the Divisional Court in *North* v. *Wood* (13), where the father allowed his daughter to keep in his house a dog which he knew to be savage. RIDLEY, J. ([1914] 2 K.B. at p. 621), says:

> "It is quite true that there may be circumstances under which a person who is not the owner of a dog may be bound to exercise control over it and will be responsible if it bite somebody. Such circumstances existed in the case of *M'Kone* v. *Wood* (11), where the defendant, who, although not the owner, treated the dog as if it was his, was held liable because there was no one else on the spot who could exercise control over it."

He points out that in *North's Case* the defendant's daughter, who was the owner of the dog, had the control of it, that is, was the keeper, and so distinguishes the case before him from that of *M'Kone* (11).

In the 3rd Edn. of Bullen and Leake, p. 366, the learned authors cite as an appropriate declaration in such a case:

> "That the defendant wrongfully kept a dog of a fierce and mischievous nature and accustomed to bite mankind, well knowing that the said dog was of such fierce and mischievous nature and so accustomed as aforesaid."

Such a declaration is to be found in *Worth* v. *Gilling* (14).

In my view, the plaintiff fails at the outset because she is not able to say here that directly or indirectly the London County Council owned or kept the dog of which complaint is made. In these circumstances, the question whether the knowledge of the owner of the dog that the dog was prone to attack mankind can be properly imputed to the London County Council does really not arise; but as counsel for the plaintiff devoted a considerable part of his argument to that question, I think it right to add some remarks upon it.

As I have said, the knowledge of the animal's mischievous propensity need not always be personal knowledge of the owner himself. If he delegates the care of his business or the care and control of the animal to others or the animal is itself used in connection with the business, the master may properly be held to have such knowledge: see *Applebee* v. *Percy* (10). In *Styles's Case* (2), on the evidence, it was held that the knowledge of some servants of the defendants, a corporation, was not sufficient to attribute the knowledge to the defendants; but the court in that case certainly indicate that if there had been someone on the premises appointed to control the business of the defendants, it would have been sufficient to show knowledge in that person having control of the dog to affect the employer, the question being, according to Blackburn, J.,

> "whether they were persons who had control of the yard, or of the dog, or of the business so as to be proper persons to receive notice for the company."

In *Baldwin's Case* (1) it was held, on the evidence, that the defendant had appointed his servant to control the defendant's dog, and, therefore, as Bramwell, B., said:

> "The defendant has appointed his coachman to that duty; the coachman knew of the mischievous propensities of the dog; and his knowledge is the knowledge of the master."

In this matter the present case seems to me on this head to fall rather within *Styles's Case* (2) than *Baldwin's Case* (1)—that is to say, that there is no evidence that the London County Council appointed the schoolkeeper to have control of the dog for the purposes of the London County Council.

In nearly all these cases, other than *North* v. *Wood* (13), the owner or keeper of the dog was the employer, but the two questions of keeping and scienter are different. I can conceive a case where, although the dog was owned by the schoolkeeper, his employer may have in terms required him to keep a dog in order to protect the property of the employer. In such a case the keeper of the dog would be the servant, but the knowledge of the mischievous tendencies of the dog might be imputed to the employer since the servant's dog was on the premises for the employer's purposes. In such a case, difficult questions of liability might arise; but the present is not such a one. Not only, that is to say, is the dog not owned or kept by the London County Council, but it is not owned or kept by the schoolkeeper for the purposes of the London County Council. Mere exemption of dogs and cats from the prohibition to keep other animals mentioned in the regulation, coupled with the obligation to keep the dog under control, is far from imposing an obligation upon the schoolkeeper to have a dog at all or to keep it for the purposes of his employers. It is at most a concession and licence to him if he wishes to keep a dog.

For both these reasons, therefore—because the dog is not either owned or kept by the defendants, and because in the circumstances of this case it is not right to impute to the defendants the knowledge of the dog's nature possessed by the schoolkeeper—I am of opinion that the plaintiff cannot hope to bring home to the defendants any liability except one founded upon negligence. Whether such a liability could or could not be established it is unnecessary to discuss, because I agree with the county court judge and the divisional court that if the action be founded upon the responsibility of the defendants for the negligence of their servant, the schoolkeeper, the defendants have a complete defence in common employment.

Appeal dismissed.

Solicitors: *Darracott, Seymour & Co.*; *Solicitor to the London County Council.*

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

REILLY *v.* REGEM

[PRIVY COUNCIL (Lord Atkin, Lord Russell, Lord Macmillan, Lord Wright, and Sir Lancelot Sanderson), November 27, December 13, 1933]

[Reported [1934] A.C. 176; 103 L.J.P.C. 41; 150 L.T. 384; 50 T.L.R. 212]

Crown—Crown servant—Dismissal—Repeal of Act constituting office—Acts to amend the Pensions Act (Statutes of Canada, 1923, *c.* 62, *and* 1930, *c.* 35)—*Canadian Interpretation Act,* 1927, *s.* 19.

In 1928 the appointment of the appellant as a member of the Federal Appeal Board, which had been constituted by an Act to amend the Canadian Pensions Act, 1923, was extended for a period of five years. In 1930, before the expiration of that period, by an Act passed in 1930, the Federal Appeal Board was superseded by a Pensions Tribunal and a Pensions Appeal Court, to neither of which bodies was the appellant appointed. No compensation for loss of office was paid to him. He, accordingly, presented a petition of right, alleging that he had been dismissed in breach of contract, and claiming damages.

Held: (i) so far as the rights and obligations of the Crown and the appellant rested on statute, the office held by the appellant was abolished and there was no statutory provision made for compensation to holders of the office so abolished; (ii) so far as the rights and obligations rested on contract, further performance of the contract had by statute been made impossible, and the contract was put an end to; (iii) the appellant could not pray in aid the provision of the Canadian Interpretation Act, 1927, s. 19, that where an Act was repealed the repeal should not affect any right or privilege acquired under the Act, for the appellant acquired no right under his appointment to the office except one which always was subject to be determined by the office being abolished by statute; and, therefore, the petition must fail.

Per **Lord Atkin**: If the terms of an appointment definitely prescribe a term and expressly provide for a power to determine "for cause" it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded.

Notes. Section 19 of the Canadian Interpretation Act, 1927, is in substantially the same terms as s. 38 (2) (c) of the Interpretation Act, 1889.

Applied: *Robertson* v. *Minister of Pensions*, [1948] 2 All E.R. 767.

As to tenure of public offices, see 5 HALSBURY'S LAWS (3rd Edn.) 472 et seq., A and ibid., vol. 7, 340–342, and for cases see 11 DIGEST (Repl.) 570 et seq.

Case referred to:

(1) *Gould* v. *Stuart*, [1896] A.C. 575; 65 L.J.P.C. 82; 75 L.T. 110; 12 T.L.R. 595; 11 Digest (Repl.) 570, *80*.

Appeal by special leave from an order of the Supreme Court of Canada (ORDE, J., B on behalf of ANGLIN, C.J., RINFRET, LAMONT and CANNON, JJ.) dismissing the appeal of the appellant from a judgment of the Exchequer Court of Canada (MACLEAN, J.), who dismissed the claim of the appellant by petition of right to recover from His Majesty damages for breach of an alleged contract of employment between the respondent and the appellant.

The sole question at issue was whether His Majesty was under any liability to C pay the appellant damages by way of compensation for loss of a statutory office (to which the appellant had been appointed for a term of years), resulting from the abolition of the office during the currency of such term by the repeal by the Dominion parliament of the statutory provisions which created it.

Redmond Quain, K.C. (of the Canadian Bar), for the appellant.

Wilfrid Greene, K.C., and *C. P. Plaxton* (of the Canadian Bar) for the respondent. D

Dec. 13. **LORD ATKIN.**—This is an appeal from the Supreme Court of Canada, which affirmed a decision of MACLEAN, J., in the Exchequer Court of Canada, dismissing a petition of right in which the present appellant, Mr. Reilly, was the suppliant. The suppliant's case was that, in pursuance of the Pensions Act, he had, on Aug. 16, 1928, been appointed a member of the Federal Appeal Board E for a term of five years and that, in breach of contract, he had been dismissed in October, 1930, and he claimed damages. There is no dispute as to the facts. By an Act to Amend the Pensions Act, c. 62 of the Statutes of Canada, 1923, there was constituted a board under the title, the "Federal Appeal Board," consisting of not less than three nor more than seven members appointed by the Governor-in-Council on the recommendation of the Minister of Justice. One of the members F was to be appointed by the Governor-in-Council, chairman of the board,

> "and shall hold that office during pleasure, and any member may be removed for cause at any time by the Governor-in-Council."

Of the members first appointed to the board other than the chairman one-half were to be appointed for a term of two years, and the others for a term of three years, G and they were to be eligible for re-appointment for such further terms not to exceed five years as the Governor-in-Council might deem advisable. The chairman was to be paid a salary of $7,000 a year; the other members, $6,000, to be paid monthly out of any unappropriated money forming part of the Consolidated Revenue Fund of Canada (R.S.C. (1927), c. 157, s. 50).

The appellant, Mr. Reilly, was in 1923 a practising member of the Bar of Quebec. H On Aug. 17, 1923, in pursuance of an Order in Council, he was appointed by letters patent under the Great Seal of Canada a member of the Federal Appeal Board for the term of three years. The appointment was extended by Orders in Council of June 4, 1926, and Aug. 18, 1927, and by an Order in Council of Aug. 16, 1928, was extended for a further five years, provided that the appointment might be terminated at any time in the event of the reduction in the board's work to an extent I sufficient to permit of its performance by fewer commissioners. This event never arose, but on May 30, 1930, the Canadian legislature passed an "Act to Amend the Pensions Act," Statutes of Canada, 1930, c. 35. By s. 14 of that Act, s. 50 of the Pensions Act, as amended by subsequent Acts, was repealed, and by s. 9 a Pensions Tribunal was constituted, consisting of a chairman and eight other members, with salaries of $7,000 and $6,000 respectively, to hold office for ten years, subject only to earlier removal for cause. By s. 10 a Pensions Appeal Court was constituted, consisting of a President and two other members. Their tenure

A was the same as that of the members of the Pensions Tribunal; their salaries were to be respectively $8,000 and $7,000 a year. Mr. Reilly's office was thus abolished: neither he nor any of the members was appointed to the new tribunal or court; nor was any compensation paid to any of them. In October, 1930, Mr. Reilly was requested to vacate the premises he had occupied in pursuance of his office.

The petition of right is founded on averments that there was a contract between B the suppliant and the Crown, and that the contract had been broken. Both courts in Canada have decided that by reason of the statutory abolition of the office Mr. Reilly was not entitled to any remedy, but, apparently, on different grounds. MACLEAN, J., concluded that the relation between the holder of a public office and the Crown was not contractual. There never had been a contract: and the foundation of the petition failed. ORDE, J.'s judgment in the Supreme Court seems to C admit that the relation might be at any rate partly contractual; but he holds that any such contract must be subject to the necessary term that the Crown could dismiss at pleasure. If so, there could have been no breach.

Their Lordships are not prepared to accede to this view of the contract, if contract there be. If the terms of the appointment definitely prescribe a term and expressly provide for a power to determine "for cause" it appears necessarily D to follow that any implication of a power to dismiss at pleasure is excluded. This appears to follow from the reasoning of the Board in *Gould* v. *Stuart* (1). This was not the case of a public office, but in this connection the distinction between an office and other service is immaterial. The contrary view to that here expressed would defeat the security given to numerous servants of the Crown in judicial and quasi-judicial and other offices throughout the Empire, where one of the terms of E their appointment has been expressed to be dismissal for cause.

In this particular case their Lordships do not find it necessary to express a final opinion on the theory accepted in the Exchequer Court that the relations between the Crown and the holder of a public office are in no degree constituted by contract. They content themselves with remarking that in some offices at least it is difficult to negative some contractual relations, whether it be as to salary or terms of F employment, on the one hand, and duty to serve faithfully and with reasonable care and skill on the other. And in this connection it will be important to bear in mind that a power to determine a contract at will is not inconsistent with the existence of a contract until so determined.

But the present case appears to their Lordships to be determined by the elementary proposition that if further performance of a contract becomes impossible by G legislation having that effect the contract is discharged. In the present case the office held by the appellant was abolished by statute; thenceforward it was illegal for the executive to continue him in that office or pay him any salary; and impossible for him to exercise his office. The jurisdiction of the Federal Appeal Board was gone. The position, therefore, seems to be this. So far as the rights and obligations of the Crown and the holder of the office rested on statute, the H office was abolished and there was no statutory provision made for holders of the office so abolished. So far as the rights and obligations rested on contract, further performance of the contract had been made by statute impossible, and the contract was discharged. It is, perhaps, unnecessary to add that discharged means put an end to and does not mean broken. In the result, therefore, the appellant has failed to show a breach of contract on which to found damages.

I It was, however, contended that this result is avoided by the provisions of the Interpretation Act, R.S.C., 1927, c. 1, s. 19:

> "Where any Act or enactment is repealed, then, unless the contrary intention appears, such repeal or revocation shall not . . . (c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, enactment or regulation so repealed or revoked."

The answer is obvious. There was no right acquired under the appointment to the office except a right which from the inception was subject to be determined by the office being abolished by statute. The propositions which establish that there was no breach of contract negative any protection under this section.

Finally, and almost inevitably in such a case, an appeal was made to the British North America Act, and it was said that legislation abolishing the office without compensation was an interference with "property and civil rights." But, as before, if the right was in itself determinable by statute, there was no interference with it. It would be strange that the Dominion should have power to create an office, but no power to abolish it except on the terms of awarding compensation apparently for the full term of the original office. The case on this point may be put in two ways. Either the Act of 1930 did not interfere with any civil right, or, if it did, its interference was necessarily incident to the undoubted power of the Dominion to abolish the old and create the new office. For the reasons above given the former seems preferable, but either will suffice.

For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed.

Appeal dismissed.

Solicitors: *Blake & Redden*; *Charles Russell & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ, *Barrister-at-Law.*]

REIDY AND OTHERS *v.* WALKER AND OTHERS

[KING'S BENCH DIVISION (Acton and Goddard, JJ.), March 29, 1933]

[Reported [1933] 2 K.B. 266; 102 L.J.K.B. 424; 149 L.T. 238; 49 T.L.R. 386; 77 Sol. Jo. 267]

Rent Restriction—Tenant—Company—Occupation by caretaker—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 5 (1).

A limited company, which was the tenant of a dwelling-house within the scope of the Rent Restriction Acts, and occupied by a caretaker employed by the company, **held** not to be capable of being a "tenant" within s. 5 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and, therefore, not entitled to resist a claim for possession under that subsection, it being incapable of occupying a house as a home, as does an individual.

Skinner v. *Geary* (1), [1931] 2 K.B. 546, applied.

Notes. Section 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, was replaced by s. 3 of the Rent and Mortgage Interest Restrictions Act, 1933: see Sched. II to that Act.

A company, however, is entitled to the protection given by the Acts regarding the limitation of the amount of rent payable by them: see *Carter* v. *S.U. Carburetter Co.*, [1942] 2 All E.R. 228; [1942] 2 K.B. 288.

Approved: *Hiller* v. *United Dairies* (*London*), *Ltd.*, post, p. 667.

As to who can be a statutory tenant, see 20 HALSBURY'S LAWS (2nd Edn.) 334, 335, and for cases see 31 DIGEST (Repl.) 658 et seq.

Case referred to:

(1) *Skinner* v. *Geary*, [1931] 2 K.B. 546; 100 L.J.K.B. 718; 145 L.T. 675; 95 J.P. 194; 47 T.L.R. 597; 29 L.G.R. 599, C.A.; 31 Digest (Repl.) 659, *7612*.

Appeal by plaintiffs from an order made at West Brompton County Court.

The plaintiffs, who were trustees for a religious organisation, brought their action

A in the county court to recover possession of a cottage, No. 16, Upper Mall, Hammersmith, of which they were the landlords and the defendants, Emery Walker, Ltd., were the tenants. The point in issue was whether a limited company, who were the tenants of premises within the scope of the Rent Restriction Acts, were entitled to the protection conferred on tenants by s. 5 of the Act of 1920. The cottage in question had originally been let to the defendant Sir Emery Walker. B The tenancy had been assigned by him to the defendant company, who were in occupation by their caretaker, the defendant, Mrs. Lewis. The contractual tenancy had been terminated by a notice to quit, and it was admitted that the plaintiffs were entitled to recover possession unless the defendant company could establish that they were statutory tenants protected by the Rent Restriction Acts.

The plaintiffs contended that it was contrary to both the wording and the policy C of those Acts that their application should be extended to limited companies. There were references in the Acts to tenants which were only consistent with the tenant being an individual, as, for instance, s. 5 (1) (d) of the Act of 1920, which provided for alternative accommodation being found in certain cases for the tenant and his family. The Court of Appeal had decided in *Skinner* v. *Geary* (1) that the person to be protected was the person actually dwelling in the house, and a limited D company could not be said to dwell anywhere. For the defendants it was argued that the company were occupiers of the premises and that Mrs. Lewis was merely their licensee, who could be ejected at any time. Being both tenants and occupiers of a house to which the Acts applied, they were entitled to be treated as statutory tenants when their contractual tenancy expired. The county court judge held that the Rent Restriction Acts applied and gave judgment for the defendants. The E plaintiffs appealed.

C. E. Rochford for the plaintiffs (the landlords).

P. B. Morle for the defendants (the tenants).

ACTON, J.—This case raises a point under the Rent Restriction Acts which it is surprising has never arisen for decision before. It is the short and simple point F whether a company with limited liability can be a statutory tenant under these Acts so as to enjoy the protection conferred on tenants by s. 5 of the Act of 1920, unless excluded therefrom on one or other of the grounds set out in the various sub-clauses of that section.

The argument for saying that a company may be such a tenant is one which without reference to certain decisions of the Court of Appeal seems to be un- G impeachable. That argument is that a company can be in occupation of premises, including a dwelling-house, and may be so in occupation through the medium of a caretaker or other person; and, therefore, counsel for the tenants says, all the conditions which are necessary in order that the company as a legal entity may be a tenant under the Acts are complied with and there is nothing in those Acts which compels the court to construe the words "possession" and "occupation" as H meaning anything either more or less than they mean at common law.

It appears, however, that the Court of Appeal have in a series of cases, culminating in *Skinner* v. *Geary* (1), taken a different view and have come to the conclusion that the protection of s. 5 is only conferred on a person in occupation in a limited sense. That is clearly expressed in the judgment of SCRUTTON, L.J., in that case, when he says ([1931] 2 K.B. at p. 564):

> I "For the reason I have given the Act does not, in my opinion, apply to protect a tenant who is not in occupation of a house in the sense that the house is his home and to which, although he may be absent for a time, he intends to return. If it were to be held otherwise, odd consequences would follow. The appellant in this case has contented himself with living in one house and claiming another. Suppose he had a number of houses. One object of the Acts was to provide as many houses as possible at a moderate rent. A man who does not live in a house and never intends to do so is, if I may use the expression, withdrawing from circulation that house which was intended for occupation by

> other people. To treat a man in the position of the appellant as a person entitled to be protected is completely to misunderstand and misapply the policy of the Acts." A

On the facts of the present case it has been pointed out in the course of the argument that, if Sir Emery Walker had remained the tenant and had put in a caretaker, he would not have been entitled to the protection of the Acts. Yet it is said that the limited company is in a better position and is entitled to that protection. B To my mind, neither this nor any other limited company can be properly described as the tenant of a house who is in occupation of it, in the sense in which that word is interpreted by SCRUTTON, L.J., namely, in the sense that it is his home, to which, although he may be absent for a time, he intends to return. It is, therefore, impossible to say that this company can be a tenant protected by the Acts, and on that ground the appeal succeeds. C

GODDARD, J.—I agree, and I share in the surprise expressed by my Lord that this is the first time this point has come before the court. As I read *Skinner* v. *Geary* (1), I think it lays down that the Act is intended to protect a person's home, not some legal right which apart from the Act he might have. The Court of Appeal came to that conclusion not only on the construction of the words of the D Act, but also having regard to the purpose for which the Act was passed. They adopted a view of the Act which amounts to this: that before you can become a statutory tenant your occupation must have a domestic quality. A company cannot reside anywhere in that sense of the word, nor does it matter whether the person in occupation is a sub-tenant or a licensee. It is essential that, when a landlord seeks to recover possession, the occupation of the person in possession of E the premises should have the domestic quality which I have described and which the occupation of a company can never have. I agree, therefore, that the appeal must be allowed.

Appeal allowed.

Solicitors: *Blount, Petre & Co.*; *Lees, Smith, & Crabb.* F

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

MUNRO *v.* COMMISSIONER OF STAMP DUTIES

[Privy Council (Lord Atkin, Lord Tomlin, Lord Macmillan, Lord Wright and Sir George Lowndes), July 20, 21, October 12, 1933]

[Reported [1934] A.C. 61; 103 L.J.P.C. 18; 150 L.T. 145]

Estate Duty—Property passing on death—Partnership—Gift to other partners of property subject to partnership—Real Property Act, 1900 (*N.S.W.*), *s.* 42—*Stamp Duties Act*, 1920–1931 (*N.S.W.*), *s.* 102 (2) (*d*).

M. carried on a business of a grazier on three pastoral holdings in New South Wales belonging to him. He had six children, and when, in 1909, the youngest attained his majority, he entered into a verbal agreement with his children by which it was agreed that the business of graziers should thenceforward be carried on by him and his six children as partners under a partnership at will. On May 1, 1913, M. transferred by way of gift to each of his four sons portions of his three holdings, and to trustees for the benefit of his two daughters other portions of the holdings, directing the trustees to utilise the trust premises in connection with the carrying on of farming or grazing pursuits either by themselves or in conjunction with any other person or persons for such time and under such conditions as they might deem advisable. The result of these transfers was to leave M. with 8,020 acres out of a total of 33,501. The transfers were taken on the undertaking that any member of the family could withdraw from the agreement and work his property with his own stock. On June 23, 1919, a formal partnership deed was entered into between M. and his children providing that no parties should have the right to retire from the partnership during the lifetime of M. The business was carried on under the deed of partnership until M.'s death on Nov. 4, 1929. No part of the lands comprised in the transfers was ever withdrawn from the use of the partnership. Duty payable on the death of the deceased was assessed on the footing that, by virtue of s. 102 (2) (d) of the Stamp Duties Act, 1920–1931, the estate of the deceased must be deemed to include the lands comprised in the transfers.

Held: (i) the right of the partnership at the time of the transfers was either a tenancy during the term of the partnership or a licence coupled with an interest; in either view what was comprised in each of the gifts to the children and the trustees was the property shorn of the right which belonged to the partnership; and in those circumstances each donee assumed bona fide possession and enjoyment of the gift immediately upon the gift and thenceforward retained it to the exclusion of the donor, and the transferred lands were not to be included in M.'s estate for the assessment of duty;

(ii) the benefit which the donor had as a member of the partnership in the right to which the gift was subject was referable to the agreement of 1909 and not to the gift, and was not a benefit within s. 102 (2) (d);

(iii) the substance of the transaction was to be regarded; it might be that the transfers, when registered, gave a title which overrode in point of law any unnotified right in the partnership; but the substance of the transaction did not fall within the words of the Real Property Act, 1900, s. 42.

Notes. For the provision in English law corresponding to s. 102 (2) (d) of the New South Wales statute, see Finance Act, 1894, s. 2 (1) (c), and the statutes therein mentioned.

Applied: *St. Aubyn* (*L.M.*) *and Others* v. *A.-G.* (*No. 2*), [1951] 2 All E.R. 473.

As to property which passes on death, see 15 Halsbury's Laws (3rd Edn.) 10 et seq., and for cases see 21 Digest 7 et seq. For Finance Act, 1894, see 9 Halsbury's Statutes (2nd Edn.) 347.

Appeal by special leave from an order of the Supreme Court of New South Wales (Street, C.J., James and Davidson, J.J.), upon a Special Case stated by the respondent under s. 124 (1) of the Stamp Duties Act, 1920–1931.

The question at issue was whether or not certain lands situate in the State of A New South Wales ought to be included in the estate of one Alexander George Forbes Munro, deceased, for the purpose of assessing the death duty payable in respect of the said estate under the provisions of s. 102 (2) (c) and (or) (d) of the Stamp Duties Act, 1920–1931. The appellants were the legal personal representatives of the deceased. The Supreme Court of New South Wales held that the lands in question formed part of the dutiable estate of the deceased, and that the B amount of duty payable in respect of the estate of the deceased was as assessed. The executors appealed.

W. A. Greene, K.C., and *J. H. Stamp* for the appellants.
Gavin Simonds, K.C., and *A. C. Nesbitt* for the respondent.

Cur. adv. vult. C

Oct. 12. **LORD TOMLIN.**—This appeal arises out of a Special Case stated by the respondent for the purpose of having it determined whether certain lands in New South Wales at one time the property of Alexander George Forbes Munro, who died on Nov. 4, 1929, and will be hereinafter referred to as the deceased, formed part of the dutiable estate of the deceased under the Stamp Duties Act, 1920–24, as amended by the Stamp Duties (Amendment) Act, 1931. The Supreme D Court of New South Wales have decided that the lands in question form part of the dutiable estate of the deceased and the appellants, who are the legal personal representatives of the deceased, have appealed to His Majesty in Council against this decision.

For some time prior to and at the time of the formation of the partnership to which reference will shortly be made, the deceased had been and was carrying on E the business of a grazier on three pastoral holdings in New South Wales belonging to him, and known respectively as "Boonal," "Weebollabolla" and "Tareelaroi." These holdings (which may for convenience be respectively called the B. estate, the W. estate, and the T. estate) contained in all about 33,501 acres. The deceased had six children, namely, four sons, Donald, Alfred, Charles, and Roland; and two daughters, Lilias and Ada. The youngest of the six children, namely, Roland, F attained his majority in April, 1909. Shortly after this event the deceased entered into a verbal agreement with his six children by which it was agreed that the business of graziers should thenceforward be carried on by the deceased and his six children as partners under a partnership at will.

According to the terms of the verbal agreement of partnership as stated in the Special Case, (i) the deceased was to contribute the whole of the capital which G consisted of the livestock and plant then upon the deceased's three holdings; (ii) the partners were to be entitled to the profits to arise from the business in the following shares, namely, one-fourth was to belong to the deceased, and one-eighth was to belong to each of the six children; (iii) the deceased was to be sole manager of the business, and his decisions on all questions relating to the purchase or sale of stock or otherwise in connection with the carrying on of the business were to be binding H on all parties; and (iv) the business of this partnership was to be carried on on the three holdings of the deceased. It is found in the Special Case that from the date of the verbal agreement for partnership the partnership was carried on upon the three holdings and continued to be carried on thereon up to and on the execution of the transfers and settlements next to be mentioned and thereafter up to the date of an indenture of partnership executed in 1919. I

On May 1, 1913, by four memoranda of transfer in the form prescribed by the Real Property Act, 1900, and duly registered in accordance with that Act, the deceased transferred by way of gift to each of his four sons all his right, title and interest in portions of his three holdings. The particulars of these transfers are as follows: (i) 5,818 acres, part of the T. estate, were transferred to Donald; (ii) 3,864¾ acres, part of the B. estate, were transferred to Alfred; (iii) 3,063 acres, 21¾ perches, further part of the B. estate, were transferred to Charles; (iv) 3,331 acres, 2 roods, 32 perches, part of the W. estate, were transferred to Roland. On the same date, the deceased by two further memoranda of transfer in the form prescribed by and duly registered in accordance with the Real Property Act, 1900, transferred: (i) 4,740 acres, part of the T. estate, to trustees to be held upon the trusts of a settlement of even date made by the deceased in favour of his daughter Lilias and her children; (ii) 4,665 acres, 1 rood, further part of the T. estate, to trustees to be held upon the trusts of a settlement of even date made by the deceased in favour of his daughter Ada and her children. Under each of the two settlements the trustees were directed to utilise the trust premises in connection with carrying on of farming or grazing pursuits either by themselves or in conjunction with any other person or persons for such time and under such conditions as they might deem advisable. The result of these transfers was to leave the deceased with about 8,020 acres out of the total of 33,501.

The circumstances in which the transfers and settlements were executed were stated in a passage contained in a statutory declaration made by the deceased's son Donald. This passage, which is set out in the Special Case and is now accepted by the respondent as correct, is as follows:

> "At the time the said transfers were executed the stock in which the partners were interested were in accordance with the agreement between them running on the land so transferred and the transfers were taken subject to such agreement on the understanding that if any member of the family were desirous of so doing he could withdraw from the agreement as to the running of stock in which the partnership was interested on his holding and work his property with his own stock provided a reasonable time was allowed for the removal of the stock therefrom in which stock the partnership was interested."

On June 23, 1919, a formal partnership deed was entered into between the deceased and his children. This deed departed in some respects from the original verbal agreement of partnership as it provided that no parties should have the right to retire from the partnership during the lifetime of the deceased. The business continued to be carried on under the deed of partnership until the deceased's death on Nov. 4, 1929. No part of the lands comprised in the six transfers was ever withdrawn from the use of the partnership.

The respondent assessed the death duty payable on the death of the deceased upon the footing that the estate of the deceased must be deemed to include the lands comprised in the six transfers made by the deceased in 1913 by virtue of s. 102 (2), para. (d), of the Stamp Duties Act, 1920–1931.

Sections 101 and part of 102 (so far as material) of the Stamp Duties Act, 1920-1931, are as follows:

> "101. In the case of every person who dies after the passing of this Act, whether in New South Wales or elsewhere, and wherever the deceased was domiciled, duty, hereinafter called death duty, at the rate mentioned in Sched. III to this Act shall be assessed and paid (a) upon the final balance of the estate of the deceased as determined in accordance with this Act.
>
> "102. For the purposes of the assessment and payment of death duty but subject as hereinafter provided the estate of a deceased person shall be deemed to include and consist of the following classes of property: . . . (2) . . . (d) Any property comprised in any gift made by the deceased at any time, whether before or after the passing of this Act, of which bona fide possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not and whenever the deceased died."

The concluding words of para. (d), namely, "whether enforceable at law or in equity or not and whenever the deceased died," were added after the death of the deceased by the Stamp Duties Amendment Act, 1931.

In their Lordships' judgment, having regard to the facts found in the Special Case and to the passage already quoted from the statutory declaration of the deceased's son Donald, the proper conclusions are that the partnership formed in 1909 continued without interruption until 1919, that under the terms of the verbal agreement made in 1909 the partnership was entitled to the use of the three holdings whatever the ownership of the holdings so long as the partnership continued, and that up to 1913 that right could only be determined by the dissolution of the partnership at will, which did not happen, that the transfers made in 1913 were intended to be subject to the partnership right, and that in connection with the transfers no alteration was made in the partnership agreement, except that the right of the partnership was diminished by the stipulation that any member of the family might withdraw from the agreement as to the running of stock on his holding upon reasonable notice.

It is unnecessary to determine the precise nature of the right of the partnership at the time of the transfers. It was either a tenancy during the term of the partnership or a licence coupled with an interest. In either view what was comprised in the gift was, in the case of each of the gifts to the children and the trustees, the property shorn of the right which belonged to the partnership, and upon this footing it is in their Lordships' opinion plain that the donee in each case assumed bona fide possession and enjoyment of the gift immediately upon the gift and thenceforward retained it to the exclusion of the donor. Further, the benefit which the donor had as a member of the partnership in the right to which the gift was subject was not, in their Lordships' opinion, a benefit referable in any way to the gift. It was referable to the agreement of 1909 and nothing else, and was not, therefore, such a benefit as is contemplated by s. 102 (2)(d). Upon this view of the matter the effect of the words added by the Stamp Duties (Amendment) Act, 1931, becomes unimportant and need not be considered.

But it was urged on behalf of the respondent before their Lordships' Board, although this point does not appear to have been raised below, that the matter must be looked at in a different light because of the form of the transfers and the provisions of s. 42 of the Real Property Act, 1900. That section provides as follows:

> "Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of land or of any estate or interest in land under the provisions of the Act shall, except in case of fraud, hold the same subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register-book constituted by the grant or certificate of title of such land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever" [with certain exceptions not material to be stated].

Now the transfers in form were expressed to be transfers of the deceased's right, title and interest in the lands comprised in them respectively without reference to any paramount right existing in the partnership and no such right was notified in the folium of the register-book. It may be, therefore, that the transfers, when registered, gave a title which overrode in point of law any unnotified right of the partnership. It is not necessary to express any opinion as to the extent of the operation of the words "except in the case of fraud" or how far these words would have had application to any of the transfers in the present case if the donee had insisted upon the absoluteness of the transfer contrary to the terms of the actual bargain.

In their Lordships' opinion it is the substance of the transactions which must be ascertained, and if when so ascertained the substance does not fall within the words of the statute it cannot be brought within them merely because the forms employed did not give true effect to the substance. It is not always sufficiently appreciated that it is for the taxing authority to bring each case within the taxing Act, and that the subject ought not to be taxed upon refinements or otherwise than by clear words. Their Lordships are satisfied that the respondent has not in the present case succeeded in making good that s. 102 (2) (d) of the Stamp Duties Act applies. The judgment below seems to have proceeded in part upon a misapprehension as to the facts, as their Lordships can find nothing to support the statement that in 1913 there was an express stipulation that the partnership should continue, and in part upon a view of the law which their Lordships do not think well founded, namely, that, if once it is found that the deceased had some benefit from the land, that in itself was sufficient to bring the case within the section, irrespective of the question whether the benefit was referable or not referable to the gift.

In their Lordships' opinion the appeal should be allowed, the rule below should be discharged, and the first question of the Special Case should be answered by declaring that none of the lands in question form part of the dutiable estate of the deceased. Their Lordships will humbly advise His Majesty accordingly. The respondent must pay the costs of the appeal.

Appeal allowed.

Solicitors: *Snow, Fox & Co.*; *Light & Fulton.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re WORTHINGTON. NICHOLS *v.* HART AND ANOTHER

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), May 5, 8, 1933]

[Reported [1933] Ch. 771; 102 L.J.Ch. 273; 149 L.T. 296; 49 T.L.R. 444; 77 Sol. Jo. 371]

Administration of Estates—Order of application of assets—Lapsed share of residue—Debts, &c., payable out of lapsed share—Bequests of pecuniary legacies and of residue—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 33 (2), (7), *s.* 34 (3), *Part II, Sched. I.*

A testatrix by her will left a number of pecuniary legacies and then bequeathed "all the residue" of her estate to two residuary legatees in equal shares. One residuary legatee predeceased the testatrix, and so the bequest to her lapsed and her share of the residue passed as on an intestacy. On the question whether the will operated to vary the order of administration laid down, in the absence of a contrary provision, by ss. 33 (2) and 34 (3) and Sched. I, Part II, para. 1, of the Administration of Estates Act, 1925, which provide that funeral, testamentary and administrative expenses, debts and other liabilities shall be paid primarily out of "property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies,"

Held: the order of administration laid down by the Act applied, and the expenses, debts, other liabilities, and legacies were, therefore, all payable primarily out of the lapsed share of residue because neither the gifts of "all the residue" nor the necessary previous mention of the legacies in the will constituted a provision that the statutory order of administration should not apply.

Re Tong (1), [1931] 1 Ch. 202, applied.

Notes. Considered: *Re Sanger, Taylor* v. *North*, [1938] 4 All E.R. 417. Followed: *Re Harland-Peck, Hercy* v. *Mayglothing*, [1940] 4 All E.R. 347.

As to the order of application of assets of a deceased since 1925, see 16 HALSBURY'S LAWS (3rd Edn.) 346 et seq., para. 671, and as to the exclusion of the statutory order of application see ibid 344, paras. 666, 667. For the Administration of Estates Act, 1925, s. 33 (2), (7), s. 34 (3), Sched. I, Part II, para. 1, see 9 HALSBURY'S STATUTES (2nd Edn.) 734, 735, 737, 767.

Cases referred to:

(1) *Re Tong, Hilton* v. *Bradbury*, [1931] 1 Ch. 202; 100 L.J.Ch. 132; 144 L.T. 260; 23 Digest (Repl.) 540, *6047*.

(2) *Re Kempthorne, Charles* v. *Kempthorne*, [1930] 1 Ch. 268; 99 L.J.Ch. 107; 142 L.T. 111; 46 T.L.R. 15, C.A.; 23 Digest (Repl.) 545, *6074*.

Appeal from the decision of BENNETT, J., dated March 29, 1933, as to the order of application of the assets of a deceased testatrix. The testatrix Mary Russell Worthington made her will on Jan. 6, 1930, and died on June 30, 1932. She bequeathed certain pecuniary legacies, and directed her executor to divide her residuary estate equally between Elizabeth Singer and Louisa Miriam Hart. Elizabeth Singer predeceased the testatrix by three months, and her share of the residuary estate was left undisposed of by the will. The question arose whether the provisions of the will altered the order in which the assets were to be applied from that directed by ss. 33 (2) and 34 (3) of the Administration of Estates Act, 1925. The executor issued this summons to determine (inter alia) whether (a) the debts, funeral, testamentary and administration expenses, and (b) the pecuniary legacies and duties payable on them were payable primarily out of the lapsed moiety of the residuary estate in exoneration of the moiety given to the surviving residuary legatee. BENNETT, J., on March 29, 1933, held that the debts, etc., were payable out of the lapsed share of residue, but that the pecuniary legacies and duties thereon were to be paid out of the general estate, and what was then left formed the residuary estate, on the ground that the specific mention of legacies was sufficient to prevent the order of administration directed by the Act being applicable. The surviving residuary legatee appealed.

Harold Christie for the surviving residuary legatee.

D. S. Chetwood for the respondent, Francis Charles Kelly, representing the next of kin.

LORD HANWORTH, M.R.—This appeal must be allowed. It raises an interesting point, and one which, by reason of certain sections of the Administration of Estates Act, 1925, and of the decisions already given on those sections, is of some difficulty.

The will is that of Mary Russell Worthington made on Jan. 6, 1930, who died on June 30, 1932, and probate of the will was granted on Aug. 22, 1930. The value of the estate was sworn at £5,967 11s. and was sufficient to cover both the debts and legacies. By her will the testatrix, after appointing the plaintiff, Ernest Barnard Nicholls, sole executor and bequeathing certain pecuniary legacies amounting to £2,750, gave, devised, and bequeathed all the residue of her estate both real and personal to Elizabeth Singer and the defendant, now the appellant, Louisa Miriam Hart (in the will called Loulou Miriam Hart) in equal shares absolutely. Elizabeth Singer died on March 22, 1932, three months before the death of the testatrix with the result that her share of the residue was undisposed of by the will.

The question is whether the legacies and debts, funeral, and testamentary expenses are to be paid out of the lapsed share or whether only the debts, &c., are so payable. BENNETT, J., declared that in the circumstances the debts, &c., were primarily payable out of the lapsed share but that the pecuniary legacies were payable out of the general estate before the residue had been ascertained.

The Administration of Estates Act, 1925, provides by rules for the order of administration of an estate. Section 33 (2) in Part III of the Act provides that

> "Out of the net money to arise from the sale and conversion of such real and personal estate (after payment of costs), and out of the ready money of the deceased (so far as not disposed of by his will, if any), the personal representative shall pay all such funeral, testamentary, and administrative expenses,

> debts, and other liabilities as are properly payable thereout having regard to the rules of administration contained in this Part of this Act, and out of the residue of the said money the personal representative shall set aside a fund sufficient to provide for any pecuniary legacies bequeathed by the will (if any) of the deceased."

And sub-s. (7) reads:

> "Where the deceased leaves a will, this section has effect subject to the provisions contained in the will."

Then in sub-s. (3) of s. 34 it is stated that

> "where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts, and liabilities payable thereout in the order mentioned in Part II of Sched. 1 to this Act."

Having regard to those sections and to Part II of Sched. I to the Act which is headed "Order of application of assets where the estate is solvent" and para. 1 of which provides

> "Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies,"

is there any reason for making the distinction made by **Bennett**, J., between debts and testamentary expenses on the one hand and pecuniary legacies on the other? The learned judge seems to have read the will as providing for payment of the legacies first and to have thought that the residue was not to be found until the legacies had been paid.

The terms of the statute indicate that, unless there is something contained in the will which negatives the order of administration there provided, the rules of such administration must apply to property left by will whether legacies or debts. The judge thought that because of the specific references to legacies in the will there was indicated a contrary intention with regard to those, so that the order of administration under the statute did not apply to them. But if there are legacies given in a will, there must be specific reference to them, and I do not see how that can be sufficient to alter the statutory order of administration. The decision of the Court of Appeal in *Re Tong*, *Hilton* v. *Bradbury* (1) seems really to cover the decision of this case. In that case I said ([1931] 1 Ch. at p. 211):

> "There are express directions [in the will] as to some matters. Is it not the fair inference that he intended the statutory table to be followed in regard to the payment of other expenses, debts or liabilities? I cannot accept the view that there is any indication in the words used in the will that the statutory order of application of assets was not to apply with regard to these other matters."

And **Romer**, L.J., there said ([1931] 1 Ch. at p. 212):

> "But I fail to find anything in the will amounting to an indication of the testator's intention that the funeral and testamentary expenses and debts generally should be paid in any other mode than that specified in Part II of Sched. I. Even if the testator had directed his executors to pay all his funeral and testamentary expenses and debts and then given the remainder of his estate on certain trusts, I should still have hesitated to say that this amounted to an indication that the expenses and debts were to be paid in any other order out of the assets than that provided for in Sched. I. The truth of the matter is that there is nothing in this Act which prevents or is intended to prevent executors from paying expenses, debts and liabilities out of the first assets coming to their hands available for the purpose; and Part II of Sched. I really only deals with the ultimate adjustment of the burden as between the parties becoming entitled to the testator's estate. Therefore the

> use of such a word as 'remainder' does not seem to me to make any difference. Such words throw no light on how as between the persons having beneficial interests in the remainder the liability for expenses and debts is to be apportioned." A

I also find difficulty in holding that there should be any change made in the statutory mode of payment because the testator might have used such a word as "remainder." B

For the reasons that I gave in that case and have given in this case I entirely agreed with what was said by ROMER, L.J., in *Re Tong* (1). Here there is nothing in the will which amounts to a direction that there should be any differentiation between the legacies on the one hand and the debts, &c., on the other hand, or that the legacies ought to be paid otherwise than as directed by the Act. C

There will, therefore, be a direction that the legacies and the debts, &c., are payable primarily out of the share bequeathed to Elizabeth Singer which has lapsed.

LAWRENCE, L.J.—I agree. The question is whether the will contains any provision which operates to vary the order of administration provided by the Act. Council for the next-of-kin contended that the gift of residue operated as showing an intention to effect such a variation. In my opinion that contention is not well D founded. The will contains no direction as to how the executor is to administer the estate and no direction which indicates an intention that the legacies are to be paid otherwise than in the statutory order of administration. The decision of the Court of Appeal in *Re Kempthorne*, *Charles* v. *Kempthorne* (*No. 1*) (2), varying the decision of the court below, brought debts, &c., into line with legacies. That was really the converse case to the present. Here I can see no real difference E between the application of the Act to debts, &c., and legacies, and I think that legacies ought to be brought into line with debts.

I agree with what ROMER, L.J., said in *Re Tong*, *Hilton* v. *Bradbury* (1) ([1931] 1 Ch. at p. 212):

> "Part II of Sched. I really only deals with the ultimate adjustment of the burden as between the parties entitled to the testator's estate. Therefore the F use of such a word as 'remainder' does not seem to me to make any difference. Such words throw no light on how, as between the persons having beneficial interests in remainder, the liability for expenses and debts is to be apportioned."

For these reasons I agree that the appeal should be allowed. G

ROMER, L.J.—I agree. Sections 33 and 34 of the Administration of Estates Act, 1925, provide that real and personal estate of a deceased person shall for the future be administered in a way materially different from the method in force before the Act, and they provide for the payment of debts, &c., and legacies in a way very different from that in use before the Act was passed. It is recognised in both sections that a testator may provide for a different order of administration: H that is, he may provide for payment of debts, &c., and legacies in a manner different from that specified in the Act. In the present case, however, I can find nothing in the will as to the order of priority in which the assets are to be administered. All we find is a gift of legacies and residue, and there is no direction given to the executor as to how, as between the beneficiaries, they are to be paid. I see no reason for departing from anything which I said in *Re Tong*, *Hilton* I v. *Bradbury* (1), and I agree that this appeal must be allowed.

Appeal allowed.

Solicitors: *Timbrell*, *Deighton*, *& Nichols*.

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

HANSON AND ANOTHER *v.* NEWMAN

[COURT OF APPEAL (Lawrence and Romer, L.JJ.), December 18, 1933]

[Reported [1934] Ch. 298; 103 L.J.Ch. 124; 150 L.T. 345; 50 T.L.R. 191]

Landlord and Tenant—Repair—Breach of covenant—Damages—Method of ascertainment—Difference between value of property at date of re-entry through breach and value if no breach had occurred—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 18 (1).

By s. 18 (1) of the Landlord and Tenant Act, 1927: "Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease . . . shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement. . . ."

In assessing damages under this subsection the court must ascertain the actual value of the property at the date of re-entry in consequence of the breach and the value which the property would then have had if there had been no breach, the difference between these two values being the amount of the damage sustained by the landlord.

Notes. Considered: *Smiley* v. *Townshend*, [1950] 1 All E.R. 530. Distinguished: *Jones* v. *Herxheimer*, [1950] 1 All E.R. 323.

As to remedies for breach of covenant to repair, see 20 HALSBURY'S LAWS (2nd Edn.) 219 et seq., and for cases see 31 DIGEST (Repl.) 371 et seq. For Landlord and Tenant Act, 1927, see 13 HALSBURY'S STATUTES (2nd Edn.) 883.

Case referred to:

(1) *Joyner* v. *Weeks*, [1891] 2 Q.B. 31; 60 L.J.Q.B. 510; 65 L.T. 16; 55 J.P. 725; 39 W.R. 583; 7 T.L.R. 509, C.A.; 31 Digest (Repl.) 373, *5042*.

Appeal by the tenant from an order of LUXMOORE, J., who ordered that, in assessing the damages for breach of covenant to repair Nos. 21–35 (odd numbers inclusive), Windmill Lane, Stratford, Essex, a tenant ought not to be credited with the difference between the value of the reversion in possession at the date of forfeiture and the value of the reversion if the lease under which the premises were held by the defendant for the remainder of the term of eighty-six years from Lady Day, 1852, had not been forfeited.

Alexander Grant, K.C., and *G. J. Paull* for the tenant.

H. B. Vaisey, K.C., and *W. T. Elverston* for the landlords.

The arguments sufficiently appear from the judgments.

LAWRENCE, L.J.—In my judgment, this appeal fails. The action is by landlords for the possession of certain premises comprised in a lease dated April 30, 1852, the term of which expires in the year 1938, on the ground that the tenant has committed breaches of the covenants to paint and repair. The landlords also claim damages for the breaches of those covenants. No defence was delivered, and judgment was given for possession and mesne profits and damages to be ascertained by a Master. When the matter came before the Master it was contended on behalf of the tenant that he was entitled to set-off against the damages for his breaches of covenant the difference between the value of the premises in possession at the date of the re-entry and the value which the reversion would then have had if the lease had not been determined. The Master—I think rightly—rejected that contention, and came to the conclusion that the correct measure of damages was the amount by which the value of the premises was diminished at the date of re-entry by reason of the non-performance of the covenants to paint and repair, and that the tenant was not entitled to any set-off by reason of what he termed "the acceleration of the reversion."

In my opinion, the expression "acceleration of the reversion" is not an apt term to use. For the purposes of the present case the reversion consists of the freehold subject to the lease. One of the terms of the lease is that the landlord may terminate the term by reason of any breach of covenant of default made by the tenant. The term granted by the lease is, therefore, subject to determination in that event under the express provisions of the lease. In these circumstances it cannot properly be said that the reversion has been accelerated when the landlord re-enters for breach of covenant.

The tenant appealed to LUXMOORE, J., against the decision of the Master, and relied upon s. 18 of the Landlord and Tenant Act, 1927, the relevant portion of which is the first part of sub-s. (1) and reads as follows:

> "Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is express or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid."

The expression "whether immediate or not" in that part of the section which I have read is, I think, explained by reference to the case, to which our attention has been called, of *Joyner* v. *Weeks* (1). A reversion may not be a reversion in possession (i.e., it may not be immediate) by reason of the freeholder having granted a reversionary lease, and in that case the reversionary lease is not to be taken into account in assessing the damages. In my judgment, what the court has to do in assessing damages under the section in the circumstances of these cases is to ascertain the actual value of the property at the date of re-entry and the value which the property would then have had if there had been no breach of covenant, and the difference between those two values is the amount of the damage sustained by the landlord (that is to say) the difference between the value of the property as it stands and the value which it would have had in case the tenant had fulfilled his obligations under the covenants in the lease. I cannot express it better than the learned judge has expressed it in his judgment when he says:

> "What the section provides is that the damages for breach of covenant on the termination of a lease are not to exceed the amount by which the amount of the reversion, whether immediate or not, in the premises is diminished owing to the breach of such covenant or agreement; that is, you take the value of the reversion as it is with the breach—the value of the property which has reverted as it is subject to the breach—and you take it as it would be if there were no breach, and you provide that the amount of damage shall not exceed the amount by which the value of the property repaired exceeds the value of the property unrepaired."

Counsel for the tenant has addressed an ingenious argument to the court. He contended that the right procedure to adopt in assessing damages under the section is to ascertain the value of the reversion before the breach (that is to say, when the lease has a certain number of years still to run), and then ascertain the actual value of the property after the breach has been committed, and the landlord has re-entered under the proviso for re-entry, and then set off the value of the reversion before the breach was committed against the actual value of the property upon which the lessor has re-entered. How the method could be applied to the case of a continuing breach counsel did not explain; but, be that as it may, I think that this contention is ill-founded. I think it is plain that the reversion referred to in the section means the freehold or leasehold estate of the landlord, subject to the lease or sub-lease, and that it would not be right to adopt any such procedure as has been contended for.

For these reasons I am of opinion that this appeal ought to be dismissed with costs.

A **ROMER, L.J.**—I am entirely of the same opinion. Whatever may be the strict meaning at law of the word "reversion," there can, I think, be no doubt as to the meaning that that word bears in the section of the Landlord and Tenant Act, 1927, with which we are concerned here. "Reversion" in that section, if it be a freehold reversion, means the freehold subject to the lease, and in valuing the reversion for the purposes of the section you must value the freehold subject to so much, B if any, of the lease as remains in existence—that is, so much, if any, of the term of the lease that remains in existence. That is perfectly plain.

The writ in the present case was issued after the determination of the lease, and by it the landlords seek to recover damages from the tenant for breach of the covenant to leave the premises in repair, and the section says that in those circumstances the reversion is to be valued. Of course, strictly speaking, there is no C reversion left, because the lease is determined, and that indicates plainly, to my mind, that for the purpose of the section the freehold has to be valued subject to so much, if any, of the term as remained unexpired. Let me apply this consideration to the present case. Here there was a continuing breach of a covenant to repair. The landlords, after taking the proper steps to end the tenancy, issued their writ on Aug. 9, 1932, to recover possession and damages for breach of the D covenants to repair. By issuing that writ they elected finally to determine the tenancy, as they had power to do under the proviso for re-entry contained in the lease. The section says that in those circumstances the value of the reversion has to be ascertained. The value of the freehold, therefore, has to be ascertained subject to so much, if any, of the term of the lease as remains unexpired, and, regarding the fact that on Aug. 9 the landlords elected to determine, E and did determine, the lease, no part of the term is unexpired. The value of the unencumbered freehold has to be ascertained. In the events that happened the lease came to an end on Aug. 9. That is found from the order that is made because the judgment provided that the landlord should recover possession against the tenant, and an inquiry as to damages which was directed to the Master to ascertain the amount of damages starts on Aug. 9, the day on which the lease, F originally granted by the predecessor in title, came to an end in accordance with its terms. In my opinion, the learned judge arrived at the correct view of the meaning of this section, and I agree with my Lord that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Deyn & Lauderdale*; *Beamish, Hanson, Airy & Co.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

A

LAWRENCE *v.* REGEM

[PRIVY COUNCIL (Lord Atkin, Lord Thankerton, and Sir George Lowndes), June 15, 16, 19, July 20, 1933]

[Reported [1933] A.C. 699; 102 L.J.P.C. 148; 149 L.T. 574; 50 T.L.R. 13] B

Criminal Law—Trial—Summing-up—Need for direction on onus of proof—Sentence—Felony—Need for sentence to be passed in presence of prisoner.

Although in certain cases the issues have been so clearly stated and agreed to by counsel on both sides that the trial judge and a court of appeal are satisfied that, although they were not directed on the matter, the jury can have been under no misapprehension on the point that the onus of proving the guilt of the prisoner was on the prosecution, speaking generally, it must be remembered that it is an essential principle of the criminal law that a charge must be established by the prosecution beyond reasonable doubt and that the tribunal of fact understands this. A defect in the summing-up in this regard is not cured merely because the defence laboured the question of onus at the trial and counsel for the prosecution, while dealing with two counts out of sixteen counts, said that the jury must give the prisoner the benefit of any reasonable doubt. Where there has been such a defect, unless it can be predicated that the jury, if properly directed, must have returned the same verdict, a substantial miscarriage of justice would appear to be established. C D E

At the trial of an action in which the appellant was charged with stealing and false accounting, the judge gave no direction at all to the jury that the onus of proof rested on the prosecution, and that the accused should be given the benefit of the doubt. Further, at the end of trial the sentence passed on the accused was varied by the judge in the absence of the accused.

Held: (i) that the omission to direct the jury as to the onus of proof or that the accused was entitled to the benefit of a reasonable doubt was as grave an error as active misdirection upon the elements of the offence, and it was a disregard of the form of legal justice by which substantial and grave injustice had been done; and (ii) the revised sentence must be regarded, not as a mere elaboration of that passed at the trial, but as a new and different sentence passed in circumstances in which the judge had no jurisdiction to pass a sentence. F G

Notes. Referred to: *Attygalle* v. *R.*, [1936] 2 All E.R. 116; *Renouf* v. *A.-G. for Jersey*, [1936] 1 All E.R. 936; *Mahlikilili Dhalamini* v. *R.*, [1943] 1 All E.R. 463.

As to the necessary contents of a summing-up, see 10 HALSBURY'S LAWS (3rd Edn.) 424 et seq., and for cases see 14 DIGEST (Repl.) 330 et seq. H

Cases referred to:

(1) *R.* v. *Hales*, [1924] 1 K.B. 602; 93 L.J.K.B. 479; 130 L.T. 317; 40 T.L.R. 179; 88 J.P. 24; 68 Sol. Jo. 461; 27 Cox, C.C. 571; 17 Cr. App. Rep. 193, C.C.A.; 14 Digest (Repl.) 326, *3154*.

(2) *Re Dillet* (1887), 12 App. Cas. 459; 56 L.T. 615; 36 W.R. 81; 3 T.L.R. 492; 16 Cox, C.C. 241, P.C.; 8 Digest (Repl.) 822, *749*. I

Appeal by special leave from a judgment and order of the full court of the Supreme Court of Nigeria upon a Case Stated, affirming the conviction and sentence of the appellant at the assizes of the Supreme Court of Nigeria, holden at Lagos.

The facts are fully set out in their Lordships' judgment.

The grounds for appeal put forward by the appellant were: (i) The absence of any adequate direction to the jury as to the issues they had to try; and (ii) the invalidity of the recorded sentence.

A *T. J. O'Connor, K.C.*, and *St. J. Hutchinson* for the appellant.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *Kenelm Preedy* for the Crown.

Cur. adv. vult.

July 20. **LORD ATKIN.**—This is an appeal in a criminal case by special leave B from a judgment of the full court of the Supreme Court of Nigeria affirming on a Case Stated a conviction of and sentence on the appellant on a trial at the special assizes at Lagos before BERKELEY, J., and a special jury. After the hearing before their board, their Lordships announced that they would humbly advise His Majesty that the appeal would be allowed, and the conviction set aside, and that they would give their reasons for their report later, which they now proceed to do.

C The appellant, in November, 1931, was an officer in the administrative service of Nigeria of about seventeen years standing. He was at that time, and had been during the year 1931, district officer in charge of the district of Ilorin in that province, and was also in charge of the Ilorin Emir's Native Administration. On Nov. 15, 1931, he left Ilorin on leave for England. In December he was arrested in England on a warrant in pursuance of the Fugitive Offenders Act charging him D with having stolen £150 in two bags of silver, the property of the Nigerian government. Eventually he was remanded in this country in order to enable him to return voluntarily to Nigeria to meet the charges. On his return, on Feb. 29, 1932, he was charged before the police magistrate at Lagos both with the theft of the silver and with four other offences of stealing by cheques sums of £25, £35, £10, and £35 in May, June, and October, 1931, and also of false accounting in respect E of these cheques under s. 439 of the Criminal Code. On March 9 he was committed for trial at the assizes at Lagos. On March 18 an information was filed by the Attorney-General containing sixteen counts, being the charges on which the appellant was committed together with six additional charges of false accounting.

On March 29 the trial began before BERKELEY, J., and a mixed special jury of Europeans and natives. The trial occupied twelve days and resulted on April 9 F in the appellant being acquitted on the original charges of stealing the bags of silver, but convicted of the remaining charges. He was sentenced to three years' imprisonment. Thereupon the jury were discharged and the assizes closed. The judge had been asked to state a Case which he was prepared to do upon the points of law relied on being filed within three days. Meanwhile, the attention of the learned judge appears to have been called to difficulties in preparing the warrant G of commitment. The maximum sentence on the charge of false accounting is two years. On the application of the Solicitor-General who conducted the prosecution, the learned judge in chambers, and in the absence of the accused, proceeded to draw up and record a revised sentence according to which on the counts for stealing the accused was to receive two years' imprisonment; on the counts for false accounting, one year's imprisonment; on the first two counts the sentences were to be H consecutive; on all the other counts the sentences were to be concurrent with the first two. In accordance with this sentence the warrant of commitment upon which the accused has served part of the sentence was drawn up. The Case stated by the learned judge was heard by the full court on April 23, 25, and 26, and on April 29, 1932, the full court delivered a considered judgment affirming the judgment below. Up to this date the accused had been on bail. He served part of I his sentence until, upon the order giving special leave to appeal being made, he was released on bail on July 30, 1932, by order of the Acting Chief Justice. He has been on bail since that date.

To appreciate the nature of the charges made against the appellant it is necessary to state generally the ordinary course of administration at the relevant dates. The appellant's pay and allowances amounted to from £60 to £68 a month. His private account was kept at the Bank of British West Africa as Oshogbo. The account of the Native Administration of Ilorin was kept at the Colonial Bank at Ibadan. The appellant kept the cheque book of that account and alone had power to draw. There was considerable expenditure in the course of the year in connection with the native police and prison equipment and works, and cheques would be drawn in payment of traders' accounts, and also to provide cash for administrative purposes. The appellant, moreover, if he desired to remit to his own bank, would on occasions draw a cheque on the Native Administration account at the same time paying to the cashier of the Native Administration office cash representing the amount. So far as the appellant was concerned, apparently the only record made by him of the cheques, and the purpose for which they were drawn, was in the counterfoil of each cheque. The counterfoils were from time to time entered in the Native Administration cash book by the native cashier. It is unnecessary to emphasise the looseness of this system, but it was in existence when the appellant came into office, and has now been altered.

The charges upon which the appellant was convicted range themselves into two groups. The first group comprising counts 3–10 inclusive relate to cheques dated May 9, 1931, for £17 1s.; May 4, 1931, £25; Aug. 18, 1931, £35; May 9, 1931, £35. In all the cases the cheques were drawn in favour of local tradesmen and the counterfoils respectively recorded "Green fezzes" (which would be part of the prison warders' equipment), "Blue drill," "Blue cloth" and "Khaki drill."

In respect of the first-mentioned cheque there was evidence by the tradesman representative that the amount due for green fezzes was £7 1s., and that he handed the balance of the cheque to the appellant personally. In respect of the cheques of May 4, £25, and Aug. 18, £35, the evidence of the tradesmen who had received the cheques was that there were no sums owing to them at that time for "Blue drill" and "Blue cloth," that the cheques appeared to be for cash, but no evidence was given of any payments to the appellant. In respect of the cheque, May 9, £35, the evidence of the tradesman was that no amount was owing for "Khaki drill" and that the cheque was exchanged for cash which the witness handed to the appellant himself. The appellant was unable to remember the actual transactions, and could only say that he denied receiving any cash. It is obvious that in the case of the first and fourth cheques there was evidence upon which a jury properly directed could find a verdict against the appellant of misappropriating £10 and £35, and necessarily, in consequence, of falsely accounting in the counterfoils.

The second group of charges is on counts 11–16 inclusive. They contain no charge of stealing, and it is significant that the Crown did not make it part of their case that in these cases any money had been stolen or lost. The charges relate to cases where in respect of two cheques of different dates the amount of the one has been entered in the counterfoil of the other. In all cases the earlier cheque was a cheque in favour of the appellant's bank for £30 paid into his account, but the cheque is entered on the later counterfoil. The later cheque was for a tradesman's account and is entered on the earlier counterfoil. Neither counterfoil could have been filled up until the later date, and the appellant's case was that in the stress of work he had neglected to fill up the counterfoils at the time and had carelessly filled them up later from memory. If the appellant had no right to draw the cheque in his favour when he did the obvious suggestion is that he misappropriated the proceeds of the cheque at the time, concealed the transaction until he drew correctly the later cheque, where out of his own funds he had made good to the cashier the amount he had previously stolen. This suggestion was directly made before their Lordships by counsel for the Crown. But at the trial this suggestion apparently was not made and no question was directed in cross-examination to the appellant to support it, nor was any evidence given that the cheques drawn by the appellant in favour of his bank were unauthorised. In these circumstances the appellant's defence of carelessness appears to have been worthy of close consideration, and it was especially important that the jury should have been adequately directed as to the meaning of "knowingly furnishing a false statement or return of money" which is the offence charged; and as to the importance of the absence of motive if the suggestion of misappropriation was not put forward by the Crown.

The grounds for appeal put forward by the appellant are: (i) The absence of any adequate direction to the jury as to the issues they had to try. (ii) The invalidity of the recorded sentence. It is evident from what has been said that the case was complicated. The issue of larceny had to be kept separate from that of knowingly furnishing a false statement; and in view of the lax system which existed in the Native Administration office, it was important to distinguish between carelessness and intentional wrongdoing. Moreover, the information consisted of at least three groups of charges; and each count in each group had to be separately considered. The appellant objected that the second and third groups ought not to have been joined with the two separate felonies of stealing the bags of silver charged in the first two counts. Their Lordships are inclined to agree, but they would not be prepared to interfere with the conviction on this ground. The appellant was in fact acquitted on these charges, and there is nothing to indicate that any substantial injustice was done by the error in procedure. The appellant, nevertheless, is entitled to say that the number of the various charges required careful separate consideration, and on this point he criticises the summing-up. The learned judge in his direction to the jury styles the various groups of counts as charges first, second and third, and in dealing with them, though he points out that the facts in each pair of counts are different, so far as their Lordships see he nowhere directs the jury that in respect of each charge the jury might convict on one pair of counts and acquit on the others. It has already been pointed out that on counts 5 and 7 any direct evidence of larceny was absent. Moreover, the learned judge took a general verdict of the jury on first charge, second charge and third charge, and, though the verdict appears to have been put in order by taking the assent of the jury to a verdict of "Guilty on counts 3–16," it is difficult to resist the impression that the jury were to consider all the counts in the second charge all or none, and so as to the counts in the third charge. Inasmuch, however, as there would be evidence to support counts 3 and 4 and 9 and 10, it would not be in accordance with their Lordships' principles in dealing with criminal appeals to interfere with the conviction if the appeal rested upon this objection alone.

A more important objection is that throughout the judge's charge he did not give the jury any direction at all as to the onus of proof, or that the accused was entitled to the benefit of a reasonable doubt. Their Lordships have no doubt that this was due to inadvertence, for when the learned judge stated a Case for the full court he states in it that, though he has to rely on his memory, he is able to say

> "that the jury were sufficiently instructed by me that the onus of proof rested on the prosecution and that the accused should be given the benefit of the doubt."

Unfortunately, the learned judge's memory failed him, for there is not a word of either topic in the shorthand record of the summing-up which was adopted in the full court as accurate. Indeed, so far as the charge dealt with the matter at all it seems to have suggested to the jury that the accused in two cases had the money, and that, if he could not account for it, the Crown had made out their case. The true direction would be that the onus was always on the Crown, but that, if the jury believed that the accused had the money, and were not satisfied that his reason for not accounting for it was true, there was evidence upon which they might, if they chose, find him guilty of stealing. Before the full court the Crown had to fall back upon the contention that, as the defence had laboured the question of onus and counsel for the prosecution had, while dealing with two of the counts, said that the jury must give the accused the benefit of any reasonable doubt, the defect in the summing-up was cured. Their Lordships cannot accept this view in this case. It often happens that the issues have been so clearly stated and agreed to by counsel on both sides that the trial judge and a court of appeal is satisfied that the jury can have been under no misapprehension on the point of onus, and that further comment by the judge is unnecessary. But, speaking generally, it has to be remembered that it is an essential principle of our criminal law that a criminal charge has got to be established by the prosecution beyond reasonable doubt; and it is essential that the tribunal of fact should understand this. Unless the judge makes sure that the jury appreciate their duty in this respect his omission is as grave an error as active misdirection on the elements of the offence, and a verdict of Guilty given by a jury who have not taken this fundamental principle into account is given in a case where the essential forms of justice have been disregarded. In such a case unless it can be predicated that properly directed the jury must have returned the same verdict a substantial miscarriage of justice appears to be established. In the present case it appears to their Lordships quite insufficient that a statement on this point should have been made by counsel for the defence. Jurors are apt to be suspicious of law as propounded by the defence; they look to the judge for authoritative statement of it, and in the present case there appears to be no sufficient ground for supposing that the jury had present to their minds the governing principle of our law as to onus of proof. Nor are their Lordships satisfied that in any case the jury must have returned a verdict of Guilty. It is true that there was evidence against the accused, but a close scrutiny of the evidence fails to satisfy them that upon a proper direction the jury might not reasonably have come to the conclusion that the guilt of the accused was not established beyond a reasonable doubt.

But, in addition to this vital defect in the procedure up to verdict, there has to be considered the alteration and recording of the sentence in the absence of the accused. It is an essential principle of our criminal law that the trial of an indictable offence has to be conducted in the presence of the accused; and for this purpose trial means the whole of the proceedings, including sentence. There is authority for saying that in cases of misdemeanour there may be special circumstances which permit a trial in the absence of the accused, but on trials for felony the rule is inviolable, unless possibly the violent conduct of the accused himself intended to make trial impossible renders it lawful to continue in his absence. The result is that sentence passed for felony in the absence of the accused is totally invalid. In the present case a double error has been made. In the first place, the general sentence of three years' imprisonment is invalid, for it is applicable to each count, and for the offences charged in the counts for false accounting the maximum punishment is two years. If the matter rested here it would appear that upon Case Stated the Appeal Court under s. 171 of the Criminal Procedure Ordinance would have had power to reverse, affirm or amend the judgment. But, unfortunately, the learned judge in chambers in the absence of the accused, and apparently at the request of the Solicitor-General, varied the sentence on the record by substituting on the record a sentence of one year's imprisonment on the third count and two years' imprisonment on the fourth count to run consecutively, and corresponding sentences on the remaining counts for false accounting and larceny all to run concurrently with the sentences on the counts 3 and 4 and with each other. The warrant of commitment recites this sentence as being that which the sheriff is directed to carry into execution according to law. This is the sentence which it was necessary to appeal against. Their Lordships cannot agree with the Appeal Court that it was merely an elaboration of a previous sentence. It was a new and different sentence passed in circumstances in which the judge had no possible jurisdiction to pass any sentence even if, which is doubtful, in point of time his power to pass sentence at all still continued. There appears to have been no sentence at all which could be amended, and their Lordships find themselves in accord with the decision on this point of the Court of Criminal Appeal in *R.* v. *Hales* (1) where a reserved sentence was passed in the absence of the accused convicted in a different county, and the court quashed the conviction. But without finally deciding whether the case could have been remitted to the Appeal Court for the sentence to be amended their Lordships are clearly of opinion that in the circumstances which they have detailed no such order should be made. In their opinion there has been disclosed, in the words of Lord Watson, expressing the judgment of the Board in *Re Dillet* (2), a disregard of the form of legal justice by

A which substantial and grave injustice has been done, and they therefore, after the hearing, humbly advised His Majesty that the conviction and sentence should be set aside.

Appeal allowed.

Solicitors: *Church, Adams, Tatham & Co.*; *Burchells.*

B [*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

C

LANCASHIRE LOANS, LTD. v. BLACK

[COURT OF APPEAL (Scrutton, Lawrence and Greer, L.JJ.), October 26, 27, 30, 31, November 1, 27, 1933]

D [Reported [1934] 1 K.B. 380; 103 L.J.K.B. 129; 150 L.T. 304]

Undue Influence—Presumption—Mother and daughter—Transaction in favour of mother, but against interest of daughter—Need to prove cessation of parental domination—Need of independent advice—Emancipation—Marriage of daughter.

E *Moneylender—Memorandum—Old loan, with interest thereon, renewed as part of new loan—Need to state that new loan made before old loan due for repayment.*

In a court of equity in the case of a benefit or contractual advantage obtained from a person coming within certain defined relations, such as the relation of parent and young child, by the related member of that class, it is enough to prove the existence of such a relation to throw on the recipient of the advantage F the burden of proving independent advice to the donor and in other respects justifying the transaction. It is impossible to lay down any hard-and-fast rule for determining how the onus which lies upon a parent of proving that a gift from his or her child was not due to the parental influence can be discharged. Each case must depend on its own special circumstances; in some cases the parental domination may be stronger and last longer than in others. G It is plain that it does not necessarily come to an end on the technical legal emancipation of the child, and it is well settled that as long as the parental domination continues, the exercise of influence will be presumed to continue also. The bare fact of the marriage of a daughter is not sufficient to exclude the application of the doctrine, as after her marriage the daughter may continue to live with her parents and remain subject to their dominion. The fact H that a daughter has married and gone to live with her husband is a circumstance of great importance in determining whether or not the dominion of a mother over her daughter has completely terminated, but it is not conclusive. The relationship between a mother and her daughter is, undoubtedly, one of the greatest intimacy and confidence, and it is impossible to lay down any general rule for measuring the amount or duration of the domination which I a mother may have acquired over her daughter. There is no hard-and-fast rule that in every case where the daughter has married and left the home of her parent or parents the parental domination must necessarily be taken to have completely ended.

Notes. Restraints on anticipation (mentioned in this case, infra) other than those which can be attached to the enjoyment of property by a man were abolished by the Married Women (Restraint upon Anticipation) Act, 1949.

Applied: *Bullock* v. *Lloyds Bank, Ltd.*, [1954] 3 All E.R. 726. Referred to: *Mutual Loan Fund Association, Ltd.* v. *Sanderson*, [1937] 1 All E.R. 380.

As to undue influence, see 17 Halsbury's Laws (3rd Edn.) 672 et seq., and for cases see 25 Digest 257 et seq. As to the memorandum in a moneylending transaction, see 23 Halsbury's Laws (2nd Edn.) 191 et seq., and for cases see Digest Supps., tit. Money and Money-lending, case 353a et seq.

Cases referred to:

(1) *Campbell (Donald) & Co., Ltd.* v. *Pollak*, [1927] A.C. 732; 96 L.J.K.B. 1093; 137 L.T. 656; 43 T.L.R. 495; 71 Sol. Jo. 450, H.L.; 36 Digest (Repl.) 366, *42*.

(2) *Derry* v. *Peek* (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 38 W.R. 33; 5 T.L.R. 625; 1 Meg. 292, H.L.; 35 Digest 27, *185*.

(3) *Chesterfield (Earl)* v. *Janssen* (1751), 1 Atk. 301; 2 Ves. Sen. 125; 26 E.R. 191; 35 Digest 39, *328*.

(4) *Powell* v. *Powell*, [1900] 1 Ch. 243; 69 L.J.Ch. 164; 82 L.T. 84; 44 Sol. Jo. 134; 12 Digest (Repl.) 115, *676*.

(5) *Howes* v. *Bishop*, [1909] 2 K.B. 390; 78 L.J.K.B. 796; 100 L.T. 826; 25 T.L.R. 533, C.A.; 27 Digest (Repl.) 156, *1136*.

(6) *Inche Noriah* v. *Shaik Allie Bin Omar*, [1929] A.C. 127; 98 L.J.P.C. 1; 140 L.T. 121; 45 T.L.R. 1, P.C.; Digest Supp.

(7) *B. S. Lyle, Ltd.* v. *Chappell*, [1932] 1 K.B. 691; 101 L.J.K.B. 185; 48 T.L.R. 119, C.A.; Digest Supp.

(8) *Re Harmony and Montague Tin and Copper Mining Co., Spargo's Case* (1873), 8 Ch. App. 407; 42 L.J.Ch. 488; 28 L.T. 153; 21 W.R. 306; 9 Digest (Repl.) 91, *401*.

(9) *Parsons* v. *Equitable Investment Co., Ltd.*, [1916] 2 Ch. 527; 85 L.J.Ch. 761; 115 L.T. 194; 60 Sol. Jo. 639, C.A.; 7 Digest 49, *256*.

(10) *Richardson* v. *Harris* (1889), 22 Q.B.D. 268; 37 W.R. 426; 5 T.L.R. 178, C.A.; 7 Digest 48, *249*.

(11) *Huguenin* v. *Baseley* (1807), 14 Ves. 273; 33 E.R. 526; 12 Digest (Repl.) 111, *657*.

(12) *Hoghton* v. *Hoghton* (1852), 15 Beav. 278; 21 L.J.Ch. 482; 17 Jur. 99; 51 E.R. 545; 12 Digest (Repl.) 112, *662*.

(13) *Turner* v. *Collins* (1871), 7 Ch. App. 329; 41 L.J.Ch. 558; 25 L.T. 779; 20 W.R. 305, L.C.; 12 Digest (Repl.) 114, *674*.

(14) *McKackin* v. *Hibernian Bank*, [1905] 1 I.R. 269.

(15) *Allcard* v. *Skinner* (1887), 36 Ch.D. 145; 56 L.J.Ch. 1052; 56 L.T. 61; 36 W.R. 251; 3 T.L.R. 751, C.A.; 12 Digest (Repl.) 111, *659*.

(16) *Rhodes* v. *Bate* (1866), 1 Ch. App. 252; 35 L.J.Ch. 267; 13 L.T. 778; 12 Jur.N.S. 178; 14 W.R. 292; 12 Digest (Repl.) 125, *765*.

(17) *Archer* v. *Hudson* (1844), 7 Beav. 551; 13 L.J.Ch. 380; 3 L.T.O.S. 320; 8 Jur. 701; 49 E.R. 1180; affirmed (1846), 15 L.J.Ch. 211; 12 Digest (Repl.) 113, *666*.

(18) *Wright* v. *Vanderplank* (1856), 8 De G. M. & G. 133; 25 L.J.Ch. 753; 27 L.T.O.S. 91; 2 Jur.N.S. 599; 4 W.R. 410; 44 E.R. 340; 12 Digest (Repl.) 113, *668*.

Appeal from an order of du Parcq, J.

Mrs. Branson, "the grandmother," was born in 1856; Mrs. A. L. Black, "the mother," in 1889; and Mrs. A. J. Black, "the daughter," in 1909. The grandmother, who had re-married at the age of seventy-one, was in possession of £10,000 yearly income for her life, without power of anticipation, under the trusts of the will of her first husband. On her death this income, without power of anticipation, was to be divided equally between her four children, one of whom was the mother. On the death of the mother, subject to her testamentary power of appointment among her children, the capital of her portion, £2,500 a year, without power of anticipation, was to pass to her children, one of whom was the daughter. In 1927, at the age of eighteen, the daughter, who was then living with one parent, her mother, married and left the parental home. In 1932 the daughter was separated from her husband, and again lived with her mother. The mother had a voluntary allowance of £1,000 a year from the grandmother; the daughter had no income. In March, 1930, the daughter, then of age, borrowed £2,000 from the Legal and General Assurance Company at 5½ per cent., reduced to 4½ per cent. on punctual payment, the daughter charging her vested interest in remainder under the said will and the mother covenanting not to exercise her power of appointment so as to defeat the daughter's interest in default of appointment. The daughter undertook to pay the interest and also the premiums on two policies of life insurance charged as security; the mother guaranteed these payments. £100 only of the £2,000 was received by the daughter; £1,100 was paid to Barclay's Trust, moneylenders, to extinguish a debt owed them by the mother; the balance, after payment of costs, was paid to the mother. In this transaction Mr. Napthali Price, a solicitor, introduced to them by Barclay's Trust, acted for mother and daughter. In March, 1930, Mr. Napthali Price incorporated the plaintiffs, Lancashire Loans, Ltd., moneylenders, and thenceforward acted as one of their solicitors. Barclay's Trust were in liquidation. On Nov. 12, 1930, the mother borrowed from the plaintiffs £150 at 240 per cent., reduced to 70 per cent., and repaid on Feb. 20, 1931. In March, 1931, the mother borrowed from the plaintiffs £150 at 85 per cent., repayable on June 4, 1931. The loan was renewed by a new loan on May 28, 1931, of £300 at 85 per cent., £120 being paid to the mother, and £180 treated as repayment of the March loan. The £30 interest was, therefore, re-lent at 85 per cent. The £300 was due to be repaid on Aug. 28, 1931. On July 3, 1931, the loan was renewed by a new loan of £500 at 85 per cent.; £140 was paid to the mother, and £360 was treated as repayment of the May loan. The interest due was under £30, which was re-lent at 85 per cent., the balance up to £60 being, in effect, a bonus to the plaintiffs. The £500 was due to be repaid on Oct. 7, 1931. On Aug. 5, 1931, the loan was renewed by a new loan of £775 at 85 per cent.; £200 was paid to the mother, and £575 treated as repayment of the July loan. The interest due was between £35 and £40, which was re-lent at 85 per cent., the balance up to £75 being, in effect, a bonus to the plaintiffs. At the request of the mother, to secure the loan of £775, the daughter, as surety, charged her vested interest in remainder under the said will, already charged to secure the £2,000 already mentioned which had not been repaid. The daughter also signed a promisory note for £775. The memorandum under s. 6 of the Moneylenders Act, 1927, stated that mother and daughter had agreed that £575 was due on the last loan. The only advice the daughter had was that of her mother and of Mr. Napthali Price, the solicitor, who acted for the plaintiffs and for mother and daughter. When giving evidence in the action, the daughter stated that she did not understand the extent of her indebtedness.

In an action by the plaintiffs against the mother and the daughter to recover principal and interest—in all over £2,000 under the August loan—DU PARCQ, J., declined to set aside the transaction as regards the daughter on the ground of "undue influence," and supported the memoranda, but found the transactions "harsh and unconscionable." Accordingly, he re-opened them, ordering the mother to repay £610—the amount she had received, with 40 per cent. interest up to Aug. 5, 1931, and from that date at 12 per cent. The daughter appealed; the mother did not appeal. The plaintiffs cross-appealed against the decision in favour of the daughter and appealed against that in favour of the mother, and, while accepting the figure of £610 as the amount lent, asked for interest at 85 per cent.

The Moneylenders Act, 1927 (17 & 18 Geo. 5, c. 21), provides:

> Section 6: "(1) No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender after the commencement of this Act or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days

of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given as the case may be. (2) The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan and either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of Sched. I to this Act."

Section 7: "Subject as hereinafter provided, any contract made after the commencement of the Act for the loan of money by a moneylender shall be illegal in so far as it provides directly or indirectly for the payment of compound interest or for the rate or amount of interest being increased by reason of any default in the payment of sums due under the contract: Provided that provision may be made by any such contract that if default is made in the payment upon the due date of any sum payable to the moneylender under the contract, whether in respect of principal or interest, the moneylender shall be entitled to charge simple interest on that sum from the date of the default until the sum is paid, at a rate not exceeding the rate payable in respect of the principal apart from any default, and any interest so charged shall not be reckoned for the purposes of this Act as part of the interest charged in respect of the loan."

Serjeant Sullivan, K.C., and *Harold Simmons* for the daughter.
Grant, K.C., and *R. F. Levy* for the plaintiffs.
C. Gallop for the mother.

Cur. adv. vult.

Nov. 27. The following judgments were read:

SCRUTTON, L.J.—Lancashire Loans, Ltd., moneylenders, brought an action against a mother, Mrs. A. L. Black, and her daughter, Mrs. A. J. Black, to recover principal and interest—over £2,000—alleged to be due from both, the mother as principal debtor, the daughter as surety on a moneylending transaction in August, 1931. The mother asked to re-open moneylending transactions beginning in November, 1930, as "harsh and unconscionable," and under the Moneylenders Act, 1900, and also because there was no sufficient memorandum under s. 6 of the Moneylenders Act, 1927. The daughter asked that the transaction of August, 1931, should be set aside (i) because she was induced to enter into it by the undue influence of the mother, and did not understand the transaction, (ii) because it was "harsh and unconscionable," (iii) because of the above defect in the memorandum. The judge declined to deal with the matter on the ground of undue influence and supported the memorandum, but he did find the transactions "harsh and unconscionable," and, therefore, re-opened them. He ordered the mother to repay the amount actually lent her, £610, with a reduced rate of simple interest, 40 per cent. up to the time when the daughter became surety, and 12 per cent. after that date, amounting in all to £764 6s. 10d., and gave the plaintiffs no costs against the mother. As against the daughter he gave judgment for a similar amount, but ordered the plaintiffs to pay her five-sixths of her costs.

Against this judgment the daughter appealed, asking to have the whole transaction set aside against her. To her appeal the moneylenders cross-appealed, asking, while accepting the figure of £610, money lent, that the simple interest should be increased from 40 per cent. and 12 per cent. to 85 per cent., and that they should have the costs of the proceedings. The moneylenders also appealed against the judgment so far as it concerned the mother, asking for a similar change as to interest and costs. The mother did not appeal. I may say at once so far as the cross-appeal and appeal of the moneylenders are concerned the court would be exceedingly slow to interfere with the rate of interest and orders as to costs fixed by the trial judge, if they did not interfere with his judgment as to undue influence, or as to re-opening the account. Indeed, in such a case, I think the decision of the House of Lords in *Campbell* (*Donald*) *& Co., Ltd.* v. *Pollak* (*No. 2*) (1) would prevent any interference with the judge's order as to costs. The substantial questions in the appeal, therefore, are (i) whether on the ground of the mother's influence on the daughter and the moneylenders' knowledge of the circumstances or on the ground of the harsh and unconscionable nature of the transaction of August, 1931, it should be set aside so far as the daughter is concerned; (ii) whether the memoranda are sufficient.

The history begins with the testamentary dispositions of Mr. Barnett, which resulted in a sum of about £240,000 being in the hands of the Public Trustee on certain trusts. His wife, then Mrs. Barnett, now Mrs. Branson, referred to in this judgment as "the grandmother," had the income for life without power of anticipation—an income of about £10,000 a year. She is now of the age of seventy-seven, and entered into a second marriage at the age of seventy-one, six years ago. On her death the income was to be divided equally between her four children, one of whom is now Mrs. Ada Louisa Black, referred to hereafter as "the mother" of the other defendant, Mrs. Alphea Joan Black, referred to hereafter as "the daughter." On the death of the grandmother the mother would be entitled to an income of about £2,500 a year, without power of anticipation. The mother had a testamentary power of appointment among her children, but in default of appointment the capital would pass in equal shares to her children, including the "daughter" Joan, who would on the death of grandmother and mother be entitled to a sum depending on the number of her mother's children who reached twenty-one. The grandmother was born in 1856, the mother in 1889. Any further children of the mother might lessen the daughter's share. The daughter was born in March, 1909, and married in March, 1927; she came of age in March, 1930, and was separated from her husband in 1932, going back to her mother's house.

The mother was a very extravagant woman, who was quite unable to restrict her wants to her actual income—apparently only a voluntary allowance of £1,000 a year from the grandmother—and evidently anticipated in expenditure her future income when the grandmother should die. So long as she could get money, however little in the present, she was quite indifferent to the amount she was to pay for it, in interest, in the future. When she endeavoured to raise money for herself on her daughter's expectations or property she says herself: "Sums were being raised for my benefit only. I did not think about the matter whether it was for my daughter's benefit." The manager of the moneylenders says: "The mother is not a business woman, far from it—I did not mention anything about percentage (of interest) to her. I don't think she minded what the interest was so long as she got the money."

In 1929 the mother was indebted to moneylenders, Barclay's Trust, in over £1,000, and tried to raise money to pay them on her daughter's expectant interest in the trust fund, which was then not vested in the daughter, for the mother might exercise her power of appointment. The mother, however, forgot to remember the trifling obstacle that her daughter was a minor. In 1930, as soon as the daughter came of age, she did raise money at her mother's request by a charge on what became her vested interest in remainder by the mother's covenanting not to exercise her power of appointment so as to defeat the daughter's interest in default of appointment. Two thousand pounds was borrowed from the Legal and General Assurance Company at 5½ per cent. reduced to 4½ per cent. on punctual payment of interest. There was then no possibility of the daughter's repaying the money lent until her grandmother and mother died. The mother undertook as surety and to relieve her daughter to pay the interest for which the daughter was primarily liable, and the premiums on two policies of insurance charged as security in default of the daughter making such payment. Of the £2,000, £100 went to the daughter, £1,100 odd to Barclay's Trust to defray the mother's debt, and the rest, after paying the costs, including those of a Mr. Napthali Price, a solicitor acting for mother and daughter, to the mother. It will be seen that the daughter got very little benefit out of the loan. The validity of this transaction as concerns the daughter is not in question in the present action, and it is only material because, besides having a bearing on the question of undue influence, it brings on the scene Mr. Napthali Price, who plays a prominent part in the transactions which are in question. Mr. Napthali Price does come on the scene because one of his clients was Barclay's Trust, who wanted £1,100 repaid by the mother. Barclay's Trust introduced Mr. Price to the mother and daughter in 1930, and he advised them as to the loan and charge. In cases where independent advice may be desirable or essential, it is very unsatisfactory that the moneylender provides the borrower with an advising solicitor in close touch with the moneylender's firm. Mr. Price, besides having acted for Barclay's Trust, was also the solicitor who incorporated Lancashire Loans, Ltd.—the present plaintiffs—and was one of the three solicitors acting for them, and took a considerable part in carrying through for them the transaction attached in the present case. To consider him as one independent adviser of the mother and of the daughter requires a considerable stretch of imagination. The daughter required advice independently of the mother.

The mother, having got the bulk of this £2,000 by the charge on her daughter's property in September, 1930, was in difficulties again in November, 1930, and came into communication with a Mr. Lessar, the manager of the plaintiffs. The plaintiffs had been incorporated in March, 1930, by Mr. Price, and about the same time Barclay's Trust was in liquidation. A Mr. Goodenday had been interested in Barclay's Trust, and he financed the plaintiff company by a loan secured by a debenture. On Mr. Lessar asking the mother for information she referred him to Mr. Price as her solicitor, which, of course, was quite satisfactory to Mr. Lessar, as Mr. Price had formed the plaintiff company and acted for it.

On Nov. 12, 1930, the plaintiff company lent the mother £150 at the moderate rate of 240 per cent. The lady had then only the voluntary allowance of £1,000 a year from the grandmother, and a reversion of about £2,500 a year on the death of the grandmother, then aged seventy-three, with restraint on anticipation. The mother paid on Feb. 20, 1931, eight days after the due date, a sum of £182 10s., the plaintiffs reducing the interest from 240 per cent. to about 70 per cent. The mother was again in want in March, 1931, and borrowed £150 from the plaintiffs at 85 per cent. interest, repayable on June 4, 1931. No question arises as to the memorandum on these two loans.

On the next two loans a different procedure was followed. The second loan of £150 due on June 4 was renewed before it was due on May 28 by a new loan of £300, of which £120 was paid to the mother, and £180 was treated as the repayment of the old loan, a week before it was due. Interest on £150 at 85 per cent. was, roughly, £30, and that £30 was re-lent at 85 per cent., interest being charged on interest. This transaction, however, is trivial compared with the next one. £300 with interest at 85 per cent. was due on Aug. 28, but on July 3 the mother wanted more money, and on that date the loan of £300 was renewed nearly two months before it was due by a transaction in which the mother received £140, and became liable to repay £500 on Oct. 7, £360 being treated as the repayment of the loan of £300 and interest, eight weeks before it was due. Interest at 85 per cent. pro rata would be under £30; the balance to make up £60 was in effect a bonus to the moneylenders. I deal with the effect of this transaction in dealing with the memorandum. I think for the reasons there given the memoranda of this transaction and the transaction of May 28 were both insufficient, and also the charging of interest on interest was illegal.

The moneylenders seem to have perceived the advantage of this system of premature renewals in piling up indebtedness, but wanted more security. We come now to the transaction of Aug. 5, 1931, in which the daughter's property is used as a security again. At this date none of the principal or interest on the first loan by the Legal and General Assurance Company had been repaid, and they declined to make any further advance. The Lancashire Loan company were ready to make a further advance of £200 to the mother, if the daughter would secure not only this advance, but the mother's existing debt to the Lancashire Loan company, by a second charge on the daughter's vested interest under the will.

The system of the last two loans was again resorted to. The £500 loan of July 3 was not due with interest till Oct. 7, 1931, but it was renewed on Aug. 5 as a new loan of £575. Pro rata interest from July 3 to Aug. 5 was between £35 and £40. This sum was increased to £75 under the name of interest, nearly £40 of which was simply a bonus to the moneylenders, and the daughter was made a surety, and her vested interest in remainder charged with a sum of £775: £200 to the mother; £500, the old loan to the mother, of which £410 was money actually advanced to her and £90 was interest; and £75 supposed interest and (or) bonus on the £500. Interest was to be paid at the rate of 85 per cent. on interest agreed to have accrued at 85 per cent. This was, of course, illegal, but the memorandum alleged that mother and daughter had agreed that £575 was due on the last loan. In fact it was not due. I deal with the effect of this transaction on the memorandum later.

The judge has accepted the daughter's statement of how this transaction began. She says, "My mother spoke to me. She said: 'I want some money: Very hard up. If you sign something I shall be able to get the money.' She wrote a letter out for me to copy. I thought I was becoming responsible for £100--but not even that, because I thought my mother guaranteed to pay the interest and would pay more than the interest so as to pay off the whole indebtedness." The £100 was the only fixed sum mentioned in the letter to the moneylenders which the mother gave the daughter to copy. The judge thinks the form of letter was prompted by Lessar. The transaction was absurd from the daughter's point of view. She had not the slightest chance of repaying this £775, or, indeed, the £2,000 already charged until her grandmother's death (then aged seventy-five, who has already lived for two years from the date of the transaction) and the death of her mother then aged forty-four, and meanwhile interest at 85 per cent. on this transaction and 5½ per cent. on the Legal and General loan was running. At the date of the writ, March 4, 1933, the sum claimed by the plaintiffs was £2,001 0s. 5d., of which the daughter had had nothing and the mother £610. The daughter's only chance of being able to repay the moneylenders at the grandmother's death was if her mother fulfilled her obligations as to principal and interest, and hitherto the mother had showed no signs of doing so, either as to principal or interest. The daughter says, and, I think, the judge accepted her evidence, that she did not understand the extent of her indebtedness. The only other advice she had was that of Mr. Napthali Price, who acted for her and her mother, and, therefore, was not, for her, an independent adviser. He says he advised her the interest was high, but as Mr. Price actually prepared the promissory note and memorandum and charge, and acted for the moneylenders in carrying through the transaction, I decline to accept him as an independent adviser, and entirely accept the very forcibly expressed disapproval of his action in the judgment below. The judge below speaks of the "enormity of the transaction," and I endorse that description.

The learned judge, while thinking the bargain as it concerns the daughter is so unconscionable that it should be re-opened and re-moulded, has not felt himself able to set it aside entirely. I have carefully considered the facts in the light of the authorities cited to us, the effect of which is expressed in the judgment of Lawrence, L.J., with the result of which I entirely agree, and I have come to the conclusion that, whether one approaches the matter from the point of view of undue influence exercised by the mother without the daughter having any independent advice, a situation well known to the plaintiffs and to Mr. Price, their solicitor, or whether one approaches it from the point of view of unconscionable bargain procured by the moneylenders, without the daughter having any advice independent of her mother and of the moneylenders, the bargain is so clearly unjustifiable that it should be set aside as far as the daughter is concerned.

The Court of Chancery has always used the term "fraud" in a more extended meaning than the courts of common law, and the two meanings came into collision in *Derry* v. *Peek* (2). Long before that, in 1750, in the well-known case of A *Chesterfield* (*Earl*) v. *Janssen* (3), LORD HARDWICKE had described two classes of transactions which equity relieved against as "fraud" in the following terms (2 Ves. Sen. at p. 154):

> Class II: Inequitable and unconscientious bargains "such as no man in his senses and not under delusion would make on the one hand, and as no honest B and fair man would accept on the other."

Of such, says LORD HARDWICKE, "even the common law has taken notice." See also the Usury Acts, and now, by s. 1 of the Moneylenders Act, 1900, if the court is satisfied that "the transaction is harsh and unconscionable or is otherwise such that a court of equity would give relief," the court may set aside either wholly or in part or revise or alter any security given or agreement made in respect of money C lent by the moneylender.

The next head of equitable "fraud" mentioned by LORD HARDWICKE, Class III, is "presumed from the circumstances and conditions of the parties contracting," when a party takes "surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience as to take advantage of his ignorance." Of this "fraud" LORD HARDWICKE says that equity "goes D further than the rule of law, which is, that it must be proved, not presumed." The rule of law thus described still prevails in the Probate Court, where it is not enough to prove a relation between testator and beneficiary which in the court of equity would require the beneficiary to displace the presumption of undue influence by proving independent advice to the testator. However, in the court of equity in the case of a benefit of contractual advantage obtained from a person coming E within certain defined relations, such as the relation of parent and young child, solicitor and client, religious superior and inferior, by the related member of that class, it is enough to prove the existence of such a relation to throw on the recipient of the advantage the burden of proving independent advice to the donor and in other respects justifying the transaction. I think on the authorities this rule of equity has become more strict than it was at first: see ASHBURNER'S PRINCIPLES F OF EQUITY (2nd Edn.) at pp. 303–4. Its highwater mark may, perhaps, be found in the judgments of FARWELL, L.J., in *Powell* v. *Powell* (4), and in those of *Howes* v. *Bishop* (5). On the other hand, the common law judges have been inclined, as LORD HARDWICKE says, to rely more on individual proof than on general presumption, while considering the nature of the relationship and the presence of independent advice as important, though not essential, matters to be considered on the G question whether the transaction in question can be supported. The common law view is exemplified by such decisions as that of LORD HAILSHAM, LORD SUMNER and LORD ATKIN in the Privy Council in *Inche Noriah* v. *Shaik Allie Bin Omar* (6), and of LORD ALVERSTONE, C.J., and MOULTON, L.J., in *Howes* v. *Bishop* (5) Fortunately, in view of the undisputed facts of this case, I do not find it necessary to discuss further which view should as a general rule prevail. H

The only contention I think necessary to touch upon is the argument that, though the relationship of mother and young daughter raises a presumption of undue influence which must be displaced by the beneficiary, that presumption is conclusively rebutted by what is called the "emancipation" of the daughter by marriage. I should be very reluctant to lay down any such general rule. A daughter married at eighteen years of age may go and live with her husband in I her mother's house and may, at the age of twenty-one, be deprived of all her property by their joint influence without independent advice. She may at the age of twenty-two be separated from her husband and return to her mother's house. Such cases should be dealt with on their own facts, and not on any general presumptions. I find it unnecessary in this case to investigate the relative merits of the differing judicial views, for on the undisputed facts before us it appears to me that both the undoubted influence of the mother over the daughter, the complete absence of justification of the terms of the bargain as against the daughter, and the absence of any independent advice to the daughter, her only advice being that of the solicitor to the moneylenders and to her mother, show that, without considering any questions of burden of proof, the transaction as against the daughter cannot be supported by the moneylenders.

The daughter had been induced to borrow and to give a charge on her interest in remainder for £2,000, the benefit of the whole of which, except £100, was to go to the mother. This transaction was initiated by her mother before her daughter came of age, and carried through by a solicitor introduced by the moneylenders, Barclay's Trust, who were to be repaid, out of the money borrowed, the debt owing by the mother, for which money could not be obtained without the daughter making herself personally liable and giving a charge on all her expectant property. The daughter had no means to pay either principal or interest as it came due, and risked the loss of all her expectations. A year later she is again induced by her mother, with the advice of the same solicitor, now connected with other moneylenders, the present plaintiffs, again to become responsible for £775 at 85 per cent. interest. She received none of the £775. She had no means of paying principal or interest when it became due, and the risk of total loss of any remaining value of her expectant interest was imminent. On these grounds I am of opinion that the personal liability of the daughter for the loan in question in this case and the charge of Aug. 5, 1931, on her property for that loan cannot be supported and that her appeal should be allowed.

A similar result, in my opinion, would follow from a point raised by the daughter on the validity of the memorandum which under s. 6 of the Moneylenders Act, 1927, is essential to the enforceability of any moneylending agreement. The real facts are that on July 3, 1931, the moneylenders purported to have lent the mother the sum of £500. I assume for the moment that this was true, but I refer later to the way that sum of £500 was arrived at. The £500 was due for repayment on Oct. 7, 1931, with interest then for the first time due at the rate of 85 per cent. On Aug. 5, 1931, nothing was in fact or in law due on the promissory note. But it was said that on that day the mother agreed that £575 was on that day due. The book entry at the time showed £525 repaid, and document 18, being the document delivered by the moneylenders on Feb. 22, 1933, under their statutory obligation to give information under s. 8 of the Act of 1927, stated that £525 was repaid on Aug. 5, 1931. The moneylenders said that £525 was the mistake of a clerk, which they had not discovered. I will assume that the mother had agreed to treat the amount as being due on Aug. 5, though, if it was assumed that the principal was repaid on that date with interest at 85 per cent to the date of repayment, the true amount would only be between £535 and £540, an extra charge of some £40 being levied. The result is that the memorandum which states, "I [the mother] agree and acknowledge that the amount now owing by me to you in respect of the promissory note, is £575, which sum I agree to treat as a present liability," does not state the real transaction. No amount was then owing on the promissory note; if it was supposed that the principal plus appropriate pro rata interest was then to be paid, the amount would be less than £540, and there would be a bonus to the moneylenders for accepting repayment before it was due of some £40. In my opinion, this transaction should be stated in the memorandum in such a way as to show the borrower that she was agreeing to pay a sum which was not due by allowing it to be deducted from the sum for which she was making herself liable.

The judge below has held himself bound to hold the memorandum accurate by our decision in *Lyle, Ltd.* v. *Chappell* (7). The facts in that case were that a former loan was due for repayment. The moneylender renewed it and made a fresh loan, and described the total of the sum due and the new loan as money advanced under an agreement to borrow. We held, following *Re Harmony and Montague Tin and Copper Mining Co., Spargo's Case* (8) and the principles stated by LORD COZENS-HARDY, M.R., in *Parsons* v. *Equitable Investment Co.* (9) that the transaction was truly stated. But in that case the previous loan was due for repayment at the time of the transaction described. LORD COZENS-HARDY, M.R., stated the result A of the authorities in *Parsons* v. *Equitable Investment Co.* (9) thus ([1916] 2 Ch. at p. 530):

> "In the third place, this doctrine has no application unless the amount retained is at the time due and payable. It will not justify the retention of an amount secured by bills or acceptances not yet due. In the fourth place, the retention B by the bill of sale holder of moneys not yet due is, in the language of FRY, L.J., in *Richardson* v. *Harris* (10) ((1889), 22 Q.B.D. at p. 276), the taking of a bonus 'which does not appear in the statement of the consideration.' In the present case it seems to me that the defendants have done exactly that which in *Richardson* v. *Harris* (10) this court said could not be done, and on that ground I think the bill of sale is void." C

I think these remarks apply to the memorandum in a moneylenders' transaction as well as to the statement of consideration in a bill of sale. In the present case the loan was in fact not yet due for repayment, and the moneylenders were, in fact, getting an additional payment or bonus for accepting repayment before it was due. In my view, this should appear on the face of the memorandum, and should not be left to be discovered by the borrower by working out arithmetical D calculations as to what might be due on the promissory note if the sum secured was to be taken to be due at a date on which it was not due. The effect of the transaction seems to be that the moneylenders, treating a sum as due for interest at 85 per cent., which was not due, proceed to get interest on interest. This seems to be illegal under s. 7 of the Act of 1927, as the alleged agreement "provides directly or indirectly for the payment of compound interest," and strengthens the E conclusion that the real fact as to such an agreement should appear on the face of the memorandum, which should state the true transaction.

The transaction against the daughter is, therefore, void for want of an accurate memorandum of the transaction. I think that the memorandum of the loans of May 28, 1931, and July 3, 1931, were bad for the same reason. In neither of them was the sum deducted in repayment due under the promissory note at the time it F was deducted. The mother, however, has not appealed against the decision of the judge, who, while re-opening the transaction, re-moulds it against her by treating her as liable for £610 cash received and interest at 40 per cent. till August, 1931, and 12 per cent. after the security of the daughter was added.

The moneylenders appeal against the rate of interest and the order as to costs, and, in my opinion, as this court is depriving the moneylenders of the security G given by the daughter's obligation, the terms against the mother should be varied by making the interest now throughout at 40 per cent. As the moneylenders were asking for 85 per cent. throughout, I see no reason to give them any costs in their appeal against the mother. The judgment of the court will be in the form to be read by LAWRENCE, L.J.

H

LAWRENCE, L.J.—The first and main question on this appeal is whether the appellant (hereinafter referred to as the "daughter") is entitled to have the transaction entered into by her with her mother and the respondents set aside on the ground of the undue influence exercised by her mother, of which the respondents had knowledge or notice. The principles upon which this question falls to be decided are not in doubt. Any difficulty there may be in this case lies in the I application of those principles to the facts.

It is, of course, not disputed that the case of parent and child is one of the class to which the doctrine established by the leading case of *Huguenin* v. *Baseley* (11) applies:

> "A man of mature age and experience can make a gift to his father or mother because he stands free of all overriding influence except such as may spring from . . . filial piety; but a young person (male or female) just of age requires the intervention of an independent mind and will, acting on his or her behalf

> and interest solely, in order to put him or her on an equality with the maturer donor, who is capable of taking care of himself":

per Farwell, J., in *Powell* v. *Powell* (4) ([1900] 1 Ch. at p. 246). In cases of this kind it must be remembered that the question is not merely whether the son or daughter knew what he or she was doing, had done, or was proposing to do, but how the intention was produced: per Lord Eldon in *Huguenin* v. *Baseley* (11) (14 Ves. at p. 300). What the parent has to prove in order to uphold the gift is, first, that the child knew and understood what it was that he or she was doing; and, secondly, that his or her disposition to do it was not produced by undue influence: per Sir John Romilly, M.R., in *Hoghton* v. *Hoghton* (12) (15 Beav. at p. 299). The jealousy of the court arises in every case where a parent takes a substantial benefit from a child, and even when it finds that the child intended the transaction to take effect according to its tenor, it considers carefully how that intention was produced.

> "Influence is a thing which is assumed as between father and child—not that the influence is assumed to be unduly exercised but the influence is assumed and it is then thrown upon the father if he takes any benefit to prove what is called the righteousness of the transaction and the court has to see that every proper protection was thrown around the child and that the child has deliberately and advisedly, and under protection, done that by which his father has obtained a benefit":

see per Lord Hatherley, L.C., in *Turner* v. *Collins* (13) ((1871) 7 Ch. App. at p. 339). These observations, in my opinion, are equally applicable to the case of mother and daughter.

It is impossible to lay down any hard-and-fast rule for determining how the onus which admittedly lies upon a parent of proving that a gift from his or her child was not due to the parental influence can be discharged. Each case must depend upon its own special circumstances; in some cases the parental dominion may be stronger and last longer than in others. It is plain that it does not necessarily come to an end on the technical legal emancipation of the child, and it is well settled that as long as the parental dominion continues the exercise of influence will be presumed to continue also. As Barton, J., very justly said in *McKackin* v. *Hibernian Bank* (14) ([1905] 1 I.R. at p. 304), the law protects young persons of an impressionable age when gratitude, affection, and respect are fresh and strong,

> "not by curtailing their capacity to deal with others but by binding the consciences of those who deal with them."

The respondents' main contention in the present case was that as the daughter had married and left her home four years before the transaction in question there could be no presumption of undue influence and the doctrine of *Huguenin* v. *Baseley* (11) had no application. Counsel for the moneylenders, however, was constrained to admit that the bare fact of the marriage of a daughter was not sufficient to exclude the application of the doctrine, as after her marriage the daughter might continue to live with her parents and remain subject to their dominion, but he contended that the marriage of a daughter coupled with her departure from home necessarily put an end once and for all to the dominion of her parents and, consequently, in such a case the doctrine of *Huguenin* v. *Baseley* (11) was inapplicable.

In my judgment, that is putting the proposition too high. The fact that a daughter has married and gone to live with her husband is, no doubt, a circumstance of great importance in determining whether or not the dominion of a mother over her daughter has completely terminated, but it is not conclusive. The relationship between a mother and her daughter is undoubtedly one of the greatest intimacy and confidence, and it is impossible to lay down any general rule for measuring the amount or duration of the dominion which a mother may have acquired over her daughter. I can readily imagine cases in which a husband might truthfully assert that the parental dominion of his mother-in-law over his wife had continued for a considerable time, and to a considerable extent, after the marriage, A and for aught I know to the contrary it may be that in the present case the continuance and exercise of that parental dominion was a contributory factor to the estrangement between the daughter and her husband. Be that as it may, however, I am of opinion that the true answer to the moneylenders' contention is that it is a question of fact depending on the particular circumstances of each case whether or not the parental dominion has completely ceased to exist and that there B is no hard-and-fast rule that in every case where a daughter has married and left the home of her parent or parents the parental dominion must necessarily be taken to have completely ended. Counsel stressed the fact that no case is to be found in the law reports where in such circumstances a daughter has been held to be under the dominion of her mother. The absence of any such reported case, however, does not, in my opinion, prevent the court, if circumstances warrant it, from C coming to the conclusion that a mother's dominion had not completely ceased although the daughter had married and left her home.

I do not propose to recapitulate the facts which were proved or admitted at the trial; they are already sufficiently stated in the judgments of the trial judge and of SCRUTTON, L.J. Nobody on learning those facts can fail to be struck by the utter helplessness of the daughter both during her married life and at the time D when she entered into the transactions now in question. She had married at the early age of eighteen a husband who did not earn enough to keep her and her children, who was addicted to drink, and with whom she was soon on bad terms. Her father was not living with her mother, to whom she was much attached, and with whom she had kept in close contact ever since her marriage. She was the only person to whom the daughter could turn for assistance and advice. In these E circumstances it is not surprising that the mother should have retained a large measure of dominion over her daughter after her marriage and, therefore, was in a position to exercise her parental influence by procuring the daughter to help her in obtaining money for herself.

In my judgment, the only reasonable explanation of the daughter's unquestioning compliance with her mother's demands, although she was thereby jeopardising, if F not altogether sacrificing, her entire fortune, is that the mother's dominion over her had not determined, but was still continuing when she entered into the transaction now in question. The letter of July 31, 1931, which the mother got the daughter to copy and send to the plaintiffs, bears on the face of it evidence of the continuance of the mother's dominion. To put it at the lowest, the moneylenders have failed to prove that the daughter had at the relevant time become completely G emancipated from the dominion of her mother. Assuming that I am right in arriving at that conclusion, the next question which arises is whether the evidence adduced at the trial establishes that the presumption of undue influence has been rebutted.

In *Allcard* v. *Skinner* (15) COTTON, L.J., stated (36 Ch.D. at p. 171) that what has to be proved to rebut the presumption is that the gift was H

> "the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justify the court in holding that the gift was the result of a free exercise of the donor's will."

The learned lord justice goes on to explain that in this class of cases the court interferes, not on the ground that any wrongful act has in fact been committed I by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused. In the case in the Privy Council of *Inche Noriah* v. *Shaik Allie Bin Omar* (6) the Board (consisting of LORD HAILSHAM, L.C., LORD SUMNER, and LORD ATKIN) approved of the passage from COTTON, L.J.'s judgment which I have just cited and (differing in this respect from the decision of FARWELL, J., in *Powell* v. *Powell* (4)) held that independent legal advice is not the only way in which the presumption can be rebutted, and, further, that it may be rebutted by proving independent legal

A advice, although that advice was not taken. The judgment then proceeds as follows ([1929] A.C. at p. 135):

> "It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the trans-
> B action had been fully explained to the donor by some independent and qualified person so completely as to satisfy the court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing; and in cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption. But the fact to be established is that stated in the judgment already cited of COTTON,
> C L.J., and if evidence is given of circumstances sufficient to establish this fact their Lordships see no reason for disregarding them merely because they do not include independent advice from a lawyer. Nor are their Lordships prepared to lay down what advice must be received in order to satisfy the rule in cases where independent legal advice is relied upon further than to say that it must be given with a knowledge of all relevant circumstances, and must be
> D such as a competent and honest adviser would give if acting solely in the interest of the donor."

Accepting this passage as containing the rule which the court ought to act upon in the present case, I have come to the clear conclusion that it has not been proved that the transaction in question was the spontaneous act of the daughter acting in circumstances which enabled her to exercise an independent will and which justify
E the court in holding that the transaction was the result of a free exercise of the daughter's will, within the meaning of the statement by COTTON, L.J., in *Allcard* v. *Skinner* (15).

The transaction so far as the daughter was concerned originated with a request by her mother for assistance in raising further money of which she (the mother) was in urgent need. The mother seems to have taken it for granted that she could
F get the daughter to comply with her request, as she had already arranged with Mr. Lessar that the daughter should guarantee the fresh loan, and it never seemed to have occurred to the daughter to do otherwise than accede to whatever her mother asked her to do, although she obviously did not understand to what she was committing herself. The last thing the mother seems to have thought of was that it was her duty to safeguard her daughter's interests and to see that she
G had proper protection thrown around her before further involving herself and her fortune in her mother's transactions with moneylenders. In the circumstances of this case I think it was essential that the daughter, before committing herself to a fresh inroad on her already diminished fortune, should have had the protection of some independent legal adviser, who could have explained fully to her the position in which she already was placed owing to her having mortgaged her
H reversion and the disastrous consequences of entering into the proposed transaction.

It is not suggested that the daughter had any such legal advice, or indeed any independent advice at all. The only so-called advice which the daughter received was from Mr. Price, of whose conduct in connection with this and the earlier transaction in which he acted as solicitor for the daughter I find it difficult to speak with becoming moderation. In 1930 Mr. Price, whilst ostensibly acting for the
I daughter (who had only just attained the age of twenty-one years), actively assisted the mother and certain moneylenders who were clients of his in procuring the daughter to raise for their benefit a sum of £2,000 on the security of a mortgage of her reversionary interest under her grandfather's will and certain policies which the lenders required her to take out. The reversionary interest so mortgaged was the sole fortune of the daughter; she had no means whatever with which to pay the interest on the loan or the premiums on the policies or the capital sum secured when it fell due. Of this loan she only received £100, the rest went to the moneylenders and to her mother. One of the deeds which, under Mr. Price's advice, the

daughter executed on this occasion contained a recital that her mother had agreed to covenant not to exercise her testamentary power of appointment under the grandfather's will so as to reduce the daughter's share below a certain amount "for the purpose of making a provision for the daughter," whereas to the knowledge of Mr. Price this was untrue, the sole purpose of the covenant being to enable money to be raised for the benefit of the moneylenders and the mother. A more improvident transaction from the daughter's point of view it is difficult to conceive. In my judgment, it affords cogent evidence that at that time she was still under the influence of her mother, and in the absence of any evidence to the contrary, I decline to presume that this influence no longer existed when some eighteen months afterwards (again with Mr. Price's assistance, and again for the benefit of the mother and moneylenders) the daughter entered into the transaction now in question, which was rightly described by the learned judge as a bargain into which no person of intelligence and experience could have been induced to enter.

Moreover, the evidence has satisfied me that the transaction was never properly explained to the daughter and that she did not fully understand what she was doing. Any explanation which Mr. Price says he gave to the daughter seems to have been merely formal and perfunctory, and from first to last Mr. Price seems to have considered it unnecessary to explain fully to her the true nature and effect of her entering into the guarantee and the serious consequences which might ensue to her if (as was practically certain to happen) her mother were to make default. It took learned counsel some considerable time to make the court understand the true nature of the transaction, and the learned judge found that Mr. Price said nothing to draw the daughter's attention "to what many solicitors might have thought to be the enormity of the transaction." In using this expression, which, I think, was amply justified, I have no doubt the learned judge had in mind both the harsh and unconscionable nature of the transaction as between the mother and the moneylenders and also the fact that it would almost certainly result in a very short time (as in fact it did) in a claim by the moneylenders against the daughter for a very large sum of money, which, of course, she had no prospect whatever of being able to pay, with the inevitable consequences that she would lose the remnant of her fortune which had been left over after the earlier transaction in 1930. Whilst considering how to carry out the transaction for the benefit of the mother and the moneylenders, Mr. Price seems to have entirely ignored or neglected the interests of the daughter.

In these circumstances I am clearly of opinion that any advice given by Mr. Price to the daughter, besides not being independent, was not such as a competent and honest adviser would have given if acting solely in the interests of the daughter.

So far as the moneylenders are concerned, it is plain that they knew or had notice of all the relevant facts. Mr. Lessar stated that he understood that the daughter was living apart from her husband. It does not appear who told him this, but I have little doubt that when it was proposed that the daughter should guarantee the loan, Mr. Lessar desired to be assured that her husband would approve and was told by the mother that her daughter and her husband were estranged and that Mr. Lessar took this to mean that they were living apart. He knew, therefore, that the daughter was not receiving any protection or advice from her husband, and he further knew that she was dependent on her mother for the amount of her reversion, as he had obtained a copy of the grandfather's will some time before. The more material fact, however, is that Mr. Price acted as solicitor for the moneylenders as well as for the mother and the daughter in completing the transaction, and that as such solicitor he knew or ought to have known all the relevant facts as to the relationship existing between the mother and the daughter and that the latter had had no independent advice.

The learned judge, after alluding to the fact that the moneylenders had stated that at the time of the transaction in question they had ceased to regard the mother as a person to whom it was safe to lend money, said:

> "It results that they were permitting, if not inducing, a young woman with little experience of her own and with no one to advise her except an extravagant and unbusinesslike and not disinterested mother and a solicitor, whose position disqualified him from offering independent advice, to enter into a transaction the whole burden of which they anticipated would fall on her. It was a bargain into which they must have known that no person of intelligence and experience could have been induced to enter."

In these circumstances I am of opinion that the moneylenders are in no better position than that in which the mother would have been had the daughter assigned her reversion directly to her instead of to the moneylenders for her benefit, in which case I do not think that it is open to reasonable doubt that the court would have set aside the transaction.

The only remaining question to be considered on this branch of the case is that raised by the amendment of the moneylenders' reply pursuant to the leave granted by this court, namely, that the daughter with full knowledge of the facts, and after being separately advised, acquiesced in and elected to be bound by the transaction and further that, by reason of such acquiescence and election, the moneylenders gave the mother time which enabled her to give a bill of sale upon her furniture and thus to deprive the moneylenders of the benefit of any judgment they might have secured against her with the result that the daughter was estopped from relying on the invalidity of the transaction. The only evidence relied upon by the moneylenders in support of this contention is the correspondence which passed between the solicitors who were eventually consulted by the mother on behalf of herself and her daughter and the solicitors representing the respondents. I do not propose to go through this correspondence, but will content myself by stating that the evidence shows that the daughter knew little of what was going on and, moreover, after having carefully read the correspondence, I have been unable to find anything more in it than negotiations to settle the moneylenders' claim and nothing which would justify the moneylenders in arriving at the conclusion that the daughter had elected to ratify the transaction or had abandoned her right to have it set aside. In these circumstances it is, perhaps, not to be wondered at that the moneylenders did not plead acquiescence or ratification in their original reply, but only introduced that plea as an afterthought.

In view of the conclusion that I have reached on the main question, it is unnecessary for me to express any opinion on the point taken by counsel for the daughter that his client was misled by her mother as to the extent of the obligation she was to undertake under her guarantee or on the further point that the transaction cannot stand because the moneylenders have not complied with the provisions of the Moneylenders Acts.

The order of this court will be to allow the appeal of the defendant, A. J. Black, with costs, and to dismiss the plaintiffs' cross-appeal against the defendant, A. J. Black, with costs. To order that so much of the judgment of DU PARCQ, J., dated May 19, 1933, as adjudged, (i) that the plaintiffs do recover against the defendant A. J. Black the sum of £764 6s. 10d.; (ii) that judgment be for the plaintiffs on the counter-claim of the defendant A. J. Black, and (iii) that the defendant A. J. Black do recover five-sixths of her costs of claim and counter-claim, be set aside, and in lieu thereof to order that the action do stand dismissed as against the defendant A. J. Black with costs. On the counter-claim of the defendant A. J. Black, to declare that the promissory note and mortgage dated Aug. 5, 1931, in the pleadings mentioned are void as against the defendant A. J. Black and order the same to be delivered up to her for cancellation and to order that the defendant A. J. Black do recover her costs of the counter-claim against the plaintiffs. On the appeal of the plaintiffs against the defendant A. L. Black, to order that the judgment of DU PARCQ, J., be varied by substituting interest at the rate of 40 per cent. for interest at the rate of 12 per cent. on the sum of £610 therein mentioned as from Aug. 5, 1931, and by increasing the sum to be recovered against the defendant A. L. Black accordingly, and to order that the plaintiffs recover no costs of this appeal against the defendant A. L. Black.

GREER, L.J.—The problem presented in the appeal of Mrs. A. J. Black (hereinafter referred to as the "daughter") calls for the application of certain principles of law established by the decisions of courts of equity to the facts proved at the trial. The following principles of law seem to me to be well established:

(i) In the case of certain relationships involving trust and confidence by one person in another the law requires that the court shall presume that a gift or voluntary settlement or obligation, entered into without consideration in favour of the party in whom trust and confidence is placed by the other party to the transaction, has been induced by undue influence.

(ii) The relationship of parent and child is one of the relationships to which the presumption applies.

(iii) The presumption continues to apply after the child has come of age for a period which has not been defined by the decisions, but has been referred to in some of the decisions as either just after or during a short time after the child has come of age.

(iv) The presumption ceases to apply if it be proved that the child has been emancipated from the relationship which gives rise to the opportunity for the exercise of undue influence, i.e., a relationship in which trust and confidence is placed in the good faith and integrity of the parent when the latter is exercising his of her influence as a parent.

(v) The presumption may be rebutted by proving that the gift or instrument whereby benefits are conferred on the parent by the child is "the result of the pure, voluntary, well-understood acts" of the child's mind. I have quoted these words from the judgment of LORD ELDON in the leading case of *Huguenin* v. *Baseley* (11) (14 Ves. at p. 296).

It is a moot question on which judges have differed whether in order to rebut the presumption it is necessary that the child should have independent advice. TURNER, L.J., in *Rhodes* v. *Bate* (16) (1 Ch. App. at p. 257) said:

> "I take it to be a well-established principle of this court that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them."

There are other authorities in decisions of Chancery judges to the same effect: see especially the view expressed in the judgment of FARWELL, L.J. (then FARWELL, J.), in *Powell* v. *Powell* (4). There are, however, expressions of opinion the other way, the most important of which are those contained in the judgments of the Privy Council in *Inche Noriah* v. *Shaik Allie Bin Omar* (6).

In support of the principles Nos. 1 to 5 it will be sufficient to quote the opinion of LORD LANGDALE, M.R., in *Archer* v. *Hudson* (17) (7 Beav. at p. 560):

> "Nobody has ever asserted that there cannot be a pecuniary transaction between a parent and child, the child being of age, but everybody will affirm, in this court, that if there be a pecuniary transaction between parent and child, just after the child attains the age of twenty-one years, and prior to what may be called a complete 'emancipation' without any benefit moving to the child, the presumption is that an undue influence has been exercised to procure that liability on the part of the child, and that it is the business and duty of the party who endeavours to maintain such a transaction to show that that presumption is adequately rebutted; and that it may be adequately rebutted is perfectly clear. This court does not interfere to prevent an act even of bounty between parent and child, but it will take care (under the circumstances in which the parent and child are placed before the emancipation of the child)

> A that such child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent altogether of any sort of control."

Somewhat similar words were used by KNIGHT-BRUCE, L.J., in the case of *Wright* v. *Vanderplank* (18). The following words are quoted from p. 755 of the B *Law Journal* report. There the lord justice refers to

> "the close attention, the rigid strictness, and the watchful jealousy with which, on principles of natural justice and upon considerations important to the interests of society, the law of this country examines, scrutinises, and, if I may borrow an old expression, 'weighs in golden scales' every transaction between C a guardian and a ward, or between a parent and child, which, including or consisting of a gift from the younger to the elder, takes place so soon after the termination of the legal authority, that the ward or child may, in consequence, probably not be in the largest or amplest sense, not in mind as well as in person, an entirely free agent."

D What is meant by "emancipation" has never been defined in any of the reported decisions. It was contended on behalf of the moneylenders that as soon as a daughter is married and leaves the parental home, that in itself amounts to emancipation which puts an end to any presumption of undue influence by a parent. I do not agree with this view. I think emancipation from the relationship which gives rise to the exceptional influence possessed by a parent over a child is a question of fact to be determined on the evidence given in each case. E Instances have been given in the judgment of LAWRENCE, L.J., of circumstances where it would be wrong to infer emancipation merely from marriage. The influence arising out of the relationship of mother and daughter is, in my judgment, one in which it is most likely that the influence of the mother in persuading the daughter to take a certain line of action will have a greater effect, and will continue to operate for F a longer period than in the case of influence arising from any other relationship. In my judgment, the evidence in this case establishes that the mother continued to exercise over her daughter the power which her relationship gave her to persuade her daughter to say "yes" to any course of action, however much it was against the interests of the daughter and for the benefit of the mother. I have, accordingly, come to the conclusion that the daughter's signatures to the agreement with G the plaintiffs, to the promissory note in their favour, and to the security given by her on her reversionary interest in the estate of her grandfather were procured by the influence of her mother at a time when she, the daughter, had not been "emancipated" within the meaning of the decisions, and I am further of opinion for the reasons stated in the judgments of SCRUTTON, L.J., and of LAWRENCE, L.J., that there was nothing in the evidence which justifies a decision that the presumption has been rebutted. H I am also of opinion that, as the plaintiffs, through Mr. Lessar, had notice of the relationship between the two defendants, and of the influence that had been exercised by the mother on the occasion of the mortgage to the Legal and General Insurance Co., and as Mr. Price was the solicitor of the mother and the daughter to the knowledge of Mr. Lessar, and was also, in completing the transaction, the solicitor of the plaintiffs, the plaintiffs must be treated I as having notice of the facts which constituted undue influence on the part of the mother. I also agree with what LAWRENCE, L.J., has said as to the alleged ratification.

Having regard to these findings, I think it unnecessary to express any opinion on what I think is a very difficult question, namely, whether the memorandum signed by the daughter and her mother was a sufficient memorandum to comply with s. 6 of the Moneylenders Act, 1927.

I also agree with my Lords with regard to the cross-appeal in the daughter's case, and the appeal in the mother's case, and as to the order to be made by this court. I have not thought it necessary to state the facts in detail as they have already been stated by my Lords, and I do not think any of the facts so stated in detail can be questioned.

Order accordingly.

Solicitors: *Lazarus, Son, & L. A. Hart*; *Philip, Goodenday & Co.*; *Forsyte, Kerman, & Phillips.*

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

CADBURY BROTHERS LTD. *v.* SINCLAIR (HIS MAJESTY'S INSPECTOR OF TAXES)

[KING'S BENCH DIVISION (Finlay, J.), January 12, 17, 23, 1933]

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Slesser, L.JJ.), June 28, 1933]

[Reported [1934] 2 K.B. 389; 102 L.J.K.B. 468; 148 L.T. 478; 49 T.L.R. 208; 77 Sol. Jo. 138; 18 Tax Cas. 157, K.B.D.; 103 L.J.K.B. 29; 149 L.T. 412; 18 Tax Cas. 157, C.A.]

Income Tax—Deduction in computing profits—Land exempt by statute from all taxation—Permissibility of deduction of annual value of land in assessment under Case I of Sched. D—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sched. D, Cases I and II*, *r.* 5 (1)—*Finance Act*, 1926 (16 & 17 *Geo.* 5, *c.* 22), *Sched.* 4.

The taxpayers occupied for the purposes of their trade land which was held by them under a lease, and which, by virtue of a statute of Charles II (12 Car. R. 2 di. No. 34), was "freed discharged and acquitted of . . . all every or any manner of taxes assessments or charges . . . whatsoever hereafter to be laid and imposed by authority of Parliament . . ." The statute further provided that the owners and occupiers of the said land "shall not at any time hereafter be rated taxed or assessed to pay any sume . . . of money or be otherwise charged in any way whatsoever for or in respect of the said [land] . . . for or towards any manner of publique tax . . .". In all relevant years of assessment prior to the operation of the Finance Act, 1926, a deduction was allowed in computing the taxpayers' liability to income tax under Case I of Sched. D of the Income Tax Act, 1918, in respect of the annual value of the land. In view of the amendment to r. 5 of the Rules Applicable to Cases I and II of Sched. D by the Finance Act, 1926, Sched. 4, the allowance was refused in the tax year 1927–28 and subsequent years.

Held: the deduction ought to be allowed because, if it were not allowed, the taxpayers would be taxed or assessed to pay a sum of money in respect of the land contrary to the statute of Charles II.

Notes. The Income Tax Act, 1918, Sched. D, Rules applicable to Cases I and II, r. 5, was replaced by the Income Tax Act, 1952, s. 136.

Considered: *Hughes* v. *Bank of New Zealand*, [1936] 3 All E.R. 975. Applied: *I.R.Comrs.* v. *Rolls-Royce, Ltd.*, [1942] 1 All E.R. 196. Distinguished: *I.R.Comrs.* v. *Australian Mutual Provident Society*, [1947] 1 All E.R. 600.

As to the allowance of annual value of land in computing profits under Case I of Sched. D, see 20 HALSBURY'S LAWS (3rd Edn.) 176, para. 305; and for cases on the subject see 28 DIGEST 45, *227–229*.

Cases referred to:

(1) *Russell* v. *Town and County Bank* (1888), 13 App. Cas. 418; 58 L.J.P.C. 8; 59 L.T. 481; 53 J.P. 244; 4 T.L.R. 500; 2 Tax Cas. 321, H.L.; 28 Digest 45, *227*.

(2) *General Hydraulic Power Co.* v. *Hancock*, [1914] 2 K.B. 21; 83 L.J.K.B. 906; 111 L.T. 251; 30 T.L.R. 203; 6 Tax Cas. 445; 28 Digest 45, *228*.

(3) *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*, [1915] A.C. 433; 84 L.J.K.B. 417; 112 L.T. 651; 31 T.L.R. 104; 6 Tax Cas. 399, H.L.; 28 Digest 56, *287*.

(4) *Stevens* v. *Boustead*, [1918] 1 K.B. 382; 87 L.J.K.B. 321; 118 L.T. 294; 34 T.L.R. 143; 62 Sol. Jo. 211; 7 Tax Cas. 107, C.A.; 28 Digest 45, *229*.

(5) *Greenwood* v. *Smidth*, [1922] 1 A.C. 417; 91 L.J.K.B. 349; 127 L.T. 68; 38 T.L.R. 421; 66 Sol. Jo. 349; 8 Tax Cas. 193, H.L.; 28 Digest 36, *186*.

(6) *I.R. Comrs.* v. *Dalgety & Co.*, [1930] A.C. 527; 99 L.J.K.B. 342; 143 L.T. 191; 46 T.L.R. 349; 15 Tax Cas. 216, H.L.; Digest Supp.

(7) *Pole-Carew and Lord St. Levan* v. *Craddock*, [1920] 3 K.B. 109; 89 L.J.K.B. 507; 123 L.T. 309; 36 T.L.R. 447; 7 Tax Cas. 488, C.A.; 28 Digest 92, *543*.

Case Stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice:

"At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on June 24, 1931, Cadbury Brothers, Ltd., hereinafter called the company, appealed against assessments to income tax for the years 1927–28 to 1930–31 inclusive, made on the company under Case I of Sched. D of the Income Tax Act, 1918.

"The question for the court's consideration is—Whether in computing the amount of the company's profits assessable under Sched. D the annual value of the company's property at Knighton, though not assessed under Sched. A, is an allowable deduction.

"The land at Knighton was owned by the Haberdashers' Company and by Act of Parliament passed in the year 1660 (12 Car. R. 2 di. No. 34) was exempt from taxation. This property is held by Cadbury Brothers., Ltd., on lease for eighty-one years from March 25, 1921, at a rental of £300 per annum, and on it they have erected a factory. It was admitted that this land and the buildings erected thereon were occupied and used for the purposes of the company's trade.

"During the years material to this appeal no assessments had been raised upon this land under Sched. A of the Income Tax Acts; there were no entries in respect thereof in the Sched. A assessment books, nor had the land in question been rated. . . . Prior to the passing of the Finance Act, 1926 (i.e., for all years of assessment up to and including the year 1926–27), the revenue authorities had allowed a deduction for the annual value of this land and the buildings thereon when computing the amount of the company's liability to income tax under Case I of Sched. D. Since the passing of that Act they had refused to do so, having regard to the following provisions contained in Sched. 4 to the said Act:

> 'In para. (1) of r. 5 of the Rules applicable to Cases I and II of Sched. D the words "annual value of" shall be substituted for the words "profits or gains arising from" and the words "and separately assessed and charged under Sched. A" shall be inserted after the word "profession" where it first occurs, and the words "provided that" shall be omitted.'

"It was admitted that the value of the land varied yearly by reason of the erection thereon of new buildings, but the figures of such value, which have been agreed inter partes, are not material to the decision of this case.

"On behalf of the company it was contended:

"(A) That the lands, tenements and hereditaments were in fact used for the purpose of the company's trade, and that the annual value thereof was a proper deduction in computing the balance of profits and gains of the company's trade for purposes of assessment under Case I of Sched. D.

"(B) That the amendments of the Income Tax Act, 1918, by the Finance Act, 1926, did not operate to deprive the company of the right to deduct the annual value of the property.

"(C) That the fact that the property had not in fact been assessed under Sched. A was immaterial. All lands and hereditaments were required to be assessed under the Income Tax Act.

"(D) That the exemption under the Act of Charles had not been destroyed.

"(E) That the assessment for 1927–28 and subsequent years should be reduced accordingly.

"On behalf of H.M. Inspector of Taxes it was contended:

"That the exemption under the statute of Charles II to the Haberdashers' Company was in respect of the land and not in respect of any trade carried on on the said land and that the revenue, while in no way seeking to raise a charge on the profits of the land under Sched. A, resisted the company's claim to deduct something from the profits of the trade carried on on the land; that in order to claim successfully an allowance from the profits of the trade in respect of the annual value of the land two conditions must be satisfied: That the premises were used and occupied for the purposes of the trade, which condition was admittedly fulfilled; and that they were separately assessed and charged under Sched. A. The property at Knighton was not so separately assessed and charged and therefore, it was contended, failed to satisfy this latter condition.

"The commissioners who heard the appeal held: that in computing the amount of the company's profits assessable to income tax, Sched. D, Case I, the annual value of the Knighton property, although not assessed under Sched. A, was an allowable deduction.

"On behalf of the Inspector of Taxes dissatisfaction was declared to the commissioners with their decision in respect of the Knighton property as being erroneous in point of law, and he therefore in due course required the commissioners to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 149.

"By an Act passed in the year 1660 (12 Car. R. 2 di. No. 34) the lands conveyed by William Adams were exempted from the payment of rates and taxes. The following is an extract from the exempting portion of the statute of 1660:

> 'And lastlie be it enacted by the authoritie aforesaid that the said mannors and graunge of Knighton with the appurtenances and all other lands and hereditaments settled and conveyed by the said William Adams to the said governors and their successors for the purposes aforesaid be and at all times hereafter shall be freed discharged and acquitted of and from the payment of all every or any manner of taxes assessments or charges civil or military whatsoever hereafter to be laid and imposed by authority of Parliament or otherwise and that the said mannors messuages lands tenements and premises and the owners and occupiers thereof or any of them shall not at any time hereafter be rated taxed or assessed to pay any sume or sumes of money or be otherwise charged in any way whatsoever for or in respect of the said mannors lands and hereditaments or any of them for or towards any manner of publique tax assessment or charge whatsoever any statute law or ordinance to the contrary hereof in any wise notwithstanding.' "

The Solicitor-General (*Sir Boyd Merriman, K.C.*) and *Reginald P. Hills* for the Crown.

A. M. Latter, K.C., and *Cyril King* for Cadbury Bros., Ltd.

FINLAY, J.—This appeal by way of Case Stated relates to the proper assessment to be made on Messrs. Cadbury Bros., Ltd., in respect of some land which they have rented from the Haberdashers' Company and which they occupy for the purposes of their business at Knighton. With regard to that land at Knighton, there is a statute of Charles II, of 1660; I do not need to read it, but it exempts from taxation this land at Knighton, and it was not, so far as concerns this case and for the purposes of this case, disputed by the Solicitor-General that the effect of that was to exempt the land from Sched. A of the Income Tax Act.

At first sight the matter appears to me to be quite plain. The question is whether the company, in computing their profits, are entitled to a deduction in respect of the annual value of the land occupied by them, such annual value not being the subject—for the reason I mentioned a few moments ago—of taxation under Sched. A. The matter depends on the construction to be put on r. 5 of the Rules of Cases I and II of Sched. D in the Income Tax Act, 1918, as it has been amended by the Finance Act, 1926. The rule as amended reads as follows:

> "The computation of tax shall be made exclusive of the annual value of lands, tenements, hereditaments, or heritages occupied for the purpose of the trade or profession and separately assessed and charged under Sched. A."

Now that appears to be a perfectly plain provision. It is a provision dealing with the computation of the tax and with the manner in which the annual value of lands occupied for the purpose of the trade is to be dealt with in that computation, and it says that the computation is to be made exclusive of the annual value provided that the lands, I will say, are occupied for the purpose of the trade—that is one condition—and, as another condition, that they are separately assessed and charged under Sched. A. It seems to me that it really is susceptible of only one construction, and that when the legislature says that the computation of the tax is to be made exclusive of that it means that it is to be made inclusive of anything which cannot be got within that section. I listened with the utmost attention and admiration, as I always do, to Mr. Latter's argument, and I did not understand him very seriously to contest the view that if one simply looks at the Case and looks at that rule the conclusion must be that which I have endeavoured to state. But he said that if one examined the history of this matter, and in particular if one saw how the amendment introducing the words with reference to the separate assessment and charge under Sched. A came to be made, that ought to lead one to a different conclusion.

In order to deal with the argument which was addressed to me, I must say a very few words with regard to the previous position of the legislation and with regard to the authorities. In *Russell* v. *Town and County Bank* (1) it was common ground between the parties that a deduction fell to be allowed in respect of the annual value of premises occupied for the purpose of the trade. That being so, it was unnecessary to address argument to that point, and it is no doubt due to that circumstance that LORD HERSCHELL appears not to have had his attention called to what was then r. 2 of Sched. D, Cases I and II, a rule which appears (and in saying this I am following a suggestion of SCRUTTON, L.J., in *General Hydraulic Power Co.* v. *Hancock* (2)) perfectly clearly to deal with the very point; but LORD HERSCHELL undoubtedly said that the deduction in respect of annual value, if not actually to be found in the Act—and, as I venture to think, following later authorities it is to be found in the Act—could be got out of the general principle on which one has to arrive at a balance of profits and gains. That general principle has been stated in language obviously carefully chosen by LORD SUMNER in *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (3) (6 Tax Cas. at p. 435). The general principle appears to me to be this, and I see nothing in *Stevens* v. *Boustead* (4) or in any other case which is inconsistent with it: if the legislature deals expressly with any subject-matter, if the legislature makes a prohibition, authorises a deduction, authorises an allowance, or anything of that sort, then one is bound by what the legislature has said. If there are cases where the legislation, so to speak, is a blank—that is to say, cases where the legislature has neither given an allowance nor made a prohibition—then the ordinary principles of commercial trading must be applied. That appears to me to be the general principle, and one has, therefore, to consider in every case: what has Parliament done with reference to the particular subject-matter and the general principle? The general principle operates, as LORD SUMNER pointed out, only in cases where there is no express legislative direction, and I cannot help thinking that so far as there has been confusion in the matter it may be due to the circumstance that LORD HERSCHELL had not his attention directed to the particular r. 2, which appeared to deal with the matter. In 1898, by s. 9 of the Finance Act of that year, a further amendment of the law was made, and in that state of the law *Stevens* v. *Boustead* (4) came before the Court of Appeal. It was there held, following *Russell* v. *Town and County Bank* (1), that the annual value of premises situated abroad formed a proper deduction in arriving at the balance of the profits and gains of a business which was partly, at all events—it had premises abroad—carried on abroad; it was a company, I think, carrying on business in this country, but with a business also in Penang or Singapore, or both. That was dealt with by the legislature in this very r. 5 with which I now have to deal, and it was dealt with by what was in form a proviso at the time when it was enacted, though by subsequent amendment it has ceased to be in form a proviso. With regard to that it seems to me to be a perfectly clear enactment that where the business is carried on in premises which are situated abroad, so that, of course, they are not the subject of Sched. A, then, in that event, the deduction cannot be made. I cannot doubt for a moment that that express enactment operates to alter the law as it was laid down in *Stevens* v. *Boustead* (4), and that it would be, as the Solicitor-General, I think, rightly said, perfectly vain now to argue that one could in the face of that avail oneself of what one may call "the general principle." The general principle has been controlled by express enactment, and it is, as the Solicitor-General pointed out, worth noticing that the express enactment dealing with that, and also the enactment dealing with the limitation to the amount of Sched. A assessment and the relief—that these things are dealt with in that very rule. The weight of Mr. Latter's argument, and I think it is an important point, was really placed on the manner in which this amendment was made, and I think he was justified in criticising the way in which it was done, if, as I think it did, it effected a change in the law, not of very vital importance, not affecting a large number of people, but still a change in the law which would affect a certain number of persons. Now what happened was this: In 1926 a large change in the income tax was made. There were various changes made, but the one to which I desire particularly to refer is this, that a large number of businesses and concerns, mines, railways, and things of that sort, which up to that date had been assessed under No. 3 of Sched A, were transferred from Sched. A to Sched. D. As a result of that transfer a certain number of amendments of the law became necessary, and the particular amendment which one has to consider was effected by Sched. 4, which contains what are called "consequential and minor amendments of the Income Tax Act, 1918." I think Mr. Latter's argument was right—and, indeed, the Solicitor-General assented to it—when he said that it was clear that the amendment which was made was an amendment consequential on the transfer of these various concerns—mines, railways, and so forth—from No. 3 of Sched. A to Sched D. The provisions as to the transfer appear in Sched. 3, and that schedule also provides that certain rules of Sched. A, No. 3, viz., r. 4, r. 5 and r. 7, are to apply and are to be deemed to be rules of Sched. D, Case I, so far as regards those lands, tenements, hereditaments or heritages—that is to say, certain rules are brought from Sched. A to Sched. D and are made applicable only to the properties which at the same time had been brought from Sched. A to Sched. D. I agree, as I have said, with Mr. Latter in thinking that this amendment of the law which I have to consider was made for the same reason as those transfers were made. But one has to consider what the effect of the section is as it has been amended. The reason for making the amendment is one thing; the

A amendment which is actually made is another thing, and while I accept that I am bound by, and I need hardly say I endeavour to apply as far as I can, the principle of two cases, both decisions of the House of Lords, one *Greenwood* v. *Smidth* (5) and the other *Inland Revenue Comrs.* v. *Dalgety & Co.* (6), still one has always to come back to construing the section which is before one. In *Greenwood* v. *Smidth* (5) and in *Dalgety's Case* (6), the one relating to an actual charge, B the other relating to an allowance or relief, the House of Lords felt able to put a construction on the sections there in question which would not have the effect in the one case of extending the charge, and in the other case of diminishing the relief. Now, in this case, if I rightly followed the argument, what was said was that I ought to construe these words "and separately assessed and charged under Sched. A" as relating only to those businesses which had been transferred from C Sched. A to Sched. D. While I should not have been unwilling to adopt that construction if I could, I do not think the words are susceptible of that construction. Rule 5 (1) is quite clearly in its terms a general rule. It applies, and clearly before the amendment did apply generally, to Sched. D concerns; it seems to be impossible to cut down the whole of r. 5 (1) now to concerns transferred. It seems to me to be equally impossible as matter of construction to say that the rule down D to the word "profession" is a general rule applying to Sched. D generally, but that the words "and separately assessed and charged under Sched. A" are words which ought to be read as applicable only to the transferred businesses. I think that it is impossible so to construe the rule; I think that it is only susceptible of the construction that the computation is to be made exclusive of the annual value where there is a separate assessment and charge under Sched. A. If that is right, E it follows, of course, that in this case the Special Commissioners have made a mistake because they have allowed the deduction which was claimed. In my opinion, basing myself, as I must do, simply on the construction of the few lines of r. 5 (1), I feel bound to arrive at the conclusion that the contention of the Crown here is right and that the appeal must accordingly be allowed.

Cadbury Bros., Ltd., appealed.

F *A. M. Latter, K.C.*, and *Cyril King* for Cadbury Bros., Ltd.

The Solicitor-General (*Sir Boyd Merriman, K.C.*) and *R. P. Hills* for the Crown.

LORD HANWORTH, M.R.—This is an appeal from a decision of FINLAY, J., given on Jan. 12, 1933. The facts which are contained in the Case are quite short. The company appealed against assessments to income tax for the years 1927–28 G down to 1930–31 made on the company under Case I of Sched. D of the Income Tax Act, Sched. D, of course, relating to the balance of the profits and gains which are made by the company. The question that is for the consideration of the court is whether in computing the amount of the company's profits assessable under Sched. D, the annual value of the company's property at Knighton and not assessed under Sched. A is an allowable deduction. We are told in the Case that prior to H the passing of the Finance Act, 1926, and for all the years of assessment up to and including the financial year 1926–27 the revenue authorities had allowed a deduction for the annual value of this land and the buildings thereon when computing the amount of the company's liability to income tax under Case I of Sched. D. That was because there was an expense incurred by the company in seeking its profits and gains, and a deduction was allowed in respect of the annual value, that I being the appropriate test of amount, in computing the liability to income tax. The Case tells us that since the passing of the Finance Act, 1926, the authorities have refused to make this diminution of liability, having regard to provisions contained in Sched. 4 to that Act, which altered the terms of r. 5 of the rules applicable to Cases I and II of Sched. D. It was argued that an exemption under the Act of Charles II still availed to prevent this increase of the sum due from the company. The commissioners who heard the case upheld the appeal of the company, and they declared that in computing the amount of the company's profits assessable to income tax under Sched. D, Case I, the annual value of the Knighton property,

although not assessed under Sched. D, was an allowable deduction. The point A
that it appears to us that we have to decide is an extremely narrow one. FINLAY, J., did not have the advantage of the point that has been pressed before us insisted on before him, and he gave a judgment on another part, an important part, of the case, on which I desire not to express an opinion. The point to my mind on which we have to express an opinion is whether or not the terms of the Act passed in 1660, which gave certain immunity to certain lands at Knighton, inure to secure B
immunity to the company from this increase of the amount of their assessment. It is quite plain from the statement of the facts to which I have referred that the inspector of taxes relies on the change in the law made by Sched. 4 to the Finance Act, 1926, to withdraw any deduction which up to that time had been allowed, and the result of withdrawing that deduction is to increase the amount which the company will have to pay. It is said that the tax that is imposed on the company C
is one in respect of profits falling under Sched. D. It must be remembered, however, that the computation of the profits which fall to be taxed under Sched. D is made in accordance with certain principles which are laid down in the statute. It would be wrong in many cases to hold that the sum on which the tax is computed is an actual sum. It is a sum which has been reached in accordance with certain statutory provisions. Up to the time when this privilege was withdrawn, the D
authorities had allowed a deduction for the annual value of the land on which a part of this enterprise owned by Messrs. Cadbury is carried on. It appears to me that, put in simple language, the case is this: The company are called on to pay a quantum which is maintained at a larger sum than it would stand at if it were allowed to suffer the same deduction as had been previously granted in earlier years. By reason of the withdrawal of that privilege to make the deduction, the E
sum which the company are called on to pay is larger than it would be if the deduction had been allowed. The statute of Charles II was passed no doubt to confer an exceptional and unusual privilege on William Adams, and it enacted that

> "the mannors and graunge of Knighton with the appurtenances and all other lands and hereditaments settled and conveyed by the said William Adams to F
> the said governors [of the Haberdashers' Company] should be freed discharged and acquitted of and from the payment of all every or any manner of taxes and assessments."

The result is that the present owners of the land, the Haberdashers' Company, are by the first limb of that clause freed, discharged and acquitted from the payment of all and every manner of taxes, and so on. Messrs. Cadbury are the G
occupiers of these premises under a lease granted in 1921 for, I believe, some eighty odd years. The second part of this clause in the statute of Charles II proceeds:

> "And . . . the said mannors messuages lands tenements and premises and the owners and occupiers thereof or any of them shall not at any time hereafter be rated taxed or assessed to pay any sume or sumes of money or be otherwise H
> charged in any way whatsoever for or in respect of the said mannors lands and hereditaments or any of them for or towards any manner of publique tax assessment or charge whatsoever any statute law or ordinance to the contrary hereof in any wise notwithstanding."

The Solicitor-General for the purpose of this case has admitted that the present statute comes within the meaning of the words "publique tax." Messrs. Cadbury I
are occupiers of these premises. If Messrs. Cadbury are called on to pay a total sum without any deduction, they are called on to pay, as I have already said, a larger quantum than previously by reason of their not being allowed to make a deduction from it. The right to make that deduction, it is said, was withdrawn by the statute of 1926, and it would seem that they would be by that Finance Act taxed or assessed to pay a sum of money in respect of the said manors or lands, for the sum which they seek to deduct is a sum which is reached by or estimated at the annual value of these very manors, lands, and hereditaments of which they

are the occupiers and which are within this immunity granted. I desire, as I say, not to express any opinion on the point whether or not by virtue of s. 26 the judgment of Finlay, J., is right or not. The Solicitor-General has asked to keep open, and has rightly asked to keep open, all arguments that may arise on that point; but we have to bear in mind this statute of Charles II. The question of the effect of these taxes arose in a case not long ago, *Pole-Carew and Lord St. Levan* v. *Craddock* (7). It was argued in that case that the immunity then asked for did not apply, and in that particular case the immunity had never been allowed over a long period of years during which the Income Tax Acts had been in operation, but Lord Sterndale, M.R., and the other members of the court, said that the court must give effect to the wide terms of the statute, and they held that it not only covered taxation existing at the time it was passed, but covered future taxation. There is less difficulty about the present section, because the actual terms include any manner of taxes, assessments, whatsoever hereafter to be laid and imposed by authority of Parliament or otherwise. In express terms it covers future parliamentary or public statutes as well as those existing at the time.

Having regard to *Pole-Carew's Case* (7), it seems to me that if we were to accept the result of the decision of Finlay, J., we should be failing to give effect to the wide terms of this statute of immunity. It would, in effect, impose further taxation, because it would require a larger sum to be paid by the subject, by Messrs. Cadbury, than they had hitherto paid when the assessments had been made upon them. On the ground, therefore, that it is necessary to give effect to the statute of Charles II, and that that statute does create an immunity in favour of Messrs. Cadbury, I think this appeal must be allowed, and for this purpose we must rightly or wrongly assume that by reason of r. 5 there is a disallowance of the deduction hitherto allowed, with the result that it brings into charge a certain sum equivalent to the deduction which has not been allowed and so contravenes the statute of Charles II.

LAWRENCE, L.J.—I agree. Rule 5 of the rules applicable to Cases I and II provides that the computation of tax shall be made exclusive of the annual value of lands occupied for the purpose of trade and separately assessed and charged under Sched. A. The lands in question in this case are occupied for the purpose of trade, but are not separately assessed and charged under Sched. A, because they are exempted from taxation under the Act of Charles II. If the contention of the Solicitor-General be right, that by reason of this exemption the annual value of the lands cannot be deducted for the purpose of computing the company's profits and gains, the result would be that the company as occupiers of the lands would be charged for or in respect of those lands within the meaning of the Act of Charles II, for unless the company, in estimating their profits and gains, are allowed to deduct the annual value of the land occupied by them for the purposes of their trade, the tax computed under Sched. D is larger than it would be if that annual value had been deducted, since the gains and profits of the company are increased by reason of the occupation of the lands. In these circumstances it seems to me that the occupiers would be indirectly taxed to pay a sum of money or otherwise charged in respect of the lands towards "a manner of public tax" contrary to the Act of Charles II. For those reasons I agree (without expressing any opinion as to the correctness or otherwise of the other contentions raised by the appellant company) that this appeal ought to be allowed.

SLESSER, L.J.—I agree. In this case in my view the Crown find themselves in a dilemma. If we assume without in any way concluding the matter, that, by reason of the operation of r. 5 (1), these lands not being separately assessed and charged under Sched. A, the deduction is now by reason of the recent legislation and consequential rules not to be made, there follows in my opinion this situation: That in so far as the occupier of the land cannot have the benefit of the deduction, to that extent he suffers, if not a tax, at least a charge; and in my view the language of the Act of 12 Charles II is so wide that, whether this be a direct tax or whether it be a deduction from the profits of the trade in respect of land, both cases are covered by the language, which is that the occupier shall not at any time be rated, taxed, or assessed to pay any sum or sums of money or be otherwise charged in any way whatsoever for or in respect of the said manors and lands. I think, notwithstanding the argument of the Solicitor-General, that this is no more than a deduction of a profit on trade; it appears to me that it certainly is a charge in some way for and in respect of the said lands which would not have to be suffered but for the occupation of the lands, on the assumption that his argument, under the rule, about which, as I say, I express no opinion, is correct. In view of that dilemma it appears to me impossible for the Crown here to maintain, whatever may be the construction of the rule, having regard to the wording of this statute in favour of the subject, that the occupier can be required to forgo the deduction.

Appeal allowed.

Solicitors: *Timbrell, Deighton, & Nichols*; *Solicitor of Inland Revenue.*

[*Reported by* J. H. G. Buller, Esq., *and* Geoffrey P. Langworthy, Esq., *Barristers-at-Law.*]

HYDE *v.* WHITE

[Probate, Divorce and Admiralty Division (Lord Merrivale, P.), February 21, 1933]

[Reported [1933] P. 105; 149 L.T. 96; 77 Sol. Jo. 251; 102 L.J.P. 71; 49 T.L.R. 325]

Solicitor—Charging order—"Property recovered or preserved through [solicitor's] instrumentality"—Plaintiff unsuccessfully propounding wills—Finding of intestacy—Plaintiff with interest thereon—Solicitors Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 37), *s.* 69—*Solicitors Act*, 1957 (5 *&* 6 *Eliz.* 2, *c.* 27), *s.* 72.

The plaintiff in a probate action unsuccessfully propounded, in the alternative, three alleged wills, but was also interested in the estate in the event of an intestacy. She instructed two firms of solicitors in turn to act for her, but withdrew instructions from, and failed to discharge the bills of costs of, both firms. The court later pronounced against the alleged wills and for an intestacy. On an application by the two firms of solicitors for charging orders on the plaintiff's share of the estate, as being "property recovered or preserved through [their] instrumentality" within the meaning of the Solicitors Act, 1932, s. 69,

Held: the solicitors were entitled to charging orders for their costs properly incurred on the plaintiff's behalf in the litigation because, although the plaintiff's claims under the alleged wills had failed, her interest on the intestacy was a mere inchoate right until it had been ascertained by the order of the court, and was, therefore, "property" which had been "preserved" in the proceedings and through the solicitors' instrumentality.

Notes. The Solicitors Act, 1957, has repealed and replaced the Solicitors Act, 1932. Section 72 of the 1957 Act is in the same terms as s. 69 of the 1932 Act.

Considered: *Loescher* v. *Dean and Woodbridge & Sons*, [1950] 2 All E.R. 124. Applied: *Wimbourne* v. *Fine*, [1952] 2 All E.R. 681.

As to applications by solicitors for charging orders, see 31 Halsbury's Laws (2nd Edn.) 260, para. 281, and as to such applications in the Probate Division, see

16 HALSBURY'S LAWS (3rd Edn.) 164, para. 266; as to what property will be charged, see 31 HALSBURY'S LAWS (2nd Edn.) 254, para. 277. For the Solicitors Act, 1957, s. 72, see 37 HALSBURY'S STATUTES (2nd Edn.).

Probate action as to the estate, worth some £11,000, of the late Mr. Henry Benjamin White, of Walmer, Kent, who died in February, 1931, without issue. His only surviving sister, Mrs. Florence Hyde, of Glenholme, Drum Hill, Walmer, as executor, propounded, in a writ dated May 8, 1931, an alleged will of the deceased dated Jan. 29, 1926, and in the alternative two earlier alleged wills of 1909. The defendant, Mr. William Archibald White, a nephew of the deceased, asked the court to pronounce against all three alleged wills.

After solicitors had issued the writ on behalf of the plaintiff there was a change of solicitors, and in August, 1931, a second firm was instructed. At a later stage the plaintiff withdrew instructions from the latter firm. The first firm recovered judgment against the plaintiff for £196 costs, taxed and assessed, and the second firm recovered judgment against the plaintiff for costs amounting to £96. Neither firm was able to enforce judgment. In July, 1932, an order was made in favour of both firms of solicitors, granting them liberty to apply for a charging order on any share of the estate to which the plaintiff might be entitled under either of the three alleged wills or on intestacy.

Section 69 of the Solicitors Act, 1932, provides:

> "Any court in which a solicitor has been employed to prosecute or defend any suit, matter, or proceeding may at any time declare the solicitor entitled to a charge on the property recovered or preserved through his instrumentality for his taxed costs in reference to that suit, matter, or proceeding, and may make such orders for the taxation of the said costs and for raising money to pay, or for paying, the said costs out of the said property as they think fit, and all conveyances and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against the solicitors. . . ."

No further step having been taken by the plaintiff, the nephew, Mr. W. A. White, issued a writ against the plaintiff (Mrs. Hyde) and her husband, claiming an intestacy, and that the three alleged wills be pronounced against. The plaintiff (Mrs. Hyde) and her husband were not represented, and the second action was not defended.

LORD MERRIVALE, P., pronounced against the alleged wills and declared an intestacy.

A. Richard Ellis (with him *Clifford Mortimer*), for the two firms of solicitors who had acted for the plaintiff, Mrs. Hyde, applied on their behalf for a charging order for their costs against her share on intestacy.

LORD MERRIVALE.—No difficulty arises by reason of the fact that the plaintiff changed her solicitors. If they had remained her solicitors down to the date of the decree pronounced to-day they would not have enlarged their right as to their costs, and if entitled to-day they would be entitled although they no longer represent the plaintiff. The real question is whether s. 69 of the Solicitors Act, 1932, gives a charge on the interest of the plaintiff which has been ascertained to-day, and whether there is such a charge by reason that her interest is property which has been "recovered or preserved through the instrumentality" of her solicitors. If one takes a superficial view, it can be said that she has been unsuccessful in the claim she made under any of the wills. It may be said, therefore, that since she has failed all down the line there has been no property preserved and recovered.

On the whole I do not think that this is the true view. The statute must be construed with reference to various classes of litigation. This is a Court of Probate. The property in question is the estate of a deceased man, and it had not vested by any judicial or administrative act in any other person. There were persons who had inchoate rights, and one of the persons who had these rights was the deceased's sister, the plaintiff, who had issued a writ in the Probate Division. She claimed in certain specific modes. She claimed so much of the estate as was disposed of in her favour under a will of 1926 and in the alternative under two wills of 1909 and that claim failed, but there still remained the question what was her interest in the estate, and that right was inchoate until there had been some order of the court. That was so until these rights had been ascertained. In these circumstances I do not think that a merely narrow construction must be put on the words of the section; they must be read with regard to the intention of the legislature. I think that this is property that has been preserved—that is to say, it has been secured to her in these proceedings. I think the solicitors are entitled to a charging order for costs properly incurred in this litigation.

His Lordship made an order that the costs incurred by both the firms of solicitors employed by the plaintiff should be charged on the share to which the plaintiff was entitled on the declaration of intestacy.

Solicitors: *Lovell, Son, & Pitfield*, for *Robinson & Allfree*, Deal; *Wiley & Powles.*

[*Reported by* WILLIAM LATEY, ESQ., *Barrister-at-Law.*]

FEIST *v.* SOCIÉTÉ INTERCOMMUNALE BELGE D'ELECTRICITÉ

[HOUSE OF LORDS (Lord Atkin, Lord Warrington, Lord Tomlin, Lord Russell and Lord Wright), November 10, 13, 23, 24, December 15, 1933]

[Reported [1934] A.C. 161; 103 L.J.Ch. 41; 50 T.L.R. 143; 78 Sol. Jo. 64; 39 Com. Cas. 145; 150 L.T. 41]

Money—Bond—"Gold clause"—Payment of £100 "in sterling in gold coin of United Kingdom of or equal to' 'specified standard of weight and fineness—Payment in sterling of sum equal to value of £100 if paid in gold coin of United Kingdom of or equal to prescribed standard.

By cll. 1 and 2 of a bond issued in September, 1928, by the respondent company, of which the appellant was the holder, it was provided that the company would, on a specified date, pay to the bearer on presentation of the bond "the sum of £100 in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on Sept. 1, 1928," and would, further, pay interest at the rate of 5½ per cent. per annum in sterling in gold coin of the same standard.

Held: on construction of all the contractual provisions of the bond the parties, in the clauses mentioned, must be taken as referring to gold coin of the United Kingdom of a specific standard of weight and fineness, not as being the mode in which the company's indebtedness was to be discharged, but as being the means by which the amount of that indebtedness was to be measured and ascertained, so that the words of the clauses quoted should be construed, not as meaning that £100 was to be paid in a certain way, but as meaning that the obligation was to pay in sterling a sum equal to the value of £100 if paid in gold coin of the United Kingdom of or equal to the standard prescribed.

Notes. Distinguished: *British and French Trust Corpn., Ltd.* v. *New Brunswick Rail. Co.*, [1936] 1 All E.R. 13. Considered: *R.* v. *International Trustee for*

A *Protection of Bondholders Akt.*, [1937] 2 All E.R. 164. Applied: *New Brunswick Rail. Co.* v. *British and French Trust Corpn., Ltd.*, [1938] 4 All E.R. 747. Distinguished: *Treseder-Griffin* v. *Co-operative Insurance Society*, [1956] 2 All E.R. 33. Referred to: *St. Pierre* v. *South American Stores (Gath & Chaves), Ltd. and Chilean Stores*, [1937] 3 All E.R. 349; *Ottoman Bank of Nicosia* v. *Chakarian*, [1937] 4 All E.R. 570; *Apostolic Throne of St. Jacob* v. *Saba Eff Said*, [1940] B 1 All E.R. 54; *Syndic in Bankruptcy of Salim Nasrullah Khoury* v. *Khayat*, [1943] 2 All E.R. 406.

As to the discharge of obligations in terms of money, see 23 HALSBURY'S LAWS (2nd Edn.) 173, and for cases see DIGEST Supps., tit. Money and Moneylending, case 17a et seq.

C **Appeal** from an order of the Court of Appeal (LORD HANWORTH, M.R., LAWRENCE and ROMER, L.JJ.) ([1933] 1 Ch. 684), affirming an order of FARWELL, J.

The Court of Appeal held that the words "in sterling" denoted the standard currency of this country, for the contract was to be interpreted according to English law. The law of England had withdrawn gold from circulation, and in 1928 the issue of notes was given again to the Bank of England in denominations of £1 and 10s., and these were made legal tender. Under the express terms of the material D statutes the plaintiff was legally bound to accept banknotes in payment of the moneys secured by the bond. The company had agreed to pay the debt and interest in gold coin, but the legislature said that it might lawfully be discharged by tendering banknotes.

The plaintiff appealed.

E *Sir William Jowitt, K.C.*, *Lionel L. Cohen, K.C.*, and *Cyril Radcliffe* for the appellant.

Gavin T. Simonds, K.C., and *H. S. G. Buckmaster* for the respondents.

The House took time for consideration.

Dec. 15. The following opinions were read:

F **LORD ATKIN.**—I have had the opportunity of reading the opinion which is about to be delivered by my noble and learned friend LORD RUSSELL, and I agree with it and desire to adopt it. I wish to say, also, that my noble and learned friend **LORD WARRINGTON** agrees with it.

LORD TOMLIN.—I also have had the opportunity of reading the opinion which is about to be delivered by my noble and learned friend LORD RUSSELL, and I G concur in it in all respects.

LORD RUSSELL.—The point for decision in this case is one which primarily depends upon the true construction of the contract between the parties, the dispute being as to the way in which the obligations of the respondents as to principal and interest under a certain bond issued by them in the month of September, 1928, H are properly dischargeable. The difficulty arises from the presence in the bond of what is sometimes known as a "gold clause," and from the particular phraseology which it has assumed.

The respondents are a limited company incorporated under the laws of Belgium with their head office in Brussels. They issued a series of bonds of various denominations which were offered for sale by M. Samuel & Co., Ltd., on Sept. 25, 1928. I The bonds are (except as to the principal amount secured thereby) identical in form. The bond which is the subject of the present proceedings is couched as to its operative part in the following language:

> "1. Société Intercommunale Belge d'Electricité (Société Anonyme), a corporation organised and existing under the laws of Belgium (hereinafter called "the company"), for value received will, on the 1st day of September, 1963, or on such earlier day as the principal moneys hereby secured become payable in accordance with the conditions endorsed hereon, pay to the bearer at the registered office of M. Samuel & Co., Ltd. (hereinafter called "the

> bankers"), in London, England, the fiscal agent of the company (or at the principal office of any successor fiscal agent) on presentation of this bond, the sum of £100 in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the 1st day of September, 1928. 2. The company will, during the continuance of this security, pay at the registered office of the bankers (or at the principal office of any successor fiscal agent), interest thereon at the rate of 5½ per cent. per annum in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the 1st day of September, 1928, by equal half-yearly payments on every 1st day of March and 1st day of September in accordance with the coupons annexed hereto. 3. The principal of and interest on this bond are payable without deduction or diminution for any taxes, assessments, charges or duties of any kind whatsoever, past, present or future, that may be levied or imposed by the Kingdom of Belgium, or by any province, commune, municipality, or other taxing authority therein or thereof. 4. This bond is one of an authorised issue of bonds of the company of an aggregate principal amount not exceeding £500,000 in sterling in gold coin of the United Kingdom at any one time outstanding. 5. This bond is issued subject to and with the benefit of the conditions endorsed hereon which are to be deemed part of it."

The conditions referred to in cl. 5 are twenty in number. I will refer to the relevant ones. No. 1 provides for a sinking fund. No. 2 enables the company to redeem bonds on any interest payment date beginning with Sept. 1, 1933. No. 4 provides for increasing the amount of the payments under the bonds to meet the case of charges imposed by Belgian authorities which the company may not legally assume and pay. No. 6 runs thus:

> "The bonds of this issue shall constitute and they and each of them hereby are declared to be the direct and unconditional liability and obligations of the company in sterling in gold coin of the United Kingdom in accordance with the provisions of the bonds and these conditions."

No. 16 (c) provides that in case default shall be made as there mentioned then

> "the company upon the demand of the bankers will pay to the bankers for the benefit of the holders of the bonds and coupons then outstanding in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the 1st day of September, 1928, the whole amount which then shall have become due and payable on all such bonds and coupons then outstanding for interest or principal or both as the case may be."

No. 18 provides that the bond shall be construed and the rights of the parties regulated according to the law of England and as a contract made and according to the terms thereof to be performed in England.

The coupons which are referred to in cl. 2 of the bond, and in accordance with which the interest is to be paid, are each described on the front thereof as a coupon for £2 15s. being half-year's interest due on the particular date and "payable in accordance with the conditions endorsed hereon" at a place specified, less British income tax. The conditions endorsed on the coupons are in the following terms:

> "For £2 15s. 0d. in sterling in gold coin of the United Kingdom, of or equal to the standard of weight and fineness existing on the 1st day of September, 1928, without deduction or diminution for any taxes, assessments, charges or duties of any kind whatsoever past, present, or future, that may be levied or imposed by the Kingdom of Belgium or by any province, commune, municipality or other taxing authority therein or thereof."

I have cited to your Lordships the relevant contractual provisions of the bond, but upon the document itself are to be found certain figures and words of description to which attention must be called. The letterpress on the front of the document is enclosed in an ornamental rectangular border and in each of the two top corners are to be found the symbol and figures "£100." Inside the border and above cl. 1 of the bond are the following words, figures and symbols:

"Thirty-Five Year Sinking Fund 5½ per cent. Sterling Bond.
Due Sept. 1, 1963.
Part of a total of £500,000 Bonds offered for sale on Sept. 25, 1928.
Issued in Bonds 50 of £1,000 each numbered 3,301 to 3,350 inclusive.
Issued in Bonds 300 of £500 each numbered 3,001 to 3,300 inclusive.
Issued in Bonds 3,000 of £100 each numbered 1 to 3,000 inclusive.
Bond for One Hundred Pounds."

I mention these details because in the courts below, upon the question of construction, some reliance was placed upon the fact that they were to be found inscribed upon the face of the document. It must, however, be borne in mind that they form no part of the contractual provisions of the bond; they merely purport to be descriptive of the bonds. If upon a consideration of the contractual provisions, those provisions are open to more than one construction, descriptive words appearing elsewhere in the document may well assist in deciding which of the alternative constructions represents the intention of the parties; indeed they may be decisive; but if the contractual provisions reveal only one construction, outside descriptive words will not be competent to alter that construction. If they cannot be reconciled with it they become misdescriptive.

The question between the parties can now be stated. The company claim, and it has so been decided in both courts below, that they are entitled to satisfy the principal moneys and interest secured by the bond by tendering whatever might at the due date of payment be good legal tender for the nominal amount of the bond or coupon as the case may be. It is obvious that this decision deprives of all effect the words which occur in cll. 1 and 2 of the bond, namely,

> "in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the 1st day of September, 1928."

These words (which merely for convenience I will call the gold clause) need in this view never have been inserted at all. The bondholder, on the other hand, contends that they were inserted for a specific purpose, namely, to protect the lender against any depreciation of sterling in terms of gold, and that the gold clause, with its reference to gold coin of a defined standard of weight and fineness, is a clause which deals, not with the method in which a debt of fixed unvarying amount is to be discharged, but with the fixing of the amount of the debt to be discharged. Alternatively, the bondholder says that, if the bond is to be construed as a contract to pay in gold coins of the United Kingdom of the specified standard of weight and fineness, then he would on breach be entitled to equivalent damages.

FARWELL, J., thought the question of construction a difficult one, but he came to the conclusion that the contract was to pay £100 and interest at 5½ per cent. as fixed sums, notwithstanding that such a condition involved giving no effect to the gold clause; and to pay those fixed sums by one particular form of legal tender and none other. He held that such a contract was not illegal, but that the respondents were notwithstanding it entitled to pay the fixed sums in any other form of legal tender. He made a declaration accordingly.

In the Court of Appeal the Master of the Rolls, in effect I think, was of opinion that upon its true construction the contract was a contract to pay £100 in manner prescribed by English law, and was not a contract to pay a sum of money to be ascertained by calculation on the basis of a specified standard of gold. LAWRENCE, L.J., after much fluctuation of opinion, came to the conclusion that the gold clause did not measure the liability, but indicated the mode in which a liability of fixed amount was to be discharged; and he held that an agreement to discharge a debt by one form of legal tender could not abrogate the enactment of the legislature that the debt could be discharged by other forms of legal tender. ROMER, L.J., took the same view as to construction, namely, that the contract was to pay sums of fixed amounts, but to pay them only

> "in a particular form of currency, namely, the gold currency as it existed on Sept. 1, 1928, to the exclusion . . . of all other forms of currency."

Such a contract he held to be illegal under s. 6 of the Coinage Act, 1870, with the result not that the whole contract was unenforceable, but that the words which created the illegality must be treated as excluded.

I share the views of FARWELL, J., and LAWRENCE, L.J., that the question of construction is a difficult one, but after careful consideration of all the contractual provisions of the bond I have come to the conclusion that we should give to the gold clause the meaning and effect for which the bondholder primarily contends.

The courts below in construing the bond have started with the assumption that the bond must be, as is stated on its face, a bond for £100; they then construe the words of the gold clause literally, and hold that its sole intention is to obtain payment in one particular form of tender only, and that that intention must be defeated by the operation of the law. For myself, I approach the question of construction in a different way. I consider first the state of affairs existing at the date of the bond. The Gold Standard Act, 1925, had exempted the Bank of England from obligation to pay its own notes in legal coin, but had provided that such notes should not thereby cease to be legal tender. Further it had repealed the provision of the Currency and Bank Notes Act, 1914, entitling the holder of a currency note to be paid its face value in gold coin. It had, however, provided that the Bank of England should be bound to sell on demand gold bullion at the price and as therein specified to any person on demand, but only in the form of bars containing approximately 400 ounces troy of fine gold. The Currency and Bank Notes Act, 1928, had received the Royal Assent, though it did not come into operation until Nov. 22, 1928. By that Act, the Bank of England was authorised to issue notes for £1 and 10s., which were to be legal tender for any amount. Existing currency notes were converted into banknotes, the bank becoming liable upon them; and the bank was empowered to require any person in the United Kingdom owning gold coin or bullion to an amount exceeding £10,000 in value to sell it to the bank on payment (in the case of gold coin) of the nominal value thereof. The country was on the gold standard, but the notes were inconvertible and gold coin was substantially no longer in circulation.

These being the circumstances and conditions of the time it is not I think improper or hazardous to make two surmises: (i) that the gold clause was inserted in cll. 1 and 2 of the bond in contemplation of the contingency of this country going (as it did in 1931) off the gold standard at some future date; and (ii) that neither party to the bond can have contemplated payment under the bond being actually made in gold coins.

I turn to the bond to see if from the contents of the document itself it is apparent that the parties did not use the words of the gold clause in accordance with the literal meaning which they would bear if considered apart from the rest of the document and the circumstances which surrounded its execution. A consideration of cl. 2 will show, I think, that, as there used, the words must mean something other than what they say, for, translating the 5½ per cent. by equal half-yearly payments into the appropriate figures, it becomes a provision for the payment of £2 15s. "in gold coin of the United Kingdom." The same consideration applies to the interest coupons, which with their express provision for deduction of income tax, would be purporting to provide for a payment "in gold coin of the United Kingdom" of a sum (to-day) of £2 1s. 3d. Again, if one looks at cl. 4 of the bond, the reference which it contains to gold coin of the United Kingdom cannot bear its literal meaning. There is no issue or amount outstanding "in gold coin of the United Kingdom." Taking even cl. 1 by itself it would be practically impossible to fulfil its literal requirements even if a sufficiency of gold coin were still in circulation, for, according to its strict reading, the coins tendered would all have to be coins of the exact standard of weight and exact standard of fineness specified in the Coinage Act, 1870, without remedy, allowance, or variation from the standards. Thus, neither in cl. 1 nor in cl. 2 can the words have been intended by the parties to carry their literal interpretation.

I, therefore, ask myself this question. If the words of the gold clause cannot have been used by the parties in the sense which they literally bear, ought I to ignore them altogether and attribute no meaning to them, or ought I, if I can discover it from the document, to attribute some other meaning to them? Clearly the latter course should be adopted if possible, for the parties must have inserted these special words for some special purpose, and if that purpose can be discerned by legitimate means, effect should be given to it.

In my opinion, the purpose can be discerned from cl. 4, in which the reference to gold coin of the United Kingdom is clearly not a reference to the mode of payment but to the measure of the company's obligation. So, too, condition 6, which again is a clause not directed to mode of payment, but to describing and measuring liability, shows that the words are used as such a measure. In just the same way I think that in cll. 1 and 2 of the bond the parties are referring to gold coin of the United Kingdom of a specific standard of weight and fineness, not as being the mode in which the company's indebtedness is to be discharged, but as being the means by which the amount of that indebtedness is to be measured and ascertained. I would construe cl. 1, not as meaning that £100 is to be paid in a certain way, but as meaning that the obligation is to pay a sum which would represent the equivalent of £100 if paid in a particular way, in other words I would construe the clause as though it ran thus (omitting immaterial words), "pay . . . in sterling a sum equal to the value of £100 if paid in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the 1st day of September, 1928." I would similarly construe cl. 2.

I am conscious, my Lords, that this construction strains the words of the document, and that it fits awkwardly with some of its provisions. Thus, for instance, the half-yearly payments in accordance with the coupons (which are described in cl. 2 as equal) may in fact not be equal. But I prefer this to the only other alternatives, namely, attributing no meaning at all to the gold clause, or attributing to it a meaning which from other parts of the document and the surrounding circumstances the parties cannot have intended it to bear.

We were in the course of the argument referred to certain decisions and judgments in cases which came before the Permanent Court of International Justice sitting at the Hague. I do not, I need hardly say, treat these as in any way binding upon us. Indeed, the relevant facts and words there under consideration were very different from those which have been under consideration here. I would like, however, to cite one passage as stating happily and succinctly the considerations and principles which have influenced me in arriving at the conclusion which I have reached. It occurs in the judgment dealing with certain Serbian loans stated to be payable both as to principal and interest in gold. It runs thus:

> "As it is fundamental that the terms of a contract qualifying the promise are not to be rejected as superfluous, and as the definite word 'gold' cannot be ignored, the question is: what must be deemed to be the significance of that expression? It is conceded that it was the intention of the Parties to guard against the fluctuations of the Serbian dinar, and that, in order to procure the loans, it was necessary to contract for repayment in foreign money. But, in so contracting, the Parties were not content to use simply the word 'franc,' or to contract for payment in French francs, but stipulated for 'gold francs.' It is quite unreasonable to suppose that they were intent on providing for the giving in payment of mere gold specie, or gold coins, without reference to a standard of value. The treatment of the gold clause as indicating a mere modality of payment, without reference to a gold standard of value, would be not to construe but to destroy it."

I would allow this appeal and substitute for the declaration made by FARWELL, J., a declaration in the following terms: Declare that upon the true construction of the bond the appellant is entitled as holder thereof to receive from the respondents from time to time by way of principal and interest thereunder and on the due dates of payment therefor such a sum in sterling as represents the gold value of the A nominal amount of each respective payment, such gold value to be ascertained in accordance with the standard of weight and fineness existing on Sept. 1, 1928, and that, accordingly, every "pound" comprised in the nominal amount of each such payment must be treated as representing the price in London in sterling (calculated at the due date of payment) of 123·27447 grains of gold of the standard of fineness specified in Sched. I to the Coinage Act, 1870, and any fraction of a "pound" B comprised in the nominal amount of any such payment must be treated as representing the price in London in sterling (calculated at the due date of payment) of a corresponding fraction of 123·27447 grains of gold of the same standard of fineness.

The view which I take upon the question of construction renders it unnecessary for me to consider the other questions which were debated upon the hearing of the appeal. They do not arise. It would be unwise and I do not desire to deal with C the question whether an effective bargain can be made for a debt to be paid only in one form of legal tender. Still less do I desire to express a view as to the meaning and effect of s. 6 of the Coinage Act, 1870.

LORD WRIGHT.—I fully agree in the reasoning and conclusions expressed in the speech just delivered by my noble and learned friend LORD RUSSELL. D

Appeal allowed.

Solicitors: *Allen & Overy*; *Stephenson, Harwood, & Tatham.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

E

THE KITE

F

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), May 11, 12, 15, 16, 1933]

[Reported [1933] P. 154; 102 L.J.P. 101; 149 L.T. 498; 49 T.L.R. 525; 18 Asp.M.L.C. 413]

Negligence—Defence—Act complained of accounted for by explanation no less probable than negligence—Act complained of excused by contract. G

Shipping—Towage—Negligence—Condition relieving tug from liability—Authority to sub-contractor to contract on terms that liability for negligence be excluded—London Lighterage Clause.

The plaintiffs, owners of cargo laden upon the barge B., claimed damages from the defendants, the owners of the tug K., for damage received by their H goods by reason of the B. having come into collision with the abutment of a bridge while being towed by the K. The defendants alleged that the collision was caused by the failure of the lighterman on board the B. (who was not the servant of the defendants) properly to make fast the breast rope by which the B. was secured to the barge which was being towed alongside her.

Held: the defendants having shown that the mishap was capable of being I satisfactorily accounted for by an explanation which was no less probable than negligence on the part of those in charge of the tug, the onus of proof shifted back to the plaintiffs, who, on a review of the evidence, had failed to show that the negligence of the defendants' servants was the cause of the damage.

Dictum of LORD DUNEDIN in *Ballard* v. *North British Rail. Co.* (1), 1923 S.C. 43, 54, applied.

The plaintiffs' cargo was being carried in the B. in pursuance of a contract made between the plaintiffs and a firm of wharfingers, by the terms of which the wharfingers were not liable for the negligence of their servants. The contract further provided that "persons supplying tugs or barges to the [wharfingers] for the purpose of enabling [them] to fulfil [their] contracts shall incur no greater liability to the [wharfingers'] customers than that of the [wharfingers] hereunder." The wharfingers contracted with a firm of lighterers for the carriage of the plaintiffs' cargo in the B. The contract between the wharfingers and the lighterers was subject to the London Lighterage Clause, by the terms of which it was expressly stipulated that the person with whom the contract was made should be the owner of the goods or his agent and should accept for himself and all parties interested the terms and conditions contained therein. The terms and conditions included a condition that the lighterers should be at liberty to employ any lighter, tug or vessel belonging to other owners or to sub-let the whole or any portion of the contract, and in either event the above terms and conditions should apply to such employment or sub-letting and should be deemed to have been agreed to between the goods' owner or customer and such other owners or sub-contractors. The lighterers contracted with the defendants for towage by the K. upon terms that the defendants should not be liable for loss or damage caused by the negligence or misconduct of their servants. The parties and all the other persons concerned in these transactions were accustomed to do business with each other, and the course of business followed was generally understood.

Held: having regard to the fact that each party knew what the other was doing, there was a limited authorisation from first to last that at each step the contractor could reserve that his sub-contractors should have the same exemption from liability for negligence that the first contractor had, and the plaintiffs could not, by suing in tort for negligence, recover in respect of negligence for which under their contract the defendants could not be made liable.

Notes. Considered: *The Mulberra*, [1937] P. 82; *The Stranna*, [1937] 2 All E.R. 383; *Imperial Smelting Corpn., Ltd.* v. *Joseph Constantine S.S. Line, Ltd.*, [1940] 2 All E.R. 46. Not followed: *Moore* v. *R. Fox & Sons*, [1956] 1 All E.R. 182. Referred to: *Elof Hansson Agency, Ltd.* v. *Victoria Motor Haulage Co.* (1938), 54 T.L.R. 666.

As to the duty of wharfingers and dock owners, see 23 HALSBURY'S LAWS (2nd Edn.) 645–649; as to proof of negligence, see ibid. 667 et seq.; and as to defences generally, see ibid. 700 et seq. As to towage, see 30 HALSBURY'S LAWS (2nd Edn.) 658–659. For cases see 36 DIGEST (Repl.) 111, 127 et seq., and 150 et seq., and 41 DIGEST 674 et seq.

Cases referred to:

(1) *Ballard* v. *North British Rail. Co.*, 1923 S.C. 43, H.L.; 36 Digest (Repl.) 142, **1237*.

(2) *The Waalstroom* (1923), 17 Ll.L. Rep. 53.

(3) *The Paludina*, [1925] P. 40; 132 L.T. 724; 16 Asp.M.L.C. 453, C.A.; affirmed sub nom. *S.S. Singleton Abbey* v. *S.S. Paludina*, 1927 A.C. 16; 95 L.J.P. 135; 17 Asp.M.L.C. 117; sub nom. *The Paludina*, 135 L.T. 707, H.L.; 36 Digest (Repl.) 192, *1013*.

(4) *Wakelin* v. *London and South-Western Rail Co.* (1886), 12 App. Cas. 41; 56 L.J.Q.B. 229; 55 L.T. 709; 51 J.P. 404; 35 W.R. 141; 3 T.L.R. 233, H.L.; affirming (1884), [1896] 1 Q.B. 189, n, C.A.; 36 Digest (Repl.) 130, *667*.

(5) *Scott* v. *The London and St. Katherine Docks Co.* (1865), 3 H. & C. 596; 5 New Rep. 420; 34 L.J.Ex. 220; 13 L.T. 148; 11 Jur.N.S. 204; 13 W.R. 410; 159 E.R. 665, Ex. Ch.; 36 Digest (Repl.) 146, *772*.

(6) *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co.*, [1924] A.C. 522; 93 L.J.K.B. 625; 131 L.T. 449; 40 T.L.R. 464; 68 Sol. Jo. 497; 16 Asp.M.L.C. 351; 29 Com. Cas. 340, H.L.; 41 Digest 478, *3118*.

Action for damage.

The plaintiffs, who were the owners of the cargo laden on board the barge *Brooklyn*, claimed against the defendants, J. P. Knight, Ltd., owners of the steam tug *Kite*, for damage sustained by their cargo in consequence of the *Brooklyn* having struck the abutment of Cannon Street railway bridge in the Thames at London while being towed by the *Kite*. The plaintiffs alleged that the defendants' servants in charge of the *Kite* were negligent in failing to keep a good look-out and in failing to keep the *Brooklyn* clear of the abutment of the bridge. It was contended on behalf of the plaintiffs that in the circumstances the onus of proving that those in charge of the *Kite* were not negligent was upon the defendants, and LANGTON, J., at the close of their case ruled that there was primâ facie evidence of negligence. The defendants denied negligence. They further contended that the plaintiffs had agreed for the conveyance of their cargo with Brook's Wharf and Bull Wharf, Ltd., a firm of wharfingers (referred to in the judgment of LANGTON, J., and in this report as Bull Wharf, Ltd.), under a contract by the terms of which Bull Wharf, Ltd., were not liable for any loss of or damage to the goods or property caused by any act of neglect or default of the company or its servants or others for whom it might be responsible. It was further expressly stipulated that "persons supplying tugs or barges to the company to enable it to fulfil its contracts shall incur no greater liability to the company's customers than that of the company hereunder." In their turn Bull Wharf, Ltd., contracted with Messrs. Wrightsons, a firm of lighterers, for the carriage of the plaintiffs' cargo in the barge *Brooklyn*. The contract between Bull Wharf, Ltd., and Wrightsons was subject to the London Lighterage Clause, the terms of which are as follows:

> "LONDON LIGHTERAGE CLAUSE
>
> "The rates charged by us are for conveyance only, and are exclusive of dock dues, demurrage, disbursements or other charges. They are quoted upon the express condition that the person with whom any contract is made is either the owner or authorised agent of the owner of the goods intended to be carried, and accepts both for himself and for all other parties interested in such goods the terms and conditions herein contained. The goods are carried only at owner's and or customer's risk, excepting loss arising from pilferage and theft of goods on board the barge whilst in course of transit, such loss or damage being limited to £20 per package and not exceeding £50 per ton. Save as aforesaid, we will not be liable for any loss or damage to goods entrusted to us for lighterage or for any loss or damage or expense occasioned to the owners of the goods or to the customers howsoever, whensoever or wheresoever, such loss or damage or expense be occasioned, and whether or not such loss, damage or expense be occasioned by any negligence, wrongful act or default of our servants or agents, or other persons for whose acts we might otherwise be liable, or be occasioned by any delay or failure in collecting, carrying or delivering the goods, and although the barge may for any reason have deviated or departed from the intended transit with the goods, and although the goods may have been loaded in the barge with other goods. We will not be liable to contribute in general average. We will not be responsible for any consequences arising from strikes, lock-outs, or other labour difficulties. We are to be at liberty to employ any lighter, tug or vessel belonging to other owners, or to sub-let the whole or any portion of the contract, and in either event the above terms and conditions shall apply to such employment or sub-letting and shall be deemed to have been agreed to between the goods owner or customer and such other owners or sub-contractors."

Messrs. Wrightsons, who did not supply tugs, contracted with the defendants to perform the towage with the tug *Kite* upon terms that the defendants were not liable for damage caused by the negligence of those in charge of the *Kite*. All the parties had done business together for many years, and the course of business between them was well known.

At the trial LANGTON, J., ruled that, it being admitted that the barge was brought into collision with the bridge, there was a primâ facie case of negligence. The defendants thereupon called the master who was in charge of the tug at the time. He stated that he looked round as he was coming for the arch and found his craft in line for the arch and everything in order as it should be to go through the arch. He then heard the knock of the barge against the bridge and the noise of shouting, and when he looked round he saw the barges "flaired out." His explanation of the collision was that the breast rope by which the *Brooklyn* was secured to the barge which was being towed alongside her had not been properly made fast.

Le Quesne, K.C., and *Naisby* for the plaintiffs.

Trapnell, K.C., and *Wilfrid Lewis* for the defendants.

LANGTON, J.—This case is of no little interest and importance. The relevant facts admit, I think, of being stated concisely, and they are these. The plaintiffs are the owners of certain perishable goods—that is to say, perishable when in contact with water—namely, tea, cocoa, and rubber. On Feb. 5, 1932, their goods were on board a barge called the *Brooklyn*, which was in tow of the tug *Kite*. The *Kite* towed the *Brooklyn* up between bridges with these goods on board the *Brooklyn*, and the *Brooklyn* came into collision with the northern abutment of the northernmost arch of the Cannon Street railway bridge. In consequence of this collision the goods were damaged. The plaintiffs are suing J. P. Knight, Ltd., the owners of the *Kite*, and, as will be seen by a glance at the pleadings, they put their case in the least possible number of words and lay it entirely in tort.

In order that the case may be fully understood, and for the purpose of the argument that has taken place here, it is necessary to examine with unusual care the whole series of events by which the business of the carriage of these goods in the barge *Brooklyn* came to be effected. The plaintiffs are a company—their proper style and title is the Rajawella Produce Co., Ltd.—and they have been accustomed to carry on business in the city of London for a very large number of years. Indeed, I may shorten this matter by saying that all the dramatis personæ in this occurrence have known each other, and done business with each other, for periods which are either proved or admitted before me, for periods varying between twenty years as a minimum and, I think, fifty years as a possible maximum. So that each knows the other very well, and each is perfectly familiar with both the manner and, indeed, the details of the way in which the other does business.

The first document of importance sets out how, and under what conditions, the plaintiffs entrusted their goods to the wharfingers. The wharfingers are Bull Wharf, Ltd. There was no written contract, but it is not for a moment denied, on behalf of the defendants, that Bull Wharf, Ltd., do their business, and have been accustomed to do their business for a long term of years, under the conditions of a certain clause. The clause, so far as it is relevant to the case, is as follows. For the purpose of easy distinction I will call the various sentences and paragraphs in the clause by numbers which do not appear in the clause. Paragraph 1 is in general terms, and it is not necessary to recite it. Paragraph 2—a somewhat strange paragraph—is in these terms:

> "The Merchant Shipping Acts, 1894 to 1921, and the London Lighterage Clause respectively limit the liability of a lighterman for loss of or damage to goods carried by lighter, barge or like vessel, and the company in respect of such goods shall in no case be liable to a greater extent than may be in fact recoverable from the owner of such vessel."

Paragraph 3 provides:

> "Save in any such case as aforesaid the company shall not be liable for loss, detention, damage or injury of or to the goods or property, howsoever and whensoever caused and of what kind soever. In particular and without prejudice to the foregoing, the company shall not be liable for consequences of lock-

> outs, strikes, and labour difficulties, or for any act, neglect or default of the company or its servants or others for whom it might be responsible, or for unfitness or unseaworthiness of any barge or tug on loading or commencement of the voyage or otherwise, or for unfitness or breakdown of machinery, appliance, store or refrigeration, or for deviation of craft."

Then para. 4:

> "Persons supplying tugs or barges to the company to enable it to fulfil its contracts shall incur no greater liability to the company's customers than that of the company hereunder."

That is a paragraph to which I shall have to return; it has been the subject of much debate in this case, but it is material to observe in passing, that it does convey to anybody dealing with Bull Wharf, Ltd., that the company may call in the aid of tugs or barges which are not their own property in order to fulfil their contracts.

It is not surprising to learn in view of that paragraph, specially inserted in the clause, that the next stage of the business was that Bull Wharf made a contract with Wrightson & Son, Ltd., well-known lighterers on the river, for the transport of these goods, in a barge belonging to Messrs. Wrightsons. Messrs. Wrightsons have been accustomed to work—again to the knowledge of all parties in this case—under the London Lighterage Clause. That clause is so well known that it is unnecessary for me to recite it here, but there are two portions of it which I think are of special importance, and I think it may be desirable to read them at this stage. Speaking of the rates charged, the clause says this:

> "They are quoted upon the express condition that the person with whom any contract is made is either the owner or authorised agent of the owner of the goods intended to be carried, and accepts both for himself and for all other parties interested in such goods the terms and conditions herein contained."

Messrs. Wrightsons, therefore, are saying to anyone who does business with them: "We do not do business with anybody who comes to us on a matter of transport, save on the terms that you are actually the owner of the goods, or that you have at least this limited authority from the owner of the goods that you are to be entitled to accept, and do, for the owner, hereby accept, all the terms and conditions contained in the London Lighterage Clause." At the end of the clause the matter is carried a stage further. The lighterer says to the party with whom he contracts or sub-lets, as follows: "We are to be at liberty to employ any lighter, tug, or vessel belonging to other owners, or to sub-let the whole or any portion of the contract, and in either event the above terms and conditions shall apply to such employment or sub-letting and shall be deemed to have been agreed to between the goods owner or customer and such other owners or sub-contractors." There the lighterers are saying: "We reserve to ourselves the right to sub-let any portion of this contract either to the extent of hiring lighters from other people or hiring the motive power in the shape of a tug." But even when they act in that way and thereby employ not an agent for themselves but actually a sub-contractor, they say: "We take it that you who are making a bargain with us for the transport of goods are willing to be bound so far as the sub-contractor is concerned in the same way as you are bound to us." The important stipulation, so far as this case is concerned, is that, just as in the Bull Wharf clause that I have read there is a perfectly clear exception as regards negligence (I am not forgetting counsel's point whether it is not clear—to my mind it is clear in the exception of negligence), there is also in the London Lighterage Clause a perfectly clear exception of any damage arising from negligence. I draw attention to the fact that in the London Lighterage Clause they go further than I remember to have seen any contracting party go, by saying that they pass on that exception of negligence and purport to contract for their sub-contractors that they (the sub-contractors) shall also have the benefit of this freedom from the results of damage by negligence. Messrs. Wrightson (to continue the business of this case) did not, themselves, supply a tug. Indeed—again to the knowledge of all parties concerned—they did not possess any tugs, and they have been accustomed over a long period of years to employ Messrs. J. P. Knight, Ltd., and Messrs. J. P. Knight, Ltd., supplied the tug *Kite*. Messrs. J. P. Knight, Ltd., have also been accustomed for a long period of years to do their business upon a well-known clause. One need not, I think, read it—it is quite a common clause. It presents no unusual features to my mind, but it presents a feature of importance that there is a clear exemption from any liability arising through loss or damage caused by the negligence or misconduct of their servants.

That, I think, is the whole business arrangement upon which these goods were transported. With all these careful provisions of each party in the chain exempting the others from any possible loss from negligence, the plaintiffs come forward and say: "Well, nevertheless, you are liable. We, the plaintiffs, know nothing about Messrs. Knight's clause, or, if we did know about it, it does not effect us. We did not contract with Messrs. J. P. Knight at all. The situation as between ourselves and Messrs. Knight is that they had control"—I do not think they say the custody—but "had control of our goods, and while the goods were in their control they were damaged."

I must come back to the initial question in the case, which is: Was there negligence, and were the goods damaged by negligence? Counsel for the plaintiffs put in a letter of admission on behalf of the defendants written by the solicitors for the defendants. It is a letter of Jan. 20, 1933, in which the solicitors say: "So as to save expense at the trial of this action, we are quite prepared to admit, on behalf of our clients, that the *Brooklyn* was brought into collision with the bridge and that in consequence the plaintiffs' cargo became damaged." Speaking for myself, I hardly see how the solicitors could have prudently acted otherwise. That strictly limited admission seems to me to be the only businesslike thing to do, in order to save a possible large area of expense. There was, I think, also an interrogatory in the case which was answered by the plaintiffs. The interrogatory was in these terms: "Did you not on or about Feb. 5, 1932, agree with Bull Wharf, Ltd., that Bull Wharf, Ltd., should arrange for the collection of the cargo the subject-matter of the claim herein at Harrison's Wharf and for the conveyance of the same from Harrison's Wharf to Brooks Wharf?" That interrogatory was answered by the plaintiffs as follows: "In the month of January, 1932, I" (James Thomas Hayes, secretary of Ceylon and Eastern Agency, Ltd., the secretaries of the Rajawella Produce Co., Ltd.) "on behalf of the plaintiffs, agreed with Brooks Wharf and Bull Wharf, Ltd., that the said Brooks Wharf and Bull Wharf, Ltd., should collect by themselves or their servants or agents the cargo the subject-matter of the claim herein."

On the letter of admission counsel claimed that there was a primâ facie case of negligence against the defendants; that the facts, to use a familiar phrase, show a case of res ipsa loquitur, and that it was for the defendants to rebut that primâ facie case. It is fair to say that counsel for the defendants did not at all agree as to that, and argued that there was no primâ facie case of negligence; that the defendants had not got the goods in their custody, but only had the control of them temporarily; and that the barge in which they were damaged was not the defendants' barge, and was not actually in charge of one of the defendants' servants. I ruled upon that that there was a primâ facie case of negligence. I think it is now far too well established to be challenged that in the case of a tug and tow in the Thames—in the absence of extraordinary circumstances which, of course, always might rebut a primâ facie case—the tug is in charge of the navigation, and primâ facie must answer for any damage which the barge that is being towed suffers whilst the tug is supplying the motive power in that way. It was at one time a subject of fairly lively controversy whether that was so. I think now, in the present state of civilisation and development, it is thoroughly established that

A the tug is in sole control of the navigation, and if the navigation comes to grief the tug has got to answer for it in the first place.

I think, however, it is material to notice that when one uses the somewhat elusive expression "burden of proof," or "onus of proof," it does not follow that the onus of proof is equally heavy in each case. Two or three authorities to which I have been referred have given me great assistance in that matter. To begin B with, I think one can always derive useful assistance by reminding oneself of the dictum of HILL, J., in *The Waalstroom* (2). In that case HILL, J., stated—as I think with very great precision—the position as regards onus of proof, and his general statement in the matter was adopted subsequently by the Court of Appeal in *The Paludina* (3). Both these cases I should say dealt with the consequences of collision—that is to say the ulterior consequences after the first collision. *The* C *Waalstroom* (2) litigation was concerned with a second collision resulting from the original collision. *The Paludina* (3) was the third or fourth collision resulting from the original collision. What HILL, J., says is this:

> "In my view, in the circumstances of this case, the burden of proving that the consequential damage was a consequence of the negligence is upon the plaintiffs. In my view, it is always upon the plaintiffs: but the facts may D speak for themselves, and in themselves shift the burden upon the defendants, as, for instance, in a case where stranding immediately follows the collision, and so follows that it speaks for itself and is primâ facie a consequence of the collision."

Not to pursue the matter further—because, of course, the facts of the case are E widely different—that I think lays down the position here, and it is important that one should not forget it. The burden of proof is upon the plaintiff to prove negligence. He seeks to prove it by the aid of this letter and the known fact, which it would be idle to deny, that the barge *Brooklyn* was brought into collision with the bridge and that in consequence the cargo was damaged. That puts upon the defendants, in my view, a burden—not, perhaps, in the circumstances anything F like so heavy a burden as if they were themselves in charge of the vessel in which the damaged goods were, because, obviously their knowledge then would, or should, be very much more detailed and particular than in a case where someone else is in charge of the vessel in which the damaged goods actually are.

Taking the matter a step further, I was referred to LORD HALSBURY'S well-known statement in *Wakelin* v. *London and South-Western Rail. Co.* (4). He says this:

> G "I am not certain that it will not be found that the question of onus of proof and of what onus of proof the plaintiff undertook, with which the Court of Appeal has dealt so much at large, is not rather a question of subtlety of language than a question of law."

It puts one, I think, a little upon one's guard against imagining that onus of proof is the simple thing that it sometimes sounds. He goes on to say this: H

> "If the simple proposition with which I started is accurate, it is manifest that the plaintiff, who gives evidence of a state of facts which is equally consistent with the wrong of which she complains having been caused by—in this sense that it could not have occurred without—her husband's own negligence as by the negligence of the defendants, does not prove that it was caused by the defendants' negligence. She may, indeed, establish that the event has I occurred through the joint negligence of both, but if that is the state of the evidence the plaintiff fails, because in pari delicto potior est conditio defendentis. It is true that the onus of proof may shift from time to time as matter of evidence, but still the question must ultimately arise whether the person who is bound to prove the affirmative of the issue [in the present case the negligent act done] has discharged herself of that burden."

That is a passage which I think is useful here and must be applied. The onus of proof may shift from time to time as a matter of evidence, but the question

A ultimately arises: Has the plaintiff proved that the defendant was negligent? The plaintiff says: "Well, you were towing the barge; the barge struck the bridge." That, I think, is sufficient to shift the burden of proof for the moment, and it is for the defendant to give an explanation of how this occurred. When he has given that explanation one has still to see whether negligence has been proved. The explanation may be disbelieved; the explanation may not at all exclude negligence, B but the explanation may leave the matter in doubt as to exactly how the occurrence did happen—may leave an equal possibility that it happened without negligence as with negligence. Of course, it may, on the other hand, be sufficient to exclude any question of negligence at all. Those are all possibilities of what may result from the explanation.

Before I pass from that I might cite one more case, which, I think, is of great C assistance in this question: *Ballard* v. *North British Rail. Co.* (1). The important passage is from the dissenting judgment of LORD DUNEDIN. As counsel for the plaintiffs rightly pointed out, being a dissenting judgment it cannot be said to have the full authority of the House of Lords, but, following upon *Wakelin's Case* (4), and coming as it does from LORD DUNEDIN, no one would for a moment suggest that it was not a dictum to which very great weight should be attached. LORD D DUNEDIN says:

> "I think this is a case where the circumstances warrant the view that the fact of the accident is relevant to infer negligence. But what is the next step? I think that, if the defenders can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself E disappears, and the pursuer is left as he began, namely, that he has to show negligence. I need scarcely add that the suggestion of how the accident may have occurred must be a reasonable suggestion. For example, in *Scott* v. *The London and St. Katherine Docks Co.* (5), a case where a bag of flour fell on a man who was passing along a quay in front of a warehouse, it would not have been sufficient to say that the flour bag might have fallen from a passing F balloon. I think this view of mine is borne out by the expressions used in *Scott's Case* (5). ERLE, C.J., who gave the judgment of the court (and it is to be noticed that though he and MELLOR, J., did not agree with the majority on the facts, the whole matter depending on the interpretation of the judge's notes, the judgment was unanimous on the law) expressed himself thus: 'There must be reasonable evidence of negligence. But where the thing is shown to G be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.' I take notice of the word 'explanation'; it is not in absence of 'proof.'"

If that be a correct statement of the law—and I humbly think it is—what the H defendants have to do here is not to prove that their negligence did not cause this accident. What they have to do is to give an explanation, and a reasonable explanation, which, if it is accepted, is an explanation showing that it happened without their negligence. And they need not even go so far as that because, if they give a reasonable explanation, which is equally consistent with the accident happening without their negligence as with their negligence, they have again shifted I the burden of proof back to the plaintiff to show—as he always has to show from the beginning—that it was the negligence of the defendant that caused the accident.

When one has got that far one has to see what is the evidence in the case, and the evidence in the case comes from one side only—comes entirely from the mouth of Mr. Edward Mason, who was in charge of the tug at the time. I expressly did not say the tug master, because he was an emergency master. It appears that there was a strike of tug men and lightermen at the time. Mr. Mason, who had served a long apprenticeship in matters of navigation generally—he had been on board coasting steamers, a mate on pleasure steamers, during war-time a Channel pilot, and for some time a mate on a tug—was just the kind of man one would A expect people would fall back upon in an emergency to do necessary work of this kind. No one suggests that he was not fully qualified to take on the business of towing four barges between the bridges. The barge *Brooklyn* was in the charge, as far as can be ascertained (the evidence was a little vague here) of somebody whose customary business lay in a less active field, because, so far as I have evidence about it now, the evidence is that the barges at this time were being B manned from people in the office of Messrs. Wrightson, Ltd., the lighterers. It appears to have been a case of "all hands to the pumps." Anybody who had a pair of hands and could possibly do the business acted as a volunteer to work on barges at this time. I think that is not at all irrelevant, because, to put it shortly, Mr. Mason's explanation was that this accident happened because the breast rope from the *Brooklyn* to the barge immediately alongside of her was either improperly, C or carelessly, or negligently, or whatever you like to say, but at least not properly made fast. The flotilla consisted of the tug *Kite* and four barges, in two ranks abreast. The *Brooklyn* was in the starboard sternmost rank, and was breasted, or should have been breasted, to the barge on her port side. The *Kite*, after passing through Tower Bridge with her tow, was following two other tugs and tows ahead of her. The leading tug and tow could only be identified as a small yellow- D funnelled tug which was proceeding very slowly. The next in the procession was an A.P.C.M. tug, with six barges in tow, proceeding reasonably fast—that is to say, at the same pace at which the *Kite*, with her flotilla, was proceeding. There was a flood tide of about three knots, and both the A.P.C.M. tug and the *Kite* were making a not improper speed in the circumstances, as it seems to me, of six knots through the water, making nine knots in all. As those flotillas respectively E arrived at London Bridge they passed through, and then, at a distance of about a cable-and-a-half above that, they would have to negotiate Cannon Street railway bridge. As they approached Cannon Street railway bridge making to work for what is known as the central arch, the yellow-funnelled tug with her tow was seen to be, as I gather, in some difficulty with craft ahead. The *Kite* was working up a little to the north of the A.P.C.M. tug, and making to negotiate in the first instance the F middle arch. The A.P.C.M. tug, seeing the trouble ahead, altered her intention and her course, and made for the northern working arch. The *Kite* found that she was constrained to do the same thing. It was a little obscure first why she was constrained to do the same thing. All I think Mr. Mason meant was that he thought he would have collided with the A.P.C.M. tug, but I think the real reason he meant to convey was that, if he had persisted in going for the centre arch, he G would either have got his craft athwart the tide, if he had eased up, or have collided with the yellow-funnelled tug ahead, and he had no real difficulty in avoiding collision—he would in no circumstances have had any difficulty in avoiding collision with the A.P.C.M. tug. However that may be, he made an alteration. It is material, again, I think to notice that he, with four barges, made a lesser alteration than the A.P.C.M. tug with six barges in tow, so that there would be less reason H for his getting a swing and getting his craft out of control. He was about 150 ft. behind the A.P.C.M. tug, and I am not prepared to say that there was anything negligent in that, so that I can see no negligence in the way he was negotiating this part of the river, and in the manœuvre which he took immediately before the accident occurred.

Just what occurred at the moment of the accident was at one time a little in I doubt. Counsel for the defendants put a series of questions, none in themselves, I think, objectionable, and presented the picture which I think the witness wanted to present, with the barges flaired out. That is to say, the *Brooklyn* went out to starboard, and her companion in that rank went out to port; that after they had flaired out the *Brooklyn* struck the bridge and the damage, of course, resulted. That may be a correct picture, but I do not think that that is all the picture, because when Mr. Mason was cross-examined about this and the facts were more exactly ascertained, the picture he really gives is this: "I looked round as I was

A coming for the arch. I found my craft in line for the arch—everything in order, as it should be, to go through the arch. I then heard the knock of the barge against the bridge. I then heard shouting and I looked round and saw that the barges were flaired out." That is not quite the picture, as I say, that counsel gently led the witness to give in examination in chief. But though there was nothing necessarily in conflict between the two pictures, he did see the barges flaired B out, he did not see the collision, and the only possible inaccuracy in the earlier version is that it is not true that he saw the barges flaired out before he saw the collision. I have to ask myself whether, in these circumstances, the defendants have offered me an explanation of what happened equally consistent with there being no negligence on their part. Is there a stronger case—a far higher probability (I think one could not put it on a mere balance of probabilities), C but really a substantial, a higher probability that this accident was caused by some negligence on the part of the tug, or is it equally possible that there was negligence on the part of the barge? I have examined with great care the various manœuvres, and I think I have shown by this rather over-detailed examination each step of the journey, and I cannot say that I see any positive negligence upon which I could fasten to say that the defendants were negligent in that respect.

D I do not think there is any negligence in proceeding at nine knots with a clear eye ahead. I do not see any negligence in following a faster tug through the northern arch. I do not see that I can infer from these facts that the train in tow of the *Kite* did get a swing, and that it must be on account of the swing that the barge struck the northern abutment of the northern arch. It seems to me equally consistent at least that this amateur on board the *Brooklyn* did fail to make his E breast rope properly fast. No doubt this alteration of the tug's helm—a port helm alteration—followed, as he told me, by a hard-a-starboard helm, might have imposed upon that breast rope a greater strain than it had endured up to that moment in the towage. But unless it was a wholly negligent manœuvre, the breast rope ought to have been so made fast or strong enough to meet that strain. Further than that, I am left in complete ignorance. Counsel for the plaintiffs pointed out, F I think very fairly, that he could not give me any evidence in the matter. He said he had applied to the solicitors acting for the lighterer in the circumstances to get a statement from the man in charge of the barge, but the solicitors refused him that indulgence. That seems to me to be the plaintiffs' misfortune in this matter; it may not be their fault, but they do not come to offer me any counter explanation. I am not even told how the rope was made fast. Mr. Mason told G me that, so far as he understood that, of course it was made fast in the ordinary way round a bollard or dolly on each barge. I could infer that for myself, there is no other way that I know of in which you can make a breast rope fast. But whether it was made fast in the proper way to meet an ordinary strain no one can tell me, and I am not even told whether this rope just rendered round the bollard or whether it broke. It might have given me a great deal of information if I had H known that, but Mr. Mason, it is fair to say, gave his evidence very fairly and gave me no reason to distrust him. He was most frank on the subject, when he was tested about it, as to hearing the noise first before he actually saw the flair-out, and he was a man of quite sufficient intelligence to have appreciated that it would have been much better for him to have seen the flair-out before he heard the noise of the collision. He had not seen the rope made fast. It was not any business of I his how it was made fast, and he could not tell me whether it was broken or rendered, so that I am left in complete ignorance as to how this accident happened. I have only the evidence of one credible witness from the defendants, and he tells me that his explanation of the matter is that the rope was not properly made fast. In the circumstances, guided as I am by these authorities, I think there is a state of affairs there at least equally consistent with no negligence, and I am driven to find—I do not say that I do it unwillingly, for I think it is a fair and proper finding in the circumstances—and I do find that the case of negligence is not proved against the defendants.

There, of course, I might, in the circumstances, stop; but I have had a very careful and excellent argument from both sides on other questions of law, and I think, in fairness to them and by way of precaution in case I am wrong about the conclusions I have arrived at on this first point, that I ought to notice their several contentions, and give my view about them.

If I may attempt to summarise the clear argument about it of counsel for the plaintiffs, I think it would be fair to say that it amounts to this: "None of these exemption clauses have anything to do with me. I, the owner of the goods, am suing in tort only the man who had control of my goods. The contracts are res inter alios acta. I am not suing under contract, and there is no relationship other than that of temporary control between the defendants and myself." He seeks to establish that in a variety of ways. First he criticises the Bull Wharf clause in very great detail. He says, as regards para. 2, that it deals with limitation of liability, and purports to leave the limitation of liability position as it is in the statute and in the London Lighterage Clause, and he says, in effect, there are certain limitations of quantum imposed by statute and this clause, that those limitations stand, and the plaintiffs do not seek to alter them. In cases where these limitations do not exist, he says that the Bull Wharf clause seeks to obtain absolute exemption from negligence, and he is assisted in that argument by the way in which these two clauses are framed. The first is, to my mind, in an odd declaratory form, and declares the existence of the Merchant Shipping Act and the London Lighterage Clause, a declaration which certainly seems to me to be rather supererogatory. I should have imagined that they were known to most people who have dealings with this firm. Having declared that, and declared a certain position under it, cl. 3 goes on to say, "save in any such case as aforesaid." It certainly is a fair point to put in argument, at any rate, that "save in any such case as aforesaid" means that anything that has been done by the foregoing paragraphs is not to be affected by what comes in the paragraph heralded in by the words "in any such case as aforesaid," and until one looks at cl. 2 very carefully that argument certainly has, to my mind, great force. But when one looks at that paragraph carefully and considers it with para. 3, and the rest of the clause and with the circumstances in mind, I think it assumes a somewhat different complexion. Paragraph 3 says:

> "The Merchant Shipping Acts, 1894 to 1921, and the London Lighterage Clause, respectively, limit the liability of a lighterman for loss or damage to goods carried by lighter, barge, or like vessel. . . . The company in respect of such goods shall in no case be liable to a greater extent than may be in fact recoverable from the owner of such vessel."

When one looks at the London Lighterage Clause—which is the important matter from this point of view—one sees that there is in it a limitation as to quantum in respect of pilferage or theft, and it is to that I have no doubt that the paragraph in the Bull Wharf clause refers. What it means—it certainly is a little obscurely worded—is, to my mind, quite incontrovertible. It means that where there is loss or damage limited to £20 per package and not exceeding £50 per ton recoverable from the lighterman, that amount shall equally be recoverable by the owners of the goods from the Bull Wharf Co., Ltd. Why they think it necessary to put that in and to state that they will be so generous as to restore what, in no circumstances they could honestly keep, I do not know. It seems to me a form of meagre generosity at the best; possibly it was not put in for that purpose, but it was thought to clarify the position with regard to the London Lighterage Clause. To my mind, it does a good deal to obscure it, but that is a question for those who framed the clause and those who work under it to consider in the future. Counsel for the plaintiffs says that the whole of para. 3 refers to no other conditions than carriage. It has got a number of provisions, such, for example, as

> "unfitness or unseaworthiness of any barge or tug on loading or commencement of the voyage or otherwise . . . or for deviation of craft";

and I find it impossible to see how any of those words can be given any meaning if they do not apply to the voyage. How can you deviate with a craft when the craft is still at the wharf is beyond my imagination. I am constrained, therefore, to say that although I see the force of counsel's argument concerning these two paragraphs—though I am not at all certain that para. 2 is in the right position in this clause to express clearly the meaning which they want to give it—I do not think I am doing any violence to the general language of the clause in reading it in the way that para. 3 gives an absolute exemption in respect of any negligence during or before the voyage, and para. 2 gives the owner of the goods the same right as regards pilferage from a barge as is reserved to the owner of the goods under the London Lighterage Clause which gives him the advantage of para. 2 of the Bull Wharf clause, and gives him the same advantage as he would have had if he himself had contracted under the London Lighterage Clause in respect of pilferage. I think that is all that para. 2 is aimed at, and I think that is a fair and proper construction of this not very elegantly worded document.

I now come to para. 4 of the Bull Wharf clause, to which I have already averted in reading it. Counsel for the plaintiffs says as to that that this Bull Wharf clause may contemplate that tugs or barges are supplied to the company, and it may properly provide for what is to be done where these tugs and barges are supplied to the company, but in point of fact the tug and the barge in this case were not supplied to the company. They were supplied to the independent contractors, and his argument is that you must take the words

> "Persons supplying tugs or barges to the company to enable it to fulfil its contracts shall incur no greater liability"

strictly as they are written. Again I do not think that that is a negligible point. I think there is force in it, and if one were dealing with people who by any stretch of imagination could be called strangers to the business—people unfamiliar with the business who would have to inquire (if they thought it their business to inquire) whether the Bull Wharf company did their business with their own tugs and barges or with other people's—I think I should be constrained to read it, as counsel so forcibly says, in its clear and grammatical sense; but when one comes to remember that these people have all done business with one another for twenty or fifty years; that the Rajawella company, contracting under this clause, and the Bull Wharf company knew perfectly well that the tug would be supplied by somebody like Knights, if not actually Knights, and that the barge would be supplied by somebody like Wrightson, if not actually by Wrightson—in other words, knew perfectly well that the Bull Wharf company must go outside their own resources to carry out the contract which they had undertaken—then I think the matter assumes a different complexion. I think it is shutting one's eyes to the known facts to construe this clause in an absolutely strict and grammatical way by saying that it is confined to cases in which tugs and barges were supplied by the company and not by an independent contractor. It is contrary to the known facts—known to everybody in the whole chain—and no one would say anybody really meant that by the words they have actually used.

But in case the case goes further there were other arguments to which I am afraid I have not done justice. In his very candid argument counsel for the plaintiffs put a case before me which has made a good deal of history in commercial law—*Elder, Dempster & Co.* v. *Paterson, Zochonis & Co.* (6). At one time I hoped that I was going to get a great deal of assistance from that case and, in particular, from the opinions given therein, but I suffered disappointment as I went through it and I found that I could get no assistance from it at all except along a quite general line. It was argued twice in the House of Lords, and in the end the House of Lords decided that provisions in a bill of lading could not be altogether ignored even though they were made as between goods owner and charterer, and not made strictly between goods owner and shipowner. That was, as it were, a beginning of the kind of case that we have to-day, because there the vessel had been chartered for the Elder, Dempster Line, and there were no actual contractual relations between the goods owner and the shipowner. The goods owner contracted with the charterer, who was the only person he knew, and then sued the shipowner in tort. So that is the same class of case, but not, of course, so complicated as the case I have to deal with now. Lord Cave says:

> "It was stipulated in the bills of lading that 'the shipowners' should not be liable for any damage arising from other goods by stowage or contact with the goods shipped under the bills of lading; and it appears to me that this was intended to be a stipulation on behalf of all the persons interested in the ship, that is to say, charterers and owners alike. It may be that the owners were not directly parties to the contract; but they took possession of the goods (as Scrutton, L.J., says) on behalf of and as the agents of the charterers, and so can claim the same protection as their principals."

That is a clear line of agency, and Lord Cave says there are the shipowners and the charterers. The shipowners' servants are still in possession, and, therefore, one can say that the owners took possession as agents for the charterers and are entitled to the same protection as their principals. Lord Finlay, dealing with the case, took a slightly different view of it. He says this:

> "This contention seems to me to overlook the fact that the act complained of was done in the course of the stowage under the bill of lading, and that the bill of lading provided that the owners are not to be liable for bad stowage. If the act complained of had been an independent tort unconnected with the performance of the contract evidenced by the bill of lading the case would have been different. But when the act is done in the course of rendering the very services provided for in the bill of lading, the limitation on liability therein contained must attach, whatever the form of the action and whether owner or charterer be sued. It would be absurd that the owner of the goods could get rid of the protective clauses of the bill of lading, in respect of all stowage, by suing the owner of the ship in tort."

Again one must remind oneself that that is not this case, but it is pretty clear that Lord Finlay took the view that the justice of the case demanded that a man who had taken pains to contract himself out of a certain liability ought not to be told afterwards, "You may, as a matter of contract succeed, but you see you are still liable in tort if you have not, as it were, shaken hands with and made the personal acquaintance of the actual individual whose goods you are shipping." Counsel for the defendants, on the same lines, urged upon me that it would be impossible to carry on the business of the Port of London if it were necessary that every man who transported goods in a barge should make the personal acquaintance of everybody who had goods in that barge, and made a separate contract with him. I hope I am always duly impressed with the necessity of the law being in consonance with the needs of commerce, but I do think in this instance that provides the solution, because counsel for the plaintiffs suggested the solution of this difficulty when he pointed out that business could perfectly well be carried on with perfect immunity to the barge owner by putting in the same clause of indemnity as that which the tug owner has in this case.

If the plaintiffs were to succeed it is not the nominal defendants who would suffer; it would be, in fact, the barge owners, because the tug owners would immediately recover by way of indemnity. So that, so far as interference with the business of the Port of London is concerned, it would mean that a clause which is already overburdened with words would be further burdened and an indemnity added all along the line.

I think, therefore, the solution of the case, from the legal point of view, is not to be found in the need for carrying on the work of the port, but one is not, therefore, obliged to be blind to the manifest absurdity to which Lord Finlay's observations point. Lord Sumner dealt with the matter in the *Elder, Dempster Case* (6) in a somewhat different way and from a different angle. He notices the cases of agency which were adopted by LORD CAVE in his opinion, but for his part LORD SUMNER preferred to notice that this bailment of the goods could not be, as he called it, a bald bailment in view of the fact of the contract that had been actually entered into between the goods owner and the charterer. He says:

> "It may be, that in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading. It may be that the vessel being placed in the Elder, Dempster & Co.'s line, the captain signs the bills of lading and takes possession of the cargo only as agent for the charterers, though the time charter recognises the ship's possessory lien for hire. The former I regard as the preferable view, but, be this as it may, I cannot find here any such bald bailment with unrestricted liability, or such tortious handling entirely independent of contract, as would be necessary to support the contention."

For that case, therefore, one gets two possible lines—one the line of agency, the other the line of bailment. One also gets from LORD FINLAY a valuable pronouncement as to the way in which a judge may fairly approach this class of contention put forward by the plaintiffs to-day. I hoped at one time that the ingenuity of the defendants was going to show me that I could go peacefully forward upon the line of agency, but counsel for the defendants, after having made a violent effort and got as far as Wrightsons on the line of agency, was unable to go further, and could not say that there was a line of agency throughout in the full sense. That is to say, he could not claim that Wrightsons in making their contract with Knights were in the full sense of the word acting as agents. Quite clearly they were not. They were making an independent contract at an independent rate. I am not so sure whether one does not reach the true solution in this case through what I may call a limited authority of agency. I will deal with that later.

As regards bailment, it was of a very light character, for it was admitted that the tug had not got the custody of the goods; she had nothing but the control; and counsel again specifically disclaimed any desire to travel along the road of bailment. He said he did not think in the circumstances that he could claim that there was a bailment. The two roads opened by the *Elder, Dempster Case* (6) appeared to be clearly barred in this case.

Counsel for the defendants, however, put it in this way: "I do claim that so far as Bull Wharf and the lighters are concerned, Bull Wharf were undoubtedly acting as agents for the owners in contracting with Wrightsons." Indeed, in view of the fact that Wrightsons will not contract on any other terms, it does not seem to me that business could be done, or could be taken to be done, under any other terms, because Wrightsons, by the London Lighterage Clause, insist that there shall be an express condition of the contract that it is made either with the owner or with the authorised agent of the owner. Counsel, therefore, seemed to me to be on strong ground thus far. As regards the further step, his original way of putting the matter was that the plaintiffs through their agents, the Bull Wharf Co., were affected with knowledge of Knights' contract, and he said: "I bring in Knights' contract that way. I say Knights have contracted with Wrightsons, and through Bull Wharf the plaintiffs are affected with knowledge of that contract." For my own part, I prefer another line of reasoning which counsel also adopted, and it is this. One gets as far as Wrightsons with Bull Wharf Co. as authorised agents in the terms of the London Lighterage Clause to contract for the owner of the goods. Wrightsons, under the London Lighterage Clause, reserve a special right to sub-let upon terms of the London Lighterage Clause, and that seems to me to imply that if they happen to vary the clause for other purposes they have at least this limited authorisation that they shall not contract on any worse terms for the owner than the terms of the London Lighterage Clause, and so far as this case is concerned it is not suggested that they did contract. They are entitled to contract as it seems to me upon terms that will be as good as the London Lighterage Clause for the sub-contractor and no worse for the owner, and that is all, in this case, they have done.

It seems to me, therefore, that if you treat this case throughout, not as a case in which each party has acted as agent for the other, in the full sense—because quite clearly they have not; they are really in many senses completely independent contractors—but if you bear in mind what they each knew about the other's business, and the language that they used, you can find in it a limited authorisation from first to last—that is from the plaintiffs to the defendants—that in each step of the way the independent contractor may reserve—as he does under the Bull Wharf clause—that the people who follow after shall have the same exemption from negligence as he, the first contractor, has got. You get it in this way. Paragraph 3 of the Bull Wharf clause gives a perfect exemption from negligence; para. 4 a reservation that people following after who supply tugs and barges shall have no greater liability. The London Lighterage Clause gives a perfectly good exemption from liability from negligence and a reservation in regard to sub-contractors, and then there is Messrs. Knights' clause where they reserve the same liability for negligence. Of course, if one were dealing with a case in which the final contractors, the defendants, were claiming something more than ever had been set out or claimed originally in the Bull Wharf agreement, there might be a difficulty, but I do not see any difficulty in inferring a limited authority in view of the fact that everybody knew precisely what the other was doing and that it was probably a great surprise to everybody concerned that this somewhat ingenious point of tort was relied upon to excuse the defendants.

I do not pretend in this review of the case that I have done full justice to all the arguments on both sides, but I have dealt with what I think are the principal points as I see them, and the result of my judgment must be that the plaintiffs fail and there must be judgment for the defendants with the usual consequence as to costs.

Solicitors: *Waltons & Co.*; *J. A. & H. E. Farnfield.*

[*Reported by* GEOFFREY HUTCHINSON, ESQ., *Barrister-at-Law.*]

BALDEN *v.* SHORTER AND OTHERS

[CHANCERY DIVISION (Maugham, J.), January 18, 1933]

[Reported [1933] 1 Ch. 247; 102 L.J.Ch. 191; 148 L.T. 471; 77 Sol. Jo. 138]

Slander—Action on case—Malice—Words spoken carelessly, but without any indirect motive or intention to injure plaintiff.

A servant of the defendants falsely said of the plaintiff, speaking carelessly but without any indirect motive or intention to injure him, that he was employed by the defendants, whereas in fact he was employed by another firm.

Held: in these circumstances there was no evidence of malice, and an action by the plaintiff for an injunction and damages must fail.

Notes. Considered: *Serville* v. *Constance*, [1954] 1 All E.R. 662. Referred to: *Re Lewis's Declaration of Trust, Lewis* v. *Lewis, Lewis* v. *Ryder*, [1953] 1 All E.R. 1005.

As to actions on the case for defamation, see 20 HALSBURY'S LAWS (2nd Edn.) 528 et seq., and for cases see 32 DIGEST 203 et seq.

Cases referred to:

(1) *Ratcliffe* v. *Evans*, [1892] 2 Q.B. 524; 61 L.J.Q.B. 535; 66 L.T. 794; 56 J.P. 837; 40 W.R. 578; 8 T.L.R. 597; 36 Sol. Jo. 539, C.A.; 17 Digest (Repl.) 77, *17*.

(2) *Riding* v. *Smith* (1876), 1 Ex.D. 91; 45 L.J.Q.B. 281; 34 L.T. 500; 24 W.R. 487; 32 Digest 171, *2094*.

(3) *British Railway Traffic and Electric Co.* v. *C.R.C. Co. and London County Council*, [1922] 2 K.B. 260; 91 L.J.K.B. 824; 126 L.T. 602; 86 J.P. 70; 38 T.L.R. 190; 20 L.G.R. 102; 32 Digest 184, *2269*.

(4) *Day* v. *Brownrigg* (1878), 10 Ch.D. 294; 48 L.J.Ch. 173; 39 L.T. 553; 27 W.R. 217, C.A.; 1 Digest 30, *237*.

(5) *Royal Baking Powder Co.* v. *Wright, Crossley & Co.* (1900), 18 R.P.C. 95, H.L.; 32 Digest 205, *2551*.

(6) *Greers, Ltd.* v. *Pearman and Corder, Ltd.* (1922), 39 R.P.C. 406, C.A.; 32 Digest 205, *2552*.

Action for injunction and damages.

The plaintiff was a traveller in china, glass, and restaurant furniture. He had been employed by L. Hart Combe & Co., Ltd., from 1927 until the company went into liquidation in November, 1931, and he continued in the employment of the company's liquidator for a short period after this date. The plaintiff had acquired a considerable connection as a traveller and earned a good commission. In January, 1932, he went to work for another firm and continued in this new employment. In February, 1932, the defendants purchased from the liquidator of L. Hart Combe & Co., Ltd., the goodwill of the business and also the right to use the company's name without the word "limited," and the business was forthwith transferred to the defendants' premises. The defendants at the same time took into their employment some of the company's servants, including a Mr. Bensted. They proceeded to circularise the old customers of the company. The circular they sent out suggested that the business of the company was being reorganised, rather than that it had been transferred to the defendants, as purchasers. On Feb. 29, 1932, Mrs. Egerton, an old customer of the plaintiff, who had received this circular, called at the defendants' place of business and was served by Mr. Bensted. It was the first day of Mr. Bensted's employment with the defendants. In the course of conversation he told Mrs. Egerton that the plaintiff was also in the employment of the defendants and would get his commission on her order in the usual way. Mr. Bensted made his statement honestly and believing it to be true. Mrs. Egerton had dealt with the plaintiff for some years and placed great reliance on his advice and wished him to benefit from her order. The plaintiff, having heard of this statement of Mr. Bensted, instructed his solicitors to write to the defendants. They wrote on May 15, 1932, and drew the defendants' attention to the fact that false statements had been made to the effect that the plaintiff was in their employment as a traveller and they asked for an undertaking that the defendants would refrain from making such false statements in the future. The defendants' solicitors replied on the next day:

> "Our clients have instructed us to inform you that they have no knowledge of your client [the plaintiff] nor have they ever heard of this gentleman. In these circumstances, they decline to give any undertaking such as you suggest, there being no foundation whatever for your client's statements. Should your client be advised to commence proceedings we are instructed to inform you that we will accept service on behalf of our clients."

The defendants appeared to have made no inquiries as to the truth of the plaintiff's complaint. In these circumstances the plaintiff started these proceedings for an injunction to restrain the defendants, their servants, employees, or agents from representing that he was employed by or otherwise connected with the business then being carried on by them. The defendants denied that Mr. Bensted made the statement complained of with their authority or as their agent or to induce the giving of the order.

C. E. Harman, for the plaintiff, alleged that the statement complained of had been made either to benefit Mr. Bensted or his employers, and had, therefore, been made maliciously so that an action for injurious falsehood would lie. [He referred to Salmond on Torts (7th Edn., pp. 580 et seq.); *Ratcliffe* v. *Evans* (1), *Riding* v. *Smith* (2), and *British Railway Traffic and Electric Co.* v. *The C.R.C. Co. and the London County Council* (3).

Humphrey H. King, for the defendants, referred to *Day* v. *Brownrigg* (4).

MAUGHAM, J., stated, as set out above, the facts, and continued: If I could properly conclude that the story told in the witness-box by Mr. Bensted was untrue and that he knew that the plaintiff was not employed by the defendants, I should have little difficulty in determining the action in the plaintiff's favour because, if Mr. Bensted said what he did say knowing it to be untrue, I should draw the inference that he did it from a dishonest motive and maliciously. But I cannot come to that conclusion. I think that he made a careless mistake, and that it was likely that he had originally heard that the plaintiff was contemplating taking new employment, but had not heard that he had definitely obtained it, and had concluded that, having been one of the company's most important travellers, he had been employed by the defendants. I am not prepared to conclude that Mr. Bensted was telling a lie when he said in the witness-box that he had made a mistake in thinking that the plaintiff was employed by the defendants. He did make the statements alleged, but made them, at the worst, carelessly; and the only question to be determined is whether that amounts to malice.

The meaning of "malice" in connection with injurious falsehood is dealt with in Salmond on Torts (7th Edn., pp. 582–583) in the following passage, which I accept as correct:

> "What is meant by malice in this connection? Lord Davey, in the passage already cited [from *Royal Baking Powder Co.* v. *Wright, Crossley & Co.* (5) (18 R.P.C. at p. 99)] defines it as meaning the absence of just cause or excuse. It is to be observed, however, that this is not one of the recognised meanings of the term malice in other connections. An act done without just cause or excuse is wrongful, but not necessarily malicious; for example, a trespass by mistake on another man's land or the conversion of his chattels under an erroneous claim of right. Notwithstanding Lord Davey's dictum, it is now apparently settled that malice in the law of slander of title and other forms of injurious falsehood means some dishonest or otherwise improper motive. A bona fide assertion of title, however mistaken, if made for the protection of one's own interest or for some other proper purpose, is not malicious."

In *Greers, Ltd.* v. *Pearman and Corder, Ltd.* (6) (39 R.P.C. at p. 417) BANKES, L.J., said that "maliciously" for the purpose which the court was considering meant "with some indirect object," and SCRUTTON, L.J., remarked that the only question in the case was whether there was evidence on which the jury could find that the statements were made maliciously "in the sense of being made with some indirect or dishonest motive."

I think that in the present case the statements were, at the worst, careless statements made without any indirect motive and without any intention of injuring the plaintiff, and I find that Mr. Bensted believed them to be true. The allegation of malice must fail, and on that finding of fact the action must be dismissed.

Bearing in mind, however, first, that the original circular of 1932 was open to criticism in that it suggested that the old business was being reorganised; secondly, that Mr. Bensted did make the statement alleged without due care, and that the plaintiff had a right to object to it; and thirdly, that the answer of the defendants' solicitors to his letter of May 15, 1932, was not an answer which solicitors desiring to avoid litigation should make, and in view also of the fact that in this letter the defendants declined to give an undertaking, untruly stating that there was no foundation for the plaintiff's statement, the action must be dismissed, but without costs.

Solicitors: *Sharpe, Pritchard & Co.*; *Woodroffes.*

[*Reported by* MISS B. A. BICKNELL, *Barrister-at-Law.*]

JONES v. BIRCH BROTHERS, LTD., AND ANOTHER, LICENCES AND GENERAL INSURANCE CO., LTD., THIRD PARTIES

[COURT OF APPEAL (Scrutton, Greer and Romer, L.JJ.), July 10, 1933]

[Reported [1933] 2 K.B. 597; 102 L.J.K.B. 746; 149 L.T. 507; 49 T.L.R. 586]

Insurance—Motor insurance—Policy—Arbitration clause—Scott v. Avery condition—Validity—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 38.

The defendant B., the owner of a motor car, was insured with an insurance company against third-party risks under a policy which contained the clause: "In the event of any difference arising between the company and the insured under this policy the same shall be referred to arbitration, and the obtaining of an award shall be a condition precedent to the liability of the company under this policy."

A collision having occurred between B.'s motor car and a motor omnibus belonging to the defendants, J., one of the passengers on the omnibus, brought an action against B. and the defendants claiming damages for personal injuries. B. sought to make the insurance company third parties in the action, but, on an application by the company, SWIFT, J., stayed the third-party proceedings.

Held: (i) the arbitration clause was not rendered nugatory by the provisions of s. 38 of the Road Traffic Act, 1930;

(ii) in any case, the first part of the clause was not affected by the section and the *Scott* v. *Avery* (1) condition in the clause was severable from it, and, therefore, the parties were bound to go to arbitration and the third-party proceedings were rightly stayed.

Notes. Considered: *Harman* v. *Crilly*, [1943] 1 All E.R. 140. A

As to arbitration clauses in insurance policies, see 18 HALSBURY'S LAWS (2nd Edn.) 463–465, and for cases see 2 DIGEST 332 et seq. For Road Traffic Act, 1930, s. 38, see 24 HALSBURY'S STATUTES (2nd Edn.) 607.

Cases referred to:

(1) *Scott* v. *Avery* (1856), 5 H.L.Cas. 811; 25 L.J.Ex. 308; 28 L.T.O.S. 207; 2 Jur.N.S. 815; 4 W.R. 746; 10 E.R. 1121, H.L.; 2 Digest 350, *263*. B

(2) *Freshwater* v. *Western Australia Insurance Co., Ltd.*, [1933] 1 K.B. 515; 102 L.J.K.B. 75; 148 L.T. 275; 49 T.L.R. 131; 76 Sol. Jo. 888, C.A.; Digest Supp.

(3) *Nelson* v. *Empress Assurance Corpn., Ltd., Faber, Third Party*, [1905] 2 K.B. 281; 74 L.J.K.B. 699; 93 L.T. 62; 53 W.R. 648; 21 T.L.R. 555; 10 Asp.M.L.C. 68; 10 Com. Cas. 237, C.A.; 29 Digest 48, *105*. C

(4) *Clover Clayton & Co.* v. *Hessler & Co.*, [1925] 1 K.B. 1; 94 L.J.K.B. 42; 132 L.T. 33; 69 Sol. Jo. 776, C.A.; 29 Digest 298, *2445*.

(5) *Gowar* v. *Hales*, [1928] 1 K.B. 191; 96 L.J.K.B. 1088; 137 L.T. 580, C.A.; 36 Digest (Repl.) 110, *549*.

(6) *Askew* v. *Grimmer* (1927), 43 T.L.R. 354; 36 Digest (Repl.) 205, *1076*.

(7) *Wright* v. *Hearson*, [1916] W.N. 216; 141 L.T.Jo. 73, D.C.; 22 Digest (Repl.) 458, *5021*. D

(8) *Golding* v. *London and Edinburgh Insurance Co.* (1932), 43 Ll.L. 487.

(9) *Jureidini* v. *National British and Irish Millers Insurance Co., Ltd.*, [1915] A.C. 499; 84 L.J.K.B. 640; 112 L.T. 531; 31 T.L.R. 132; 59 Sol. Jo. 205, H.L.; 2 Digest 333, *146*.

E

Appeal by the second defendant, one Fred Barnes, from an order of SWIFT, J., in chambers on a summons for directions.

The action arose out of a collision which took place between a Rolls-Royce car, owned by Barnes, and a motor omnibus, owned by the first defendants, Birch Bros., Ltd., in which a number of passengers in the motor omnibus were injured. On May 3, 1933, SWIFT, J., made an order that the case should be tried before himself without a jury, the costs of the order to be paid by the defendant Barnes. On May 11 Barnes applied ex parte for leave to issue a third-party notice against his insurers, the Licences and General Insurance Co. The policy contained as a condition cl. 6: F

> "In the event of any difference arising between the company and the insured under this policy the same shall be referred to arbitration, and the obtaining of an award shall be a condition precedent to the liability of the company under this policy." G

The insurance company applied to the judge to stay the third-party proceedings under the arbitration clause, and the judge did so, both because of the arbitration clause and also because he was of opinion that he was bound by the decision of the Court of Appeal in *Freshwater* v. *Western Australia Insurance Co., Ltd.* (2). H Barnes appealed upon the ground that the arbitration clause was of no effect by reason of s. 38 of the Road Traffic Act, 1930, which provides as follows:

> "Any condition in a policy . . . providing that no liability shall arise under the policy . . . or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the I event giving rise to a claim under the policy . . . shall be of no effect in connection with such claims as are mentioned in s. 36 (1) (b). Provided that nothing in this section shall be taken to render void any provision in a policy . . . requiring the person insured . . . to repay to the insurer . . . any sums which the latter may have become liable to pay under the policy . . . and which have been applied to the satisfaction of the claims of third parties."

The appeal was first heard on June 1 and 2 before SCRUTTON and SLESSER, L.JJ., but as there was a difference of opinion the case was ordered to be re-argued.

Edward Terrell for the defendant, Barnes.
Valentine Holmes for the plaintiff.
T. Eastham, K.C., and *Philip Vos* for the insurance company.
Humfrey Edmunds for the second defendants.

SCRUTTON, L.J., read the following judgment.—Owing to the fact that we thought it necessary to have this case re-argued, as we should have been bound to do if the parties had applied to us, because there was some difference of opinion in the court, I have had rather more opportunity than my brothers have had of considering this case, and I have had sufficient time to put my provisional views into writing. I have listened very carefully to the second argument of counsel for Mr. Barnes, to see whether it would in any way alter my views, and, as it has not, I am enabled—whether it is an advantage or not—to give a more considered view of the matter, in writing, than my brothers are.

This appeal is intended to raise questions, which, when raised, will be of general importance and may ultimately have to be answered by a higher tribunal. There was a collision between a motor car, owned by Barnes, and a motor omnibus, owned by Birch Bros., Ltd., and a number of passengers in the omnibus were injured. One action by a passenger against the owners of both vehicles was brought in the county court, resulted in a judgment against Barnes and is now under appeal. The present action by another passenger, also against both owners, is in the new Procedure List, a writ having been issued on March 10, 1933, and a statement of claim delivered on March 29. On May 3 SWIFT, J., on the summons for directions made an order that the case should be tried before himself without a jury on June 13. For some reason not stated the costs of this order were ordered to be paid by the defendant Barnes. On May 11 counsel for Barnes applied ex parte for leave to issue a third-party notice against his insurers, the Licences and General Insurance Co. The policy contained as a condition, cl. 6:

> "In the event of any difference arising between the company and the insured under this policy the same shall be referred to arbitration, and the obtaining of an award shall be a condition precedent to the liability of the company under this policy."

The insurance company thereupon applied to the judge to stay the third-party proceedings under the arbitration clause; and the judge did so, both because of the arbitration clause, and, we are told, because he was of opinion that he was bound by the decision of this court in *Freshwater* v. *Western Australia Insurance Co., Ltd.* (2).

The defendant, Barnes, appeals to this court and asks that the order of SWIFT, J., should be reversed. The order "to stay" is probably formally right, since, if the party who asks for a stay does not proceed with diligence, the court may remove the stay and let the proceedings go on. But in the similar case of an ex parte order for service out of the jurisdiction, the court, on hearing the proposed defendant, does not "stay" the service of the writ, but rescinds the leave to serve it. The defendant here argues that the third-party procedure should not be stayed, as he alleges that the arbitration clause and the *Scott* v. *Avery* (1) addition to it, that the obtaining of an award shall be a condition precedent to the liability of the company under the policy, are of no effect under s. 38 of the Road Traffic Act, 1930.

The history of the procedure by defendants against their insurers stands thus up to 1928, when the third-party procedure rules were amended. In *Nelson* v. *Empress Assurance Corpn., Ltd., Faber, Third Party* (3), where an original insurer failed to bring in a re-insurer under the third-party procedure, MATHEW, L.J., affirming BIGHAM, J., said ([1905] 2 K.B. at p. 285):

> "The rule under which the application to bring in the third party is made has been in existence for many years, and policies of re-insurance have been in existence for a still longer period, but this appears to be the first occasion on which it has been sought to apply the rule in the case of such a policy"

In *Clover Clayton & Co.* v. *Hessler & Co.* (4) I said, stating my knowledge of the general practice in insurances ([1925] 1 K.B. at p. 8):

> "The third-party procedure is limited to claims for indemnity or contribution, and there is, I believe, no reported case, and I never heard of a case in which persons have been joined as third parties merely because they have underwritten a policy insuring the defendant against the loss which gives occasion for the plaintiff's claim."

In 1927, in *Gowar* v. *Hales* (5), this court refused third-party procedure on the ground stated in the headnote, which reads thus:

> "As a general rule, in the absence of special circumstances, the insurance company which has issued a motorist's insurance policy should not be brought in as a third party at the hearing of an action for damages by the injured party against the motorist. It is a well-established rule of practice at the Bar, enforced by the judges, that in an action against a motorist the jury should not be informed that the defendant is insured."

One of the circumstances relied on as supporting the practice was the professional rule of conduct that a jury should not be told that the defendant was insured, and the decisions that a breach of this rule justified the judge in discharging the jury and ordering the plaintiff to pay the costs thrown away: *Askew* v. *Grimmer* (6) and *Wright* v. *Hearson* (7). The presence of the insurance company at the trial told the jury of the insurance and was therefore objectionable. What happened in practice was that the insurance company, after knowing the facts, either defended the action in the name of the defendant, or, where they did not admit liability, left the defendant to establish their liability by arbitration where the court would enforce the award. Passing over for the moment R.S.C., Or. 16A, r. 1, which was made in 1929 and two statutes of 1930, in 1932, in *Golding* v. *London and Edinburgh Insurance Co.* (8), this court stayed an action in a case against an insurer where the policy contained a *Scott* v. *Avery* (1) clause, holding that there was nothing in *Jureidini* v. *National British and Irish Millers' Insurance Co., Ltd.* (9) to prevent them from doing so. Fortunately in this appeal the decision in *Jureidini's Case* (9) has not been relied on, counsel probably thinking that after the decisions in *Golding* v. *London and Edinburgh Insurance Co., Ltd.* (8) and *Freshwater's Case* (2) he could not rely on it.

The circumstances that I have passed over are, first, the alteration of the third-party rule in May, 1929, by extending the rule beyond "contribution and indemnity" (this may have removed some of the previous objections to third-party procedure against insurers, but did not touch the objection of the effect on the jury of the fact that the defendant was insured), and secondly, the effect of the two statutes of 1930, the Third-Parties (Rights against Insurers) Act, 1930, and the Road Traffic Act, 1930, ss. 36 and 38, which came into force on Jan. 1, 1931, before the policy in the present case was issued. The Third-Parties (Rights against Insurers) Act, 1930, was passed to prevent the party injured by the motorist, called a "third party," from losing his right to the sum recovered against the motorist if the latter became bankrupt and his property went to the general body of his creditors. The Act applies only if the insured becomes bankrupt or makes a composition or arrangement with his creditors, in which case the insured's rights against the insurer under the policy are to be transferred to the "third party." In my opinion, *Freshwater's Case* (2) has decided that this Act does not affect the terms of the policy transferred, which, except as to the addition of another person who can sue on the policy, still remains in force. In the present case Mr. Barnes, the insured, is not bankrupt, and except that he is the owner of a Rolls-Royce car, not exactly a sign of impecuniosity, there is no evidence that he is likely to be. The plaintiff in the present action has, therefore, no right at present under the policy, or interest in joining the insurance company as third parties.

The Road Traffic Act, 1930, the preamble of which states (inter alia) that it is "to make provision for the protection of third parties against risks arising out of the use of motor vehicles,'' by s. 36 enacts that no person shall use a motor unless he is insured against third-party risks. Subsection (4) reads:

> ''Notwithstanding anything in any enactment, a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons.''

I have read that subsection several times without understanding what it means. Then follows s. 38, the material words of which for this purpose are:

> ''Any condition in a policy or security issued or given for the purposes of this Part of this Act, providing that no liability shall arise under the policy or security or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall be of no effect in connection with such claims as are mentioned in para (b) of s. 36 (1): Provided, that nothing in this section shall be taken to render void any provision in a policy or security requiring the person insured or secured to repay to the insurer or the giver of the security any sums which the latter may have become liable to pay under the policy or security and which have been applied to the satisfaction of the claims of third parties.''

I take first the ordinary arbitration clause—that is to say, the first part of condition 6 down to the words ''applicable thereto.'' The practice of the courts on this clause is that they do not treat it as ousting their jurisdiction, but, as it is desirable in the public interest that people who make legal contracts should keep them, they stay the action and refer the dispute to arbitration under the agreement, unless special circumstances are shown why the agreement should not be observed: see per Lord Hanworth, M.R., in *Freshwater's Case* (2) ([1933] 1 K.B. at pp. 519 and 520). I said myself in *Gowar's Case* (5) ([1928] 1 K.B. at p. 198):

> ''Now that does not oust the jurisdiction of the courts if they think fit to allow an action; but it is a general principle that people who make contracts should keep them rather than break them, and the owner of a motor car who, having agreed in a policy to settle a dispute by arbitration, does not do it, but goes to law, is breaking his contract; and the general principle therefore on which the courts act is that, unless there are special circumstances, they invite the person who brings an action to comply with his contract and go to arbitration.''

There are many other authorities to the same effect.

I am unable to see how the ordinary arbitration clause without the *Scott* v. *Avery* (1) addition is affected by s. 38 of the Road Traffic Act, 1930. It does not, in my opinion, provide that any liability under the policy shall cease in the event of a specified thing being omitted to be done, but only that the continuing liability under the policy shall be determined in a particular way according to the agreement of the parties unless the court otherwise orders. Nor, in my opinion, does the *Scott* v. *Avery* (1) part of the condition, which, in my view, is severable from the other part of the condition, make the matter worse. It is an agreed additional way of enforcing the agreement of the parties. What will happen if the matter goes to arbitration? An award will result enforceable by action and any difficulty of the absence of an award under condition 6 will disappear. If the award is in favour of the insured there is no difficulty; if it is against him on the facts of the accident, it is the tribunal he has agreed to and must accept; if it is against him for breach of conditions after the accident, such as conditions 1 and 2, he can raise by Special Case the point of law whether those conditions are inoperative by reason of s. 38. Any point that condition 6 is inoperative by reason of s. 38 cannot arise, for there will be an award as agreed.

I do not think it is necessary to determine finally what is the effect of the proviso to s. 38. I have an impression that the draftsman did not quite understand what he meant to do, and has not unnaturally left it doubtful what he has done. I find it difficult to think that on the original claim between insured and insurer, at a time when the injured plaintiff has no rights, Parliament intended to alter the contract between insured and insurer in the claim, but to allow the insurer to counter-claim against the insured as if the conditions of the policy were not altered.

In my opinion, SWIFT, J., came to a right result in staying the third-party proceedings and the insured must be left to the arbitration he has agreed to. The appeal should be dismissed.

GREER, L.J.—I agree that this appeal should be dismissed. I assume, without deciding, that if there were no *Scott* v. *Avery* (1) clause in this policy the third-party procedure under Order 16A, r. 1, would be a possible way of determining the rights as between the insurer and the assured. But I have come to the conclusion that this is a case in which litigation between the insurer and the assured should be restrained by the court because the parties have agreed that their rights shall be determined, not by litigation, but by an arbitration.

I have considered the effect of the *Scott* v. *Avery* (1) clause having regard to the recent statutes—the Third-Parties Insurance Act, 1930, and the Road Traffic Act, 1930. I think it is clear, if one reads the decision of the House of Lords in *Scott* v. *Avery* (1), that it means this. At that time it had been clearly demonstrated that the courts would not permit their jurisdiction over causes of action to be interfered with by the agreement of the parties, and insurers and other contractors invented the *Scott* v. *Avery* (1) form of contract in order to get rid of that difficulty. That was done successfully because the contract in the *Scott* v. *Avery* (1) form gives rise to no legal liability until there is an arbitration and an award and a refusal by one party to the contract to abide by and perform the award which has been made. I think that is clearly the decision of the House of Lords in *Scott* v. *Avery* (1). It is put in this way by the Lord Chancellor (5 H.L.Cas. at p. 847):

> "Now this doctrine depends upon the general policy of the law, that parties cannot enter into a contract which gives rise to a right of action for the breach of it, and then withdraw such a case from the jurisdiction of the ordinary tribunals. But surely there can be no principle or policy of the law which prevents parties from entering into such a contract as that no breach shall occur until after a reference has been made to arbitration."

In the present case, before the Third-Parties (Rights against Insurers) Act, 1930, was passed, nobody was concerned with the contract of insurance except the insurer and the assured, and they could put into the policy any terms to which both parties agreed and would in all circumstances be bound by the terms to which they had agreed. Nobody who was not a contracting party could get any advantages whatever from the contract of insurance. But it was thought that that was an unfortunate position as regards persons who were injured by the negligence of an insured company or individual if that insured company or individual became bankrupt. It did not seem just that the insurance moneys should go to swell the dividends of the general creditors of the bankrupt or the company in winding-up. It was considered right that in those circumstances, if any insured moneys were due to the insured person, they should go to the person who had been injured by his negligence, and, accordingly, it was provided by s. 1 (1) that:

> "Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur, then: (a) In the event of the insured becoming bankrupt or making a composition or arrangement with his creditors . . . if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred."

That vesting of the right of action takes place only in the event of the bankruptcy of the assured.

When the legislature came to pass the Road Traffic Act of 1930 it was thought that that might prove to be of very little advantage to the injured person because he had not had an opportunity of seeing the policy, he did not know what was in it, and he assumed it was an indemnity against the accidents that might happen, and the injuries that might be done by the negligence of the defendant. Therefore, for his protection in a case in which he might become interested, s. 38 of the Road Traffic Act, 1930, was passed, and it is in these terms:

> "Any condition in a policy or security issued or given for the purposes of this Part of this Act, providing that no liability shall arise under the policy or security or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall be of no effect in connection with such claims as are mentioned in s. 36 (1) (b)."

Those are claims in respect of an accident covered by the policy. I find some difficulty in reading that section without making it apply to a *Scott* v. *Avery* (1) clause, and I am inclined to think, though it is unnecessary to decide it, that the effect of that section is that the *Scott* v. *Avery* part of the clause is rendered inoperative for the time being, though subject to the proviso; but I think it is unnecessary to decide that because, even if it is doubtful whether that result would follow, I think it is right to say that there should be a stay of the third-party proceedings, because they might have the result of rendering the policy inoperative if the action were allowed to proceed, whereas, if the arbitration proceeds, the policy would not become inoperative by reason of the *Scott* v. *Avery* (1) clause. The section goes on to provide as follows, and this is a very odd provision:

> "Provided that nothing in this section shall be taken to render void any provision in a policy or security requiring the person insured or secured to repay to the insurer or the giver of the security any sums which the latter may have become liable to pay under the policy or security and which have been applied to the satisfaction of the claims of third parties."

There is such a provision in the present policy and the effect of that seems to me to be that, assuming there is a provision in the policy which renders it inoperative in the event of no award being obtained, then the liability of the company to pay in the arbitration only has the effect that the insurance company can then recover the amount from the insured; that is to say, if he is called upon, as he may be called upon, to pay to the injured person which his own policy says he is not liable to pay to the injured person, he can then get from the insurance company the amount which the statute has forced him to pay to the person who is injured. But however this may be, I agree with my Lord that the condition under this policy with regard to arbitration is one that can be separated, and, if necessary, it can be held that that part of the clause which agrees to arbitration is ineffective by s. 38 though the *Scott* v. *Avery* (1) part of the clause is effective, but rendered void for certain purposes by s. 38. If that be so, it is merely a case where the learned judge had to deal with a contract containing an arbitration clause and to exercise his discretion on the principles laid down in *Freshwater* v. *Western Australia Insurance Co., Ltd.* (2) as to whether or not that was the tribunal which the parties have agreed should be dispensed with in favour of a court of justice. I agree that the decision of the learned judge was right.

ROMER, L.J.—I agree that SWIFT, J., came to a right conclusion. It is said on behalf of the appellant that what has been called the *Scott* v. *Avery* (1) addition to this arbitration clause is rendered invalid by s. 38 of the Road Traffic Act, 1930. Notwithstanding the argument of counsel for the assured, I have felt inclined to decide that section has no operation upon that addition. Since, however, this argument closed I was informed by Mr. Valentine Holmes as amicus curiæ that there were some observations in the House of Lords which were not inconsistent with the reasons that I was suggesting. I have not had an opportunity of considering those observations, and, therefore, I think it better not to express any

A opinion as to what effect, if any, s. 38 has upon the *Scott* v. *Avery* (1) addition to the arbitration clause. I will assume that it renders it void. That being so, we have an ordinary arbitration clause unaffected by the *Scott* v. *Avery* (1) addition, the addition being, in my opinion, clearly severable from the rest of the clause. That being so, I can see no reason why in the exercise of the court's discretion the assured should not be compelled by arbitration to carry out the contract that he deliberately entered into. B There is, indeed, in this particular case a further, and I think a very strong, reason why he should be so compelled. As has been pointed out, condition 7 endorsed on the back of the policy provides as follows:

> "The insured shall repay to the company all sums paid by the company which have been applied to the satisfaction of claims of third parties in respect of any claim under this policy which the company would not have been liable to pay but for the said provisions of either of the said Acts." C

That is the clause the insertion of which is recognised as being a proper clause to be inserted by the proviso to s. 38. Supposing this third-party procedure goes on and the reference to arbitration is not made, the insurance company will be met, no doubt, by the plea of the invalidity of the *Scott* v. *Avery* (1) addition, and on the defendant's claim against them in the third-party proceedings they would be D held liable. Then they would say: "Now we have been held liable to pay you by way of indemnity what you have been ordered to pay to the plaintiff in the action, and inasmuch as we should not have been liable to pay you anything if it had not been for the provisions of s. 38, you have to pay it back to us." There would have been no answer to that because there would be no arbitration, and but for the provisions of s. 38, the absence of the arbitration would be a complete answer E to the plaintiff's claim. The result would be that there would then have to be an arbitration to see how the matters should be ultimately adjusted between the defendant who has issued these third-party proceedings and the insurance company. Very similar considerations to that induced us in *Freshwater* v. *Western Australia Insurance Co., Ltd.* (2) to stay the proceedings and refer the matter to arbitration. For those reasons I agree that the appeal fails.

F *Appeal dismissed.*

Solicitors: *J. E. Holloway-Pike & Co.*; *William Charles Crocker*; *Barlow, Lyde, & Gilbert*; *Kenneth Brown, Baker, Baker.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

TIDY AND ANOTHER *v.* BATTMAN

[COURT OF APPEAL (Lord Hewart, Lord Wright and Slesser, L.J.), October 10, 1933]

[Reported [1934] 1 K.B. 319; 103 L.J.K.B. 158; 150 L.T. 90]

Negligence—Proof of negligence—Presumption—Collision with stationary vehicle—No presumption of negligence.

While driving a motor cycle on a highway by night the plaintiffs' son collided with a motor lorry which had been drawn up on the highway in such a manner that its lights could not be seen. He thereby sustained injuries which resulted in his death. The plaintiffs claimed damages under Lord Campbell's Act, alleging negligence on the part of the lorry driver. The defendant pleaded contributory negligence by the deceased man, alleging that it was a rule of law that a driver colliding with a stationary object was guilty of negligence, for either he was not keeping a proper look-out or he was driving too fast to pull up within his limits of vision.

Held: there was no rule of law which disentitled the jury from finding on the evidence that the deceased man could not by ordinary care have avoided the consequences of the defendant's negligence; there was no rule of law that the driver of a vehicle is necessarily negligent if he collides with a stationary object on the highway; but every such case must be decided on its own facts.

Tart v. *G. W. Chitty & Co., Ltd.* (1), [1933] 2 K.B. 453, and *Baker* v. *E. Longhurst & Sons, Ltd.* (2), [1933] 2 K.B. 461, distinguished.

Notes. The common law rule that contributory negligence was a complete defence to an action for negligence was abolished by the Law Reform (Contributory Negligence) Act, 1945, which provided for the apportionment of the loss between the parties according to their share in the responsibility for the damage.

Considered: *Steward* v. *Hancock*, [1940] 2 All E.R. 427. Applied: *Morris* v. *Luton Corpn.*, [1946] 1 All E.R. 1. Referred to: *S.S. Heranger* (*Owners*) v. *S.S. Diamond* (*Owners*), [1939] A.C. 94; *Smith* v. *Harris*, [1939] 3 All E.R. 960; *Sparks* v. *Edward Ash, Ltd.*, [1943] 1 All E.R. 1; *Hickman* v. *Peacey*, [1945] 2 All E.R. 215; *Simpson* v. *Peat*, [1952] 1 All E.R. 447.

As to proof of negligence, see 23 HALSBURY'S LAWS (2nd Edn.) 667 et seq., and for cases see 36 DIGEST (Repl.) 127 et seq.

Cases referred to:

(1) *Tart* v. *G. W. Chitty & Co., Ltd.*, [1933] 2 K.B. 453; 102 L.J.K.B. 568; 149 L.T. 261, D.C.; 36 Digest (Repl.) 93, *504*.

(2) *Baker* v. *E. Longhurst & Sons, Ltd.*, [1933] 2 K.B. 461; 102 L.J.K.B. 573; 149 L.T. 264, C.A.; 36 Digest (Repl.) 93, *505*.

(3) *Butterfield* v. *Forrester* (1909), 11 East, 60; 1 Man & G. 571, n; 103 E.R. 926; 36 Digest (Repl.) 177, *939*.

(4) *Tuff* v. *Warman* (1858), 5 C.B.N.S. 573; 27 L.J.P.C. 322; 5 Jur.N.S. 222; 6 W.R. 693; 141 E.R. 231, Ex. Ch.; 36 Digest (Repl.) 170, *912*.

(5) *Grayson, Ltd.* v. *Ellerman Line, Ltd.*, [1920] A.C. 466; 89 L.J.K.B. 924; 123 L.T. 65; 36 T.L.R. 295; 14 Asp.M.L.C. 605; 25 Com. Cas. 190, H.L.; 36 Digest (Repl.) 181, *980*.

Appeal by the defendant from an order of the Divisional Court (TALBOT and MACNAGHTEN, JJ.), which had dismissed the defendant's appeal from a judgment in favour of the plaintiffs given in the county court.

The plaintiffs, who were husband and wife, brought their action to recover damages under Lord Campbell's Act for the loss of their son, who had been killed on Feb. 23, 1932, in a collision between a motor cycle ridden by him and a motor lorry driven by the defendant's servants. The collision occurred at night, and the plaintiffs alleged that the lorry was drawn across the road, so that its lights could not be seen by anyone proceeding along the road. The defendant relied on contributory negligence by the deceased man. On the night in question the defendant's lorry was drawn up across a road between Chichester and Arundel in such a way as to block about two-thirds of the width of the road, and so that its lights were invisible to persons approaching. A motor car approached the lorry and stopped a few yards from it. The plaintiffs' son, on his motor cycle, was following the motor car, and, drawing out from behind it, crashed into the lorry, and sustained injuries which resulted in his death.

In the county court the learned judge left to the jury the question of negligence on the part of the defendant and contributory negligence on the part of the deceased. The jury found for the plaintiffs on both points, and awarded damages. It was now contended by the defendant that it was a rule of law that, if the driver of a vehicle struck a stationary object on the highway, he was necessarily guilty of negligence, for he was in the dilemma that either he was not keeping a proper look-out or he was driving too fast to pull up within his limits of vision. In support of this proposition *Tart* v. *G. W. Chitty & Co., Ltd.* (1) and *Baker* v. *E. Longhurst & Sons, Ltd.* (2) were cited.

Scott Henderson for the defendant.
Manningham-Buller for the plaintiffs.

LORD HEWART, C.J.—I think this appeal ought to be dismissed. I entirely agree with the judgment of MACNAGHTEN, J., and with the remarks of JUDGE AUSTIN JONES in the courts below.

LORD WRIGHT.—I agree. I think it is a pure question of fact. *Tart* v. *G. W. Chitty & Co., Ltd.* (1) and *Baker* v. *E. Longhurst & Sons, Ltd.* (2) indicate clearly that no one case is ever like another. I do not think that any principle of law can be extracted from those cases. I think it is very unfortunate that matters that are purely matters of fact should be confused by importing into them principles of law which I am sure very properly have been applied to helping in the decision of other cases on other sets of facts. I agree with the judgment of MACNAGHTEN, J., in all respects, and I think TALBOT, J., would have agreed if it had not been that he felt he ought to take a different course, which, I think, he did very reluctantly, because of something which was cited to him from some other case.

SLESSER, L.J.—I agree. The principles of law which are laid down in such old cases as *Butterfield* v. *Forrester* (3), *Tuff* v. *Warman* (4), and *Grayson, Ltd.* v. *Ellerman Line, Ltd.* (5) are unaffected so far as I know by any recent observations in the Court of Appeal or any other tribunal. I agree with my Lords that each of these cases must depend upon its facts, applying to those facts the principles laid down in the authorities dealing with the matter. In the present case I think there was ample evidence upon which the jury might find, firstly, that the defendant had been negligent—that is scarcely disputed—and, secondly, decline to find that the plaintiffs' son, by ordinary care could have avoided the consequences of the defendant's negligence.

Appeal dismissed.

Solicitors: *Blyth, Dutton, Hartley, & Blyth*, for *G. H. King & Franckeiss*, Portsmouth; *Rising & Ravenscroft*, for *Triggs, Turner & Co.*, Guildford.

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

LANDER *v.* BRITISH UNITED SHOE MACHINERY CO., LTD.

[Court of Appeal (Lord Hanworth, M.R., Lawrence and Slesser, L.JJ.), June 16, 19, 1933]

[Reported 102 L.J.K.B. 768; 149 L.T. 395; 26 B.W.C.C. 411]

Workmen's Compensation—"Arising out of employment"—Accident due to idiopathic condition of workman—Fall to floor in epileptic fit—Skull fractured by contact with floor—Floor not in itself dangerous—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 1 (1).

The workman, who had been employed by the employers for some time, suffered from epilepsy. On Aug. 13, 1932, he had occasion to go to the lavatory which the employers had provided on the working premises, and he fell, while in an epileptic fit, striking his head on the floor, fracturing his skull, and dying the same day as a result. The floor of the lavatory was tiled and was wet, but it was found to be a proper and suitable floor, quite level, and not in itself dangerous, and the fall was due to the fit and not to the workman slipping on the floor. On a claim by the workman's widow for compensation under the Workmen's Compensation Acts,

Held: there being no lurking danger in the floor of the lavatory as such and the accident being due to the workman's idiopathic condition, the accident could not be said to arise out of his employment, and the widow was not entitled to compensation.

Wright and Greig, Ltd. v. *M'Kendry* (1), 1919 S.C. 98, disapproved.

Notes. The Workmen's Compensation Act, 1925, was repealed by the National Insurance (Industrial Injuries) Act, 1946, which prescribes a system of insurance against injuries caused by industrial accidents, but s. 1 (1) of the latter Act provides that the insurance shall be "against personal injury caused . . . by accident arising out of and in the course of" employment, thus adopting the wording of s. 1 (1) of the Act of 1925. See also s. 7 (1), and note that s. 7 (4) provides that an accident arising in the course of the insured person's employment shall be deemed, in the absence of evidence to the contrary, also to have arisen out of that employment.

Considered: *Martin* v. *Finch*, [1937] 2 All E.R. 631; *Ironmonger* v. *Vinter* (1938), 31 B.W.C.C. 90. Not followed: *Wilson* v. *Chatterton*, [1946] 1 All E.R. 431. Referred to: *Craig* v. *Dover Navigation Co.*, [1938] 4 All E.R. 559; *Tankard* v. *Stone Platt Engineering Co.* (1946), 174 L.T. 277.

As to "accidents" within the Workmen's Compensation Acts, see 34 Halsbury's Laws (2nd Edn.) 816 et seq., and for cases see 34 Digest 266 et seq. For National Insurance (Industrial Injuries) Act, 1946, see 16 Halsbury's Statutes (2nd Edn.) 797.

Cases referred to:

(1) *Wright and Greig, Ltd.* v. *M'Kendry*, 1919 S.C. 98; 1918 2 S.L.T. 282; 11 B.W.C.C. 402.

(2) *Dennis* v. *A. J. White & Co.*, [1917] A.C. 479; 86 L.J.K.B. 1074; 116 L.T. 774; 33 T.L.R. 434; 61 Sol. Jo. 558; 10 B.W.C.C. 280, H.L.; 22 Digest (Repl.) 149, *1351*.

(3) *Upton* v. *Great Central Rail. Co.*, [1924] A.C. 302; 93 L.J.K.B. 224; 130 L.T. 577; 40 T.L.R. 204; 68 Sol. Jo. 251; 16 B.W.C.C. 269, H.L.; 34 Digest 276, *2336*.

(4) *Lawrence* v. *George Matthews (1924), Ltd.*, [1929] 1 K.B. 1; 97 L.J.K.B. 758; 140 L.T. 25; 44 T.L.R. 812; 21 B.W.C.C. 345, C.A.; Digest Supp.

(5) *Allcock* v. *Rogers* (1918), 87 L.J.K.B. 693; 118 L.T. 386; 34 T.L.R. 324; 62 Sol. Jo. 421; 11 B.W.C.C. 149, H.L.; 34 Digest 315, *2582*.

(6) *Wicks* v. *Dowell & Co., Ltd.*, [1905] 2 K.B. 225; sub nom. *Wilkes* v. *Dowell & Co.*, 74 L.J.K.B. 572; 92 L.T. 677; 53 W.R. 515; 21 T.L.R. 487; 49 Sol. Jo. 480; 7 W.C.C. 14, C.A.; 34 Digest 266, *2265*.

(7) *Thom* (*or Simpson*) v. *Sinclair*, [1917] A.C. 127; 86 L.J.P.C. 102; 116 L.T. 609; 33 T.L.R. 247; 61 Sol. Jo. 350; 10 B.W.C.C. 220, H.L.; 34 Digest 320, *2619*.

Appeal by the employers from an award made by HIS HONOUR JUDGE HAYDON, K.C., in the Leicester County Court.

The facts appear in the judgments.

Harold Derbyshire, K.C., and *Alun Pugh* for the employers.

C. E. Loseby and *J. P. Stimpson* for the workman.

LORD HANWORTH, M.R.—This appeal must be allowed. It involves a difficult point which has been discussed in a very large number of cases, and we have had an interesting argument on both sides bringing to our attention the cases in which this matter has been conned over previously.

The facts are in the narrowest possible compass. The application for arbitration was brought by the widow of a man who was in the employ of the respondents, the British United Shoe Machinery Co., Ltd. He was a man who suffered from epilepsy, but he had been employed for some time. In the course of his work it was known that he did fall sometimes from epilepsy. At times he knew it was coming on, and at such times he sought the security of sitting down, but there is no doubt that from time to time he did fall, and evidence is that more frequently epileptics fall upon their backs with their heads thrown back too. At about 11.30 a.m. on Aug. 13, 1932, this man went into the lavatory, and he fell down there. He was found with a wound at the base of the skull, and from that wound he died that evening. His widow now seeks compensation on the ground that his death arose out of and in the course of his employment by these employers.

As SLESSER, L.J., said in the course of the argument, we have to pay a close attention to the facts of the case. The learned county court judge in his award said:

> "On Aug. 13, 1932, at about 11.35 a.m. the deceased man went, during business hours, to a lavatory on the premises of the respondents provided by them for the use of their employees. A plan of this lavatory has been furnished to me. The floor is of blue brick and, having been recently washed, was wet. It was a proper and suitable floor, quite level, and no more slippery than an ordinary pavement, which is often wet. I find as a fact that the floor was not, in itself, dangerous, except in the sense that to fall upon it, just as upon any other hard surface, would very probably be productive of injury, and almost certainly so in the case of an epileptic person who fell backwards on to his head. A good deal of the evidence related to the question whether the fall was due to the deceased man slipping on the floor, or to an epileptic seizure. I came to the conclusion that the fall was wholly due to a seizure. The medical assessor who sat with me agreed with this view."

Therefore, we have the case of a man who falls in a perfectly safe and proper part of the premises from a cause which is idiopathic to himself, and he suffers an injury from which he dies.

In those circumstances, is the employer liable? The learned county court judge says this:

> "I hold that resort to this particular spot for 'necessary purposes' was not only an incident, but an obligation, of the employment."

Although the learned county court judge found that the premises were perfectly sound and proper, and in no sense dangerous, he did put to himself this question:

> "Was the floor of this lavatory a zone of special danger? My answer to that, with relation to an epileptic person, would be 'Yes.'"

A We have had a number of cases cited to us. There is no question that if the workman's employment causes him to suffer a strain which brings into activity some latent infirmity or weakness, he may still recover from his employers. If he is in the course of his business going to encounter dangers which are to be found at a particular locality, or, it may be, as in the case of the boy Dennis (*Dennis* v. *A. J. White & Co.* (2)) in the street, he may recover; or it may be (of which *Upton* B v. *Great Central Rail. Co.* (3) is a good illustration) where a man in the course of his duty slips up upon a platform which is outside his employers' premises, but is a place where he had to be, he can still impute responsibility to his employers. But LORD HALDANE said in *Upton* v. *Great Central Rail Co.* (3) ([1924] A.C. at p. 307):

> C "A direct physical cause will, of course, fall among those which are included in s. 1 of the Workmen's Compensation Act, but the scope of the Act and the inquiry which it enjoins appear to extend also to the general conditions under which the workman has been directed to act. If he simply dies of heart disease, the effect of which has not been aggravated by anything which his employment led to his doing, or if he is struck by lightning in a place where D the condition of his employment rendered him no more exposed to danger than any member of the public not so employed, the injury will not have resulted from the conditions under which he was being employed."

But then he goes on:

> "It is not easy to lay down with precision how far such conditions may extend. The mere fact that they have arisen in the course of the employment is not in E itself sufficient. They must be such that the accident has some sort of casual relation with them, although not necessarily an active physical connection."

Those passages are both of very great importance upon an inquiry of the nature on which we are now engaged, and, to my mind, RUSSELL, L.J., expanded that causal relation, and laid down certain propositions which elucidate the rules or F canons by which the court should be bound, when he laid down the following four propositions in *Lawrence* v. *George Matthews* (*1924*), *Ltd.* (4) ([1929] 1 K.B. at pp. 18, 19). He said first:

> "If the accident results from a risk which is necessarily incident to the performance of the servant's work, the accident arises out of the employment."

G Secondly:

> "If a workman is injured by an accident resulting from a risk to which everyone is subject, but of which it can be said that the workman runs more than the normal risk, the accident arises out of his employment."

Thirdly:

> H "If a workman is injured in an accident resulting from a risk to which everyone is subject, but which is not necessarily incident to the performance of his work or to which he is not by his work abnormally subjected, the accident does not arise out of his employment."

RUSSELL, L.J., held that:

> I "In cases falling within the first two propositions, sufficient causal relation or causal connection is established between the accident and the employment"

—within, of course, the observations or rules laid down by LORD HALDANE in *Upton* v. *Great Central Rail. Co.* (3). His fourth proposition is this:

> "The authorities seem to me to establish a fourth proposition, namely, that sufficient causal relation or causal connection between the accident and the employment is established if the man's employment brought him to the particular spot where the accident occurred, and the spot in fact turns out to be a dangerous spot."

Incidentally, I may say that I think SANKEY, L.J., rightly declared that the divergence of opinion in *Lawrence* v. *George Matthews (1924), Ltd.* (4) was not upon the question of law, but upon the value of the facts which had been established. If I had taken the same view of the facts that was taken by SANKEY, L.J., and RUSSELL, L.J., I should have come to the same conclusion. A

RUSSELL, L.J., however, considers in his fourth proposition what is meant by the workman's employment bringing him to the spot where the accident occurred, and that spot turning out to be a dangerous spot. For the elucidation of that problem, I think I can turn to *Allcock* v. *Rogers* (5) and to the speech of LORD WRENBURY (118 L.T. at p. 387): B

> "Was there any evidence that it was a dangerous place? For the present purpose a dangerous place is a place which as a place is dangerous—a place which has some quality which results in danger, for instance, that an insecure wall, which may fall, exists there." C

He held with regard to the facts of that particular case, where a bomb fell upon a man working in the street, that there was no evidence that the place had any quality which made it more dangerous than any other place. The only evidence is that danger resulted in the place, not that it resulted from any danger connected with the place as a place. LORD RUSSELL, when applying his fourth proposition, when thus elucidated, says this ([1929] 1 K.B. at p. 23): D

> "His employment—that is, Lawrence's employment—brought him to a danger spot; that is to say, a spot which had a quality which resulted in danger; the lurking danger was a tree."

E

In the present case we have got the conclusion of the learned judge that the workman's fall was due to an epileptic seizure and that the place was dangerous only to an epileptic person. Considering what the purpose of the locality was, it is impossible to impute either want of care or want of consideration to the employers. How otherwise could proper provision be made for the workmen's comfort other than was made by this lavatory. If that be so, it appears to me that there was no lurking danger. The origin of the mishap was the man's idiopathic condition. It seems almost grotesque to say that in order to avoid a possible fall by a possible epileptic person some provision for a soft floor should have been made in this particular locality of the world. F

Let me refer to one more case, that is *M'Kendry* v. *Wright and Greig, Ltd.* (1). It is, I think, to be noted that upon the facts in that case there was no direct evidence as to the cause of the fall. The medical investigation showed that the man suffered from a disease of the kidneys that might produce a uræmic fit, but there was no evidence that in fact the uræmic fit did cause the fall; there was not the evidence that we have in the present case, or a finding of the learned county court judge, which is, that it was the epilepsy which caused the man to fall, and nothing else—no slip or anything of that sort. I find myself in regard to *M'Kendry* v. *Wright and Greig, Ltd.* (1) in agreement with LORD SALVESEN. LORD SALVESEN, be it observed (11 B.W.C.C. at p. 417), expressly recognises, as I should wish to recognise, that, G H

> "A fall, of course, even on what appears to be an absolutely safe spot within the employers' premises, may be, of course, accidental, and if it occurs through a workman slipping on a greasy floor or tripping over rails or on a loose bit of wood on the employers' premises, I think it may be said with perfect truth that such a fall does arise out of the employment." I

LORD SALVESEN expresses the conviction that he can accept the English decisions which had been quoted to him, but as he pointed out in that particular case, as here, the precise nature of the injury depended entirely on the manner in which the workman collapsed, the part of his body which first came in contact with the floor on which he was standing, and the hardness of the floor itself. He said (11 B.W.C.C. at p. 416):

"All that can be said is that the mere fact that a man falls down in a fit need not occasion serious injury, or indeed any injury at all, although it may also, as in this case, have fatal results."

If the locality to which the man is induced to go by his employment is one which contains a danger, and that danger becomes active, and the man is injured, as in *Lawrence* v. *George Matthews, Ltd.* (4), then he can recover. But if the man is in perfect safety upon premises adequate and proper for that purpose, and then he, without any extra strain to be imputed to his work, or any other inducement thereto, falls down entirely from a cause which is particular and peculiar to himself, I do not think there is evidence which can impose liability upon the employer.

In *Wicks* v. *Dowell & Co., Ltd.* (6) the workman would not have suffered injury unless his work had brought him to a place where he had to stand in proximity to what some people have called a precipice, but, at any rate, a place where, if he fell from any cause by accident or a cause not idiopathic to himself, there was a grave risk of injury. In the present case, having regard to the finding of the perfect safety of the premises, and the cause of the fall being peculiar to the man himself, I do not think that the causal relation asked for by LORD HALDANE and explained by LORD RUSSELL appears, and, therefore, there is no liability upon the employers. The result will be that the appeal will be allowed with costs here and below.

LAWRENCE, L.J.—I agree. The deceased workman was subject to occasional fits of epilepsy. On the day in question, during working hours, he went to a lavatory provided by the employers on their premises for their workmen, and while there he fell in a fit and fractured his skull. The learned county court judge found that the floor of the lavatory, which was of blue brick, was a proper and suitable floor and not dangerous in itself. In those circumstances it is not disputed that the accident arose in the course of the workman's employment, and the only question for this court is whether the accident arose out of the employment.

Speaking for myself, and apart altogether from the authorities cited to us, I cannot conceive how it can reasonably be said that the fatal injury which this unfortunate man sustained was an injury by accident arising out of his employment within the meaning of s. 1 of the Act. His fall was caused by a fit, which he might have had at any time and in any place, and which was not in any way caused by or brought on by his employment. That the employer should be held liable because the fit happened to come on whilst the workman was on his premises would, I think, be extending the liability of employers under the Act beyond all reasonable bounds.

The learned county court judge has held that the lavatory to which the workman went, although constructed in a proper and suitable manner, was a danger zone so far as this particular workman was concerned within the meaning of the authorities, and that, therefore, the employers were liable. With the utmost respect for the opinion of the learned county court judge, I cannot agree with him. The lavatory floor was no more dangerous than the pavement in the street, or in fact any hard floor. The evidence shows that a man in an epileptic fit usually falls backwards and is, or course, liable to fracture his skull if the fit should occur whilst he is walking or standing on a hard surface.

The learned county court judge based his decision mainly on *Wicks* v. *Dowell & Co., Ltd.* (6) and *M'Kendry* v. *Wright and Greig, Ltd.* (1). As regards the former case, it is distinguishable from the present case on the facts. There the workman in order to perform his job had to stand close to an open hatchway, a position which was fraught with danger even to a man in sound health. The workman, therefore, in that case was brought within a zone of special danger, and the employer was held liable to make compensation. In *M'Kendry's Case* (1) I prefer the dissenting judgment of LORD SALVESEN to that of the majority of the learned judges who decided that case. In my judgment, the reasoning of LORD SALVESEN is convincing and applies to the facts of the present case. In the present case there was no evidence of any special danger attaching to the spot where the workman A had the fit. Therefore, there was no zone of special danger within which he was brought. The workman was as safe on the brick floor of the lavatory as he would have been on the stone floor of his own kitchen, or would have been in the street, or in fact at any other position in which a man ordinarily has to stand or walk. I agree with LORD SALVESEN that if it were enough in circumstances like the present to say that the fall was the accident, and that this was the proximate B cause of the injury, and that it was unnecessary and irrelevant to inquire further, the words "arising out of the employment" might as well be erased from the Act.

In the present case I am clearly of opinion that the accident was entirely due to the workman's state of health, and had no relation to his employment. Consequently, it cannot properly be said to arise out of his employment. The only C evidence here is that the accident happened in the lavatory; but there is no evidence that it resulted from any danger connected with the lavatory as a lavatory. I confess that I am glad to be able to come to this conclusion as a contrary decision would have the effect of preventing men like the deceased, who suffer from occasional fits of epilepsy, from getting any employment.

SLESSER, L.J.—I agree that this appeal must be allowed. When we look at D the first section of the Act of 1925—and these words are contained in the Act of 1906 and in the Act of 1897—we find that it is necessary, in order that a workman shall succeed, to show that personal injury by accident arose out of and in the course of the employment. In listening to the argument which we have heard, and in considering the award of the learned judge, it seems to me, as was suggested E by LORD SALVESEN in *M'Kendry* v. *Wright and Greig, Ltd.* (1), that, if those contentions be right, the words "arising out of" do not in any way limit the ambit of the phrase "in the course of," for what in substance is said is this: Any man meeting with any accident in any place where there are not alleged any circumstances of special or peculiar danger, may recover compensation because he has in that place met with an injury. That seems to me far too wide if one had to consider F the matter afresh now for the first time; but there is ample authority, in my opinion, which shows us that such a conclusion would be an improper one, and where the accident has to be considered within the classes which have been so clearly stated by RUSSELL, L.J., in *Lawrence* v. *George Matthews (1924), Ltd.* (4), it falls within the fourth of his classes, and it would have here to be shown that the accident had occurred to the workman by reason of his employment bringing G about his presence at the particular spot and so exposing him to a danger which is in fact proved to exist at that particular spot.

In this case it is not disputed that going to this lavatory was work within and necessarily incident to or within his employment, and he was, therefore, taken to that particular spot as a part of his employment. But how can it be said that he was there exposed to any peculiar danger or particular danger or special danger?— H various words have been used—dangers greater than those which the public at large might be expected to risk. The learned county court judge has found on the evidence that this was a proper and suitable floor, quite level, but no more slippery than an ordinary pavement which is often wet. He says that it was only dangerous because this man was an epileptic. I cannot help thinking that some confusion has arisen from the fact that whereas, as has been often stated, where there is an I accident, one must look to the proximate cause of that accident and not consider remote causes, it is here forgotten that the danger in this case only arose because this man was an epileptic—in other words, in the passage in LORD WRENBURY's judgment in *Allcock* v. *Rogers* (5) (118 L.T. at p. 387) to which my Lord referred, there is nothing in the place as such which makes it a dangerous place; it was only dangerous because the man was an epileptic, and the fact that he was an epileptic was in no way caused, nor was it suggested it was caused, by the accident. Therefore, if we eliminate the fact that he was epileptic, which was not a condition in

A any way caused or prompted by the accident, the place emerges as a place which in itself was not dangerous.

The only possible difficulty one might feel in this case, otherwise I should have been inclined to say that the respondents' case here was almost unarguable, is provided by the decision of the court of session in *M'Kendry* v. *Wright and Greig, Ltd.* (1). I think counsel for the workman is entitled to say it certainly was the B view expressed by LORD ATKINSON in *Upton* v. *Great Central Rail. Co.* (3) that the floor in *M'Kendry* v. *Wright and Greig, Ltd.* (1) was in fact found to be dangerous to walk on. It seems to me on the facts that the case is very similar to the present case, but, in my view, it is impossible on the authorities to say that the decision of the majority of the Court of Session was correct in that case, and I think, without any doubt in my own mind, that LORD SALVESEN's dissenting judgment was more C consistent with authority. It may be that the finding of the majority of their Lordships in that case was due to the fact that that decision apparently, which was much influenced by *Thom* (*or Simpson*) v. *Sinclair* (7), was not considered in relation to *Allcock* v. *Rogers* (5), which in fact had been decided before the consideration of *Wright and Greig, Ltd.* v. *M'Kendry* (1), but was not cited in the argument in the Court of Session—possibly it had not been reported—and finds no D place in the judgment of their Lordships. But in *Allcock* v. *Rogers* (5) the principle of *Dennis* v. *A. J. White & Co.* (2) was applied. That is, where there was no evidence of any special danger attaching to the spot where the workman was told to work, there was no evidence that the accident arose out of the employment. Had that case been fully before their Lordships, the contrast between that and the dangerous condition of the wall, for example, in *Thom* (*or Simpson*) v. *Sinclair* E (7) and other cases, where there was a special danger, it may have been that they would have come to a contrary conclusion. But be that as it may, I can find no reasons given by the majority of the Court of Session for holding that in *Wright and Greig, Ltd.* v. *M'Kendry* (1) there was any accident which arose out of the employment. If that case be urged as an authority, I must respectfully say, first, that it is not binding upon us and secondly, I regard it, in the light of subsequent F decisions and in the light of proper construction, as incorrect.

With regard to *Wicks* v. *Dowell & Co., Ltd.* (6) ([1905] 2 K.B. at p. 229) that does not seem to me to help the workman here at all. In that case the worker was brought to a place of special danger. LORD COLLINS, M.R., described it as a precipice. He says:

> G "Because by the conditions of his employment the workman was bound to stand on the edge of what I may style a precipice, and if in that position he was seized with a fit he would almost necessarily fall over."

COZENS-HARDY, L.J., said ([1905] 2 K.B. at p. 231):

> "A workman who is put in a dangerous position in order to do his work is more liable to an accident by reason of the disability."

H That seems to be a case exactly within the description which RUSSELL, L.J., gives in *Lawrence* v. *George Matthews, Ltd.* (4) of a person who by his employment is exposed to a danger at a particular spot. There was no exposure to danger at a particular spot on the facts of this case except because this man was an epileptic. The fact of his epilepsy had no relation to his employment, and in my view all nexus of any kind between the unhappy casualty which occurred and the man's I employment is completely lacking.

Appeal allowed.

Solicitors: *Stafford Clark & Co.*, for *Ironside & Co.*, Leicester; *Clarkson & Son*, for *Simpson, Son, & Bennett*, Leicester.

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

PERFORMING RIGHT SOCIETY, LTD. *v.* HAWTHORN'S HOTEL (BOURNEMOUTH), LTD.

[Chancery Division (Bennett, J.), June 23, 27, 1933]

[Reported [1933] Ch. 855; 102 L.J.Ch. 330; 149 L.T. 425; 77 Sol. Jo. 523]

Copyright—Infringement—Public performance—Music played at hotel—Presence of non-residents—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 1 (2).

An orchestral performance of copyright musical works in the lounge of an hotel, admission to which lounge was allowed not only to persons staying in the hotel, but also to members of the outside public on those occasions when they had, on payment, taken dinner in the hotel,

Held: to be a performance in public within the meaning of the Copyright Act, 1911, s. 1 (2).

Notes. The Copyright Act, 1911, s. 1 (2), was repealed by the Copyright Act, 1956; see now s. 2 (3) (c) of the Act of 1956.

Considered: *Jennings* v. *Stephens*, [1936] 1 All E.R. 409.

As to copyright and its infringement, see 8 Halsbury's Laws (3rd Edn.) 424 et seq., and for cases see 13 Digest 204 et seq. For Copyright Act, 1911, see 4 Halsbury's Statutes (2nd Edn.) 777, and for Copyright Act, 1956, see ibid., vol. 36, p. 67.

Cases referred to:

(1) *Duck* v. *Bates* (1884), 13 Q.B.D. 843; 53 L.J.Q.B. 338; 50 L.T. 778; 48 J.P. 501; 32 W.R. 813, C.A.; 13 Digest 214, *507*.

(2) *Harms* (*Incorporated*) *and Chappell & Co.* v. *Martan's Club*, [1927] 1 Ch. 526; sub nom. *Harms* (*Incorporated*) v. *Embassy Club, Ltd.*, 96 L.J.Ch. 84; 136 L.T. 362; 43 T.L.R. 21; 70 Sol. Jo. 1219, C.A.; Digest Supp.

Action for injunction.

The plaintiff society was a limited company, the members of which consisted of authors, composers, publishers, and others interested in the copyright of their works. On the evening of Nov. 20, 1932, a musical performance was given in the lounge of a residential hotel by an orchestra which had been employed for the purpose by the proprietors of the residential hotel. During the performance there were present in the lounge of the hotel several of the hotel guests. There was also present a member of the society accompanied by a friend, and such member had given notice of his intention to dine that evening in the hotel with his friend. In the course of the evening two works were performed, as the result of which performance the society brought this action against the hotel company, claiming an injunction on the ground that the performance constituted an infringement of copyright. The question for the decision of the court was whether the performance of the two works on the evening in question was a performance in public within the meaning of s. 1 (2) of the Copyright Act, 1911.

Section 1 (2) of the Copyright Act, 1911, was as follows:

> "For the purpose of this Act, 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; and shall include the sole right . . ."

S. O. Henn Collins, K.C., and *K. E. Shelley* for the plaintiffs.—The question for the court to decide is whether the performance was in public. This was a performance for profit, because it formed one of the attractions offered by the proprietors of the hotel both for people to stay there, and to come and have dinner there on payment. The hotel was open to the public who chose to come and stay there, and was also open to the public on those occasions when any member of the public chose to come and have dinner there on payment. This is quite a different matter from a private or domestic performance. [They referred to *Duck* v. *Bates* (1) and *Harms* (*Incorporated*), *Ltd. and Chappell & Co.* v. *Martan's Club* (2).]

W. P. Spens, K.C., and *R. C. Vaughan* for the defendants.—This is not a public performance. It was of a domestic or quasi-domestic nature. The people who attended it were not genuine members of the public, because the only other people present besides the guests in the hotel were persons who came to watch the interests of the plaintiffs.

BENNETT, J.—The only question which has to be decided in this action is whether the performance of the two works in question on Nov. 20, 1932, was a performance of those two works "in public." If it was, the defendants have infringed the rights which are conferred upon the plaintiffs, as owners of the performing rights, by virtue of s. 1 (2) of the Copyright Act, 1911.

The defendants' hotel is unlicensed. It has accommodation for about 175 guests, and regularly, for the past four years, on Sunday evenings, the trio engaged on Nov. 20, 1932, has played in the lounge. In addition to playing on Sunday evenings it plays at tea-time during the Christmas and Easter holidays. On Nov. 20, 1932, a number of guests were sleeping at the hotel. Some of them were in the lounge on the occasion in question. There was also present an emissary of the plaintiffs (accompanied by a friend) who went there for the purpose of hearing whether any piece of music, to the copyright of which the plaintiffs were entitled, would be played by the trio.

I think that it is quite plain, on the evidence, that any member of the public, who had given notice to the defendants of his desire to dine at the hotel on Nov. 20, 1932, or on any other Sunday, would have been allowed to have dinner there, provided that he appeared to be respectable. No doubt, he would also have been at liberty to go into the lounge and listen to the music performed by the trio. In other words, any respectable member of the public who was prepared to pay the price charged by the defendants either for consuming meals in their hotel, or for staying there, was at liberty to listen to the music performed by the trio engaged by the defendants. In my judgment the performance by the defendants, in those circumstances, was a performance "in public," and the rights which the plaintiffs have under the statute have been infringed. The rights of the plaintiffs have been challenged by the defendants and the plaintiffs are entitled to an injunction restraining the defendants, their servants and agents, for the duration of the copyright, from performing in public the two musical works in question.

Solicitors: *Syrett & Son*; *Smith, Fawdon, & Low*, for *Edward H. Bone*, Birmingham.

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

PERFORMING RIGHT SOCIETY, LTD. *v.* HAMMOND'S BRADFORD BREWERY CO., LTD.

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), October 3, 4, 1933]

[Reported [1934] Ch. 121; 103 L.J.Ch. 210; 150 L.T. 119; 50 T.L.R. 16]

Copyright—Infringement—Broadcast music—Public performance by separate loudspeaker—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 1 (2).

The plaintiffs were the owners of the copyright in three musical works, and had granted a licence to the British Broadcasting Corporation to broadcast those works, but for "domestic and private use only." The defendant company, who owned a hotel, used a receiving set and loudspeaker to reproduce the broadcast by the British Broadcasting Corporation of these musical works for the customers in their hotel.

Held: the act of the defendants in installing the loudspeaker and so making the broadcast music heard, not only by the domestic circle at the hotel, but also the general company who had come to the hotel to enjoy the comforts and amenities there provided, was an effective and separate act, to which the plaintiffs had not consented, which amounted to a performance of the music or the authorisation of a performance thereof within s. 1 (2) of the Copyright Act, 1911, and, therefore, under s. 2 of the Act the defendants had infringed the plaintiffs' copyright.

Notes. The Copyright Act, 1911, ss. 1 and 2, were repealed by the Copyright Act, 1956; see now s. 2 (3) (c) of the Act of 1956.

Applied: *Ernest Turner Electrical Instruments, Ltd.* v. *Performing Right Society, Ltd.*, *Performing Right Society, Ltd.* v. *Gillette Industries, Ltd.*, [1943] 1 All E.R. 413. Referred to: *Mellor* v. *Australian Broadcasting Commission*, [1940] 2 All E.R. 20.

As to copyright and its infringement, see 8 HALSBURY'S LAWS (3rd Edn.) 424 et seq., and for cases see 13 DIGEST 204 et seq. For Copyright Act, 1911, see 4 HALSBURY'S STATUTES (2nd Edn.) 777, and for Copyright Act, 1956, see ibid., vol. 36, p. 67.

Cases referred to:

(1) *Buck* v. *Jewell-La Salle Realty Co.* (1931), 283 U.S. 191.

(2) *Messager* v. *British Broadcasting Co.*, [1927] 2 K.B. 543; 97 L.J.K.B. 65; 137 L.T. 810; 43 T.L.R. 818; Digest Supp.

Appeal by defendants from an order of MAUGHAM, J.

Sir Arthur Colefax, K.C., and *A. W. Griffiths* for the defendants.

S. O. Henn Collins, K.C., and *K. E. Shelley* for the plaintiffs.

The facts and arguments appear from the judgment of the Master of the Rolls.

LORD HANWORTH, M.R.—This appeal raises an important point. The action was brought by the Performing Right Society, who, it is conceded, have the sole right to perform in public certain musical works which are specified in the statement of claim. The allegation made by the plaintiffs was that on or about Oct. 1, 1932, the defendants infringed the said rights of the plaintiffs by performing in public at the George Hotel, Brighouse, Huddersfield, in Yorkshire, these three specified musical works, or by authorising such performance without the consent of the plaintiffs. The plaintiffs thereupon claimed that they were entitled to an injunction to restrain a repetition of the unauthorised performance of these musical works.

It appears that the defendants at this hotel at Brighouse have made it possible for certain persons staying at the hotel—who were at the hotel for the purpose of

A staying there and were not included in what might be called a domestic circle of any licence granted to a particular person, to hear a representation of the works specified in the statement of claim.

An agreement was entered into between the British Broadcasting Corporation and the plaintiffs for the purpose of permitting the corporation to broadcast certain of the works, the sole right to perform which was vested in the plaintiffs. That B agreement is dated Feb. 8, 1932. The plaintiffs granted to the corporation licence and authority

> "to perform or broadcast or cause or allow to be performed or broadcasted publicly at or from all or any of the corporation's broadcasting stations, studios, or other premises used by them for broadcasting purposes in Great Britain, C Northern Ireland, the Channel Islands, and the Isle of Man to which the public are not admitted on payment."

That is described as the licensed area. Then, secondly:

> "To perform for the purpose of broadcasting and to broadcast or cause or allow to be performed for the purpose of broadcasting and to broadcast publicly from any hall or public place at which a broadcast performance is given by the D direction or under the auspices and control of the corporation within the licensed area."

Thirdly:

> "To broadcast or cause or allow to be broadcast publicly from any hall, theatre or other place of public entertainment or public resort or from any hotel, E restaurant, concert room, café or the like at which the performances are not under the direction or the direct authority, management or control of the corporation but are by or under the direct authority, management or control of some other person, firm or company all or any of such musical works as at any time during the continuance of this licence are or may be included in the repertoire of the society and which the corporation may elect to perform for F the purpose of broadcasting within the licensed area."

MAUGHAM, J., pointed out:

> "It is not in dispute that according to the terms of that licence the document did not purport to authorise the British Broadcasting Corporation to broadcast the copyright musical works of the plaintiffs otherwise than by means of broadcasting for domestic and private use, and according to its terms the corporation G was not authorised itself to authorise people with receiving sets to employ their sets for the purpose of affording entertainment to the public generally."

I have referred to that in order to show what was the nexus between the plaintiffs and the British Broadcasting Corporation. Putting it quite shortly, the corporation could broadcast these musical works for the purpose of what I may call their customers, but it did not enable the corporation to stand in the shoes of the plain- H tiffs and to authorise a further transmission or performance of these musical works to persons other than those who were contemplated by the agreement of February, 1932, between the corporation and the plaintiffs.

There was a performance at the Hammersmith Cinema of these musical works and, as I understand, the British Broadcasting Corporation took advantage of that performance to transmit the musical sound of it to what I have called their I customers. One of the customers to which it was transmitted in the ordinary course was the owner, or the responsible person, at the George Hotel, Brighouse, Huddersfield. There was what I may call an installation there by means of a loudspeaker, whereby what was received at the George Hotel was made audible, not to what I will call the domestic circle of the George Hotel, but to all the persons who had come to the hotel and were at the hotel for the purpose of the amenities and comforts provided at the hotel. Without such an installation the general company of the hotel would not have had the opportunity or the advantage of hearing what had been broadcast from the Hammersmith Cinema to the George

Hotel. It was by means of this further installation that what had been derived from the Hammersmith Cinema was placed at the service of and for the entertainment of all the persons who were at the George Hotel.

It is said by the defendants that they have in no sense infringed the copyright which unquestionably belongs to the plaintiffs. They do not contest that, if what they did was wrong, the performance was a performance in public; but what they do say is that there was no performance at all for which they were responsible. They put it in this way. The only performance that took place was the one in the cinema at Hammersmith; anything that happened thereafter was merely an extension of that performance which had lent itself to potential and to actual hearing, and, inasmuch as the performance at the Hammersmith Cinema was authorised, there was nothing left over on which the plaintiffs could exercise the authority of their ownership. The performance once made in that way, and once broadcast, did not lend itself to a subsequent separate performance; there took place at the hotel merely a continuance of the original of that performance. Once the performance at the cinema had been authorised, the copyright in respect of that performance was exhausted. If it was asked of the hearers at the George Hotel: What did they hear? the answer would have to be: We heard the performance at the Hammersmith Cinema; and so, say the defendants, they heard what was an authorised performance, and the plaintiffs cannot now derogate from the permission which they gave, which was to cover, and did cover, the performance at the Hammersmith Cinema and its extension by the Broadcasting Corporation.

I turn now for a moment to the Act in which the rights of copyright are defined. A copyright is given to its owners in respect of musical works and literary works, and by s. 1 (2) copyright is declared to mean the sole right to produce or to reproduce the work or any substantial part thereof in any material form whatever, or to perform the work or any substantial part thereof in public, and it shall include the sole right to authorise any performance in public; so that there is placed in the hands of the owners of copyright the rights in respect of any performance in public and the right to authorise any such act as the performance in public. More than that, by s. 2, without further proof, if you have certain facts which bring you within s. 2, the copyright is to be deemed to be infringed; it is to be deemed to be infringed "by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright." In other words, if a person performs, or authorises the performance of, a musical work, he is deemed to infringe the right of the owner of the copyright unless he can prove that he has the assent of the owner of the copyright to the course which is taken. Section 35 defines performance as "any acoustic representation of a work . . . including such a representation made by means of any mechanical instrument."

Bearing those sections in mind, what did the defendants do? By certain acts which I have comprised in the word "installation," they made audible this performance at Hammersmith to a larger number of persons than would automatically have received it as part of the domestic circle of the George Hotel. It was at the volition of the management, it was at the instance of the management, that steps were taken to provide this entertainment to an increased number of persons. It appears to me that that act on the part of the management constituted on their part either a performance or the authorisation of a performance.

Maugham, J., in dealing with this, has put it in this way. It is a reproduction

> "and is not similar to the mere step of making distant sounds audible by some magnifying device. The sounds are produced by an instrument under the direct control of the hotel proprietor."

It seems to me, as it did to Maugham, J., that that act, done at the volition of the hotel proprietor, constituted an invasion of the rights of performance or the authorisation of performance, which are granted to the owner of the copyright by s. 1 and its subsections, and by virtue of s. 2 is to be deemed to be an infringement unless consent can be proved. That it was a performance seems clear, because it was an acoustic representation of a work.

I must, however, deal with the point that was insisted upon by counsel for the defendants, that the original consent to the performance at the cinema and the broadcasting of that performance at the cinema exhausted the rights of repression which belonged to the owner, and that all that was done by what I may call the unlicensed persons who received this performance was as if they had come forward as spectators to an existing performance such as I have suggested, as persons may gather round a spectacle which is provided at some watering place or well-known centre of holiday attraction. Junior counsel for the defendants, in an argument full of scientific detail, asked us to treat what happened in this case as if it was merely the extension of the voice of a singer if it was made to reach a much larger area by added mechanical means and energy. That illustration, to my mind, fails because in the present case it would not have been sufficient to render the performance audible to those who in fact listened, unless there had been set up in the hotel some further contrivance for the purpose of reaching the guests of the hotel. It is not, so to speak, that they merely looked in at the window at a peep-show which was for all and sundry to look at, but it was by the authority and at the instance of the proprietor of the hotel that further steps were taken to render an addition to the audience which was to be reached, and would have been reached by a singer with a strong voice or one who had had mechanical energy added to his voice. Counsel's argument may be taken to mean that the singer can, by means of these devices, cover an area of one hundred miles. Yes; but even so, it would not reach these particular listeners at the hotel. It was by reason of a further additional mechanical device that something more than one hundred miles was added to the area covered by the singer.

To my mind, the right view is presented in the words which are to be found in the judgment in the case in the United States of *Buck* v. *Jewell-La Salle Realty Co.* (1), in which it is said, at p. 201 of 283 United States Reports:

> "The guests of the hotel hear a reproduction brought about by the acts of the hotel in (i) installing, (ii) supplying electric current to, and (iii) operating the radio receiving set and loudspeakers. There is no difference in substance between the case where a hotel engages an orchestra to furnish the music and that where, by means of the radio set and loudspeakers here employed, it furnishes the same music for the same purpose. In each the music is produced by instrumentalities under its control."

The judgment of McCARDIE, J., in *Messager* v. *British Broadcasting Co.* (2) was to the same effect. He says this ([1927] 2 K.B. at p. 548):

> "It was by means of electrical instruments that the defendants, by modulating the waves in the ether, were able to affect, as they intended to affect, a vast number of electrical instruments possessed by members of the public and thereby to render audible to that public the performance given within the walls of the defendants' studio. In my view, however, the defendants, in doing what they did, clearly gave a public performance. Instead of gathering the public into a vast assembly room, they set in motion certain ether waves knowing that millions of receiving instruments in houses and flats were tuned to the waves sent forth, and knowing and intending also that acoustic representation of the opera would thereby be given to an enormous number of listeners. If I did not hold this to be a public performance by the defendants I should fail to recognise the substance and reality of the matter, and also the object and intent of the Copyright Act."

He was dealing there, of course, with the Broadcasting Corporation itself, but the words that he used are applicable to the acts which are done and which have the effect of incorporating into the audience a larger body of persons than would have been reached without that intervention.

Upon the question of consent there is no evidence that there was any consent on the part of the plaintiffs. There was a licence limited to certain and particular conditions, and it cannot be contended that the defendants had themselves received a right to authorise a performance, nor to make a fresh performance in public. The real point that the defendants make is that they merely took steps to intervene in a performance that was going on, a performance which was one and complete over the full distance covered, no matter how many people listened to it, whereas it appears to me, as it did to MAUGHAM, J., that there was an effective intervention of a separate kind by the defendants themselves which rendered it possible for the guests at the hotel to hear the performance. That was in itself a separate performance, or an authorisation of a performance which is prohibited by the terms of the Copyright Act. For these reasons, in addition to those given by MAUGHAM, J., the appeal must be dismissed, with costs.

LAWRENCE, L.J.—I agree; and, but for the argument addressed to this court by counsel for the defendants, I should have been content to have adopted as my own the judgment of MAUGHAM, J. However, in deference to those arguments, I will state in a few words my reasons for concurring with that judgment.

The question is whether the defendants, by putting their wireless receiving set into operation at their hotel in Yorkshire while the musical works in question were being performed at the cinema in Hammersmith, were themselves performing or authorising the performance of those works at their hotel. It is conceded that, if there was a performance of the works at the hotel, the performance was in public. By s. 35 of the Copyright Act, 1911, the term "performance" is defined as meaning "any acoustic representation of a work." The question, therefore, resolves itself into whether the defendants, by operating their wireless set, were causing an acoustic representation of the works to be given at their hotel. In my judgment, the answer given by MAUGHAM, J., to that question is correct. The wireless receiving set by means of which alone the sounds were produced at the hotel was owned by, and was under the control of, the defendants, who operated it for the purpose of giving to their customers at their hotel an acoustic representation of the musical works which were being performed at Hammersmith, and but for the wireless set being put into operation there would have been no acoustic representation of the works at the hotel at all. It is, therefore, in my judgment, right to say that the owner and operator of a receiving set causes an acoustic representation of any musical works which are being performed elsewhere to be given at the place where the receiving set is installed and thus is himself performing or authorising the performance of the musical works within the meaning of the Copyright Act of 1911. For these reasons I agree with the decision given in the court below.

ROMER, L.J.—I agree. There are two questions arising on the appeal. The first is: Did the defendants perform these musical compositions at the George Hotel in Huddersfield? In order to answer that question you must first find out what is the meaning of the word "perform." In my opinion, a man performs a musical composition when he causes it to be heard. Now it is said by counsel for the defendants that the person who caused these pieces to be heard at the George Hotel in Huddersfield was the person who sang the song at the cinema in Hammersmith. I disagree entirely. The man in the cinema at Hammersmith who sang the song caused it to be heard by any people who happened to be in the cinema and any people who were outside the cinema but near enough to hear him through the windows and doors; he in no way caused the people who were assembled in the George Hotel at Huddersfield to hear these musical compositions. That, in my opinion, was clearly done by the defendants.

They did it in this way. There was installed in the cinema by the British Broadcasting Corporation the necessary apparatus to enable them to utilise the sounds caused by the singer in the cinema for the purpose of creating vibrations, or waves, as they are, perhaps inaccurately, called, in the ether, and, by reason of the fact that the defendants had installed in the George Hotel a receiving apparatus, they were enabled thereby to utilise the waves in the ether caused by the British Broadcasting Corporation, for the purpose of producing vibrations of the air in the George Hotel which corresponded exactly to the waves in the air which had been created by the singer in the cinema. That was done by the defendants, who put into operation the apparatus in the George Hotel, and, as it is called, tuned in; it is not the vibration caused in the cinema that reaches the hotel in Huddersfield, it is that there is produced by the means I have mentioned in the hotel at Huddersfield vibrations which are precisely equal in frequency to those that are produced, and, as it turns out, almost simultaneously, in the cinema.

Counsel has invited us to treat this as a case in which the singer in the cinema has been endowed by recent discoveries with a stentorian voice which can reach Huddersfield. If we regarded him as the possessor of a voice reaching to Huddersfield, it must be remembered that the vibrations in the air only travel at about the rate of 1,000 ft. a second, and, if we treat Huddersfield as being 200 miles from London, it would take just over fifteen minutes for the sound to reach the George Hotel, whereas, inasmuch as the vibrations in the ether caused by the British Broadcasting Corporation travel at approximately the rate of 186,000 miles a second, by means of what the British Broadcasting Corporation have done, and by means of the receiving apparatus, the sound is heard in the George Hotel at about fifteen minutes before it otherwise would have arrived there, assuming the stentorian voice to be possessed by the singer. It has been said, and I have no doubt accurately, that such is the rate at which these waves travel that a listener-in in Australia to a concert will hear the songs sooner than a person will who is situated at the back of the hall, because of the difference in the rate at which the waves travel. In my opinion, it is reasonably clear in the circumstances that the music is caused to be heard in the George Hotel by the action of the defendants, and that it is not, in the sense in which I have used the word, caused by the action of the singer in the cinema. To what extent it may be caused by the action of the British Broadcasting Corporation themselves is a question which we need not consider.

The second question that arises on the appeal is: Have the plaintiffs consented to this performance by the defendants in the George Hotel? The fact that they consent to a performance by the singer in the cinema, even if it was a performance in public, is beside the mark when one once arrives at the conclusion that the performance of which complaint is made in this action was not a performance by the singer in the cinema. It is true that the British Broadcasting Corporation were granted a licence to broadcast, that is to say, to utilise the vibrations of the air for the purpose of causing these vibrations in the ether, and, inasmuch as it must have been known when that licence was given that the British Broadcasting Corporation were taking the licence for the purpose of enabling listeners-in to hear the music, it might be assumed that, but for an express provision in the licence, they had consented to the listeners-in hearing the music, that is to say, utilising their receiving apparatus for the purpose of producing the sounds in the places where the receiving apparatus was situated; but, as was pointed out by MAUGHAM, J., in the licence given to the British Broadcasting Corporation by the plaintiffs it is expressly provided that the licence

> "authorises and covers the audition or reception of copyright musical works within the repertoire for the time being of the society by means of broadcasting for domestic and private use only."

Therefore, the plaintiffs have never consented to a utilisation of the receiving apparatus for the purpose of causing this music to be heard, as admittedly in this case it was heard, by the public. For these reasons I agree that this appeal fails.

Appeal dismissed.

Solicitors: *Godden, Holme, & Ward*; *Syrett & Sons.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

LIDDIARD *v.* WALDRON

[COURT OF APPEAL (Scrutton, Lawrence, and Greer, L.JJ.), December 6, 7, 1933]

[Reported [1934] 1 K.B. 435; 103 L.J.K.B. 172; 150 L.T. 323; 50 T.L.R. 172]

Easement—Right of way—No express reservation in grant—No evidence justifying implication of grant—Implication of further grant after express reservation.

If a grantor of a tenement intends to reserve any right over that tenement, it is his duty to reserve it expressly in the grant.

Where there is an express reservation for one purpose the court should not imply any further reservation for another purpose unless it is driven to do so by the circumstances of the case.

The owner of land on which two houses had been built, at the back of which ran a paved path giving access to the gardens belonging to the houses, sold one of them to the defendant, but no mention was made in the conveyance of any right on the part of the owner or occupier of the adjoining house, who was the plaintiff, to use that path, except for one express purpose.

Held: as the conveyance contained no express reservation of the right of way claimed, and a reservation could not be implied on the evidence, the plaintiff's claim to a right of way over the path failed.

Thomas v. *Owen* (1) (1887), 20 Q.B.D. 225, distinguished.

Wheeldon v. *Burrows* (2) (1879), 12 Ch.D. 31, applied.

Notes. Referred to: *Re Webb, Sandom* v. *Webb*, [1951] 2 All E.R. 131.

As to the creation of easements, see 12 HALSBURY'S LAWS (3rd Edn.) 529 et seq., and as to rights of way see ibid. 569 et seq. For cases see 19 DIGEST 22 et seq. and 93 et seq.

Cases referred to:

(1) *Thomas* v. *Owen* (1887), 20 Q.B.D. 225; 57 L.J.Q.B. 198; 58 L.T. 162; 52 J.P. 516; 36 W.R. 440, C.A.; 19 Digest 34, *166*.

(2) *Wheeldon* v. *Burrows* (1879), 12 Ch.D. 31; 48 L.J.Ch. 853; 41 L.T. 327; 28 W.R. 196, C.A.; 19 Digest 45, *253*.

(3) *Aldridge* v. *Wright*, [1929] 2 K.B. 117; 98 L.J.K.B. 582; 141 L.T. 352, C.A.; Digest Supp.

(4) *Suffield* v. *Brown* (1864), 4 De G. J. & Sm. 185; 3 New Rep. 340; 33 L.J.Ch. 249; 9 L.T. 627; 10 Jur.N.S. 111; 12 W.R. 356; 46 E.R. 888, L.C.; 19 Digest 42, *226*.

(5) *Cory* v. *Davies*, [1923] 2 Ch. 95; 92 L.J.Ch. 261; 129 L.T. 208; 39 T.L.R. 268; 67 Sol. Jo. 517; 19 Digest 30, *139*.

Appeal from an order of a Divisional Court (TALBOT and MACNAGHTEN, JJ.).

The plaintiff, John Liddiard, as owner and occupier of No. 22, New Road, Chisledon, Wilts., claimed against the defendant, H. Waldron, as owner and occupier of No. 21, New Road, aforesaid, a declaration that he was entitled to a right of way over a paved path, the property of the defendant, for the purpose of access to the back of his house, and an injunction to protect his right to such access. The path in question ran between the two houses, Nos. 21 and 22, New Road. Those houses had been built in 1908 by a Miss Alford. In August, 1919, Miss Alford sold No. 21, including the path in question, to the defendant, and in the conveyance no mention was made of the right of way. In March, 1920, Miss Alford sold No. 22 to a Mr. Fox, who was the predecessor in title of the plaintiff. In this conveyance also no mention was made of the right of way. At first the occupier of No. 22 used the path without objection for all the ordinary purposes of a right of way, and it continued to be so used by successive occupiers until October, 1930, when the defendant closed up the path and prevented its further use, claiming that the land on which it lay was his absolute property. It was proved that the plaintiff and his predecessors had used the path in order to take coal to a shed at the back of the house, and that there was no other means of doing so except by taking it through the house. It was also proved that in 1921 Mr. Fox had obtained permission from the defendant to take coal and wood over the path. On these facts the plaintiff claimed the right to use the right of way on the ground of implied reservation. The Divisional Court held that no owner or occupier of that strip of land could hold it free from the right of the occupier of No. 22 to use the way, so as to frustrate the intention with which the original owner had laid out the land. The defendant appealed.

E. H. C. Wethered for the defendant.

Edward Terrell for the plaintiff.

SCRUTTON, L.J.—In the village of Chisledon, in Wiltshire, there is a terrace of five houses. The capital value of each house is said to be about £250. At the backs of two houses, Nos. 21 and 22, there is a paved way. The plaintiff is claiming an unlimited right of way from the back of No. 22 past the back of No. 21 into the road. He commenced proceedings in the county court. The county court judge decided against him. He appealed to the Divisional Court, and the Divisional Court decided in his favour. The other side then appealed to the Court of Appeal, who are going to decide in their favour. Counsel for the plaintiff, the unfortunate owner of No. 22, intimates an intention of considering whether he shall go to the House of Lords, and by the time this wretched dispute has been settled I should think that the entire capital value of both houses will be swallowed up by that very deserving profession of the lawyers. It is very regrettable.

I have come to the conclusion that the plaintiff has not proved his right of way against the defendant, and I think that because I find that the predecessor in title of the plaintiff conveyed No. 21 to the defendant in these terms:

> "All that messuage or tenement with the outbuildings and garden thereto situate and being in Chisledon aforesaid and known as No. 21 New Road, and now in the occupation of Mrs. Wirdnam, together with the user of the well on property belonging to one, James Howard, as theretofore enjoyed and also together with the right to go pass and re-pass over and along the path or way to the said well and also together with the right of drainage into and user of the cesspit with the house and premises adjoining belonging to Nelson James Chun Fox to hold all the said hereditaments and premises unto and to the use of the purchaser in fee simple subject nevertheless to the payment of a proportionate part of the expense in maintaining and keeping the said well and the path thereto in repair and also to the right of the owners and occupiers of the adjoining houses entitled thereto to go to pass and re-pass over and along the said path or way to and from the said well."

Reserving, as he did, to No. 22, and possibly the other houses in the row, the right to pass over the path into the lane, by which alone they could get to the said well, he did not reserve any general right to pass along the path for the purpose of getting into the high road. Counsel has argued, in spite of there being in a conveyance which contains express reservations no express reservation of the right he is claiming in this action, that on the facts there was, under the authorities, an implied reservation of a right to pass, apparently for all purposes, because there has been no limitation of the claim, over the path at the back of No. 21. I come to the conclusion on the facts of this case that the plaintiff has not proved his case, and I should be content to leave it there but for the fact that TALBOT, J., in a considered judgment, has come to the opposite conclusion, and, while I do not distinguish between judges, there is no judge from whom I would differ on a point of law with more reluctance and with more anxiety lest I should be wrong and he should be right, than TALBOT, J., and, therefore, I say a word or two to explain the conclusion to which I have come. I think my difference with TALBOT, J., turns upon my taking a different view of the facts from the view he takes. I had the advantage, or the disadvantage, of considering in *Aldridge* v. *Wright* (3) the law A applicable to this matter, and I came to a conclusion on the facts there, which is the same conclusion as I have come to in this case—that the evidence did not show any grant of a right to the premises which correspond with the premises No. 22 in this case.

In 1908 two friends, not jointly, erected a terrace of five houses. Miss Alford was going to erect two on her land and another person, whose name is immaterial, B was going to erect the other three; for convenience they built the five houses through one architect and one builder, and there is no doubt that as built by that one architect and that one builder there was, to use the language of the cases, a formed way along the backs of all five houses. There was a paved path running right along the backs of all five houses, and if one were to look at nothing else one would think that the builder had intended that the occupants of all five should be C able to walk behind each other's houses because there is a path formed for that purpose. But anyhow, that is not what Miss Alford intended, for she set up a barrier between her house, No. 22, and the next house, No. 23. I decline to go into what counsel invites me to consider as to the relation of Nos. 22, 23, 24 and 25; it seems to me to be absolutely irrelevant.

First, the question is: What is the position with regard to Nos. 21 and 22? D Each house was let to a weekly tenant, and I confess the idea of a weekly tenant wandering about with a series of easements when he can be got rid of at a week's notice seems to me the sort of thing of which the law will not take much notice, but there were two weekly tenants, one in each house, and they lived in peace and amity together from 1908 to 1918, Mr. Newman in No. 22 and Mrs. Wirdnam in No. 21. They did not quarrel with each other, and, being sensible people, no E objection was raised to Mr. Newman taking coal and dust over the path at the back of No. 21; but there is no evidence whatever as to what the terms of the weekly tenancy were, or to which weekly tenant came in first. There is no evidence whatever whether the user which in fact took place was the usual friendly user between people who live next door to each other on good terms, or whether it was a user claimed as of right and acquiesced in as being a right claimed. That F state of affairs goes on until 1919, when the present defendant buys No. 21 from Miss Alford, and he buys it under the conveyance that I have mentioned, a conveyance which expressly reserves to No. 22 two named rights and does not mention the right which is now claimed to a right of way for all purposes for No. 22 over the path at the back of No. 21 and out into the high road. The history after that is also striking. The then owner of No. 22, after the present defendant had G bought No. 21, went to him and asked for permission to use the path at the back of No. 21, and, being a careful person, he states the exact thing that he wants to do over the path. He wants to bring in his coals, he wants to take out his dust, he wants to take out a bicycle, and the climax of this group of easements is that he wants to take out a goat which apparently he was keeping in his back garden. Whether he wants to take it out for a walk or to tether it somewhere where it H would get more food than off the flowers in his back garden I do not know, but at any rate he asked for permission to use the path for a goat—permission which is quite contrary to a claim of right, a request for permission and granted as such. He left, and I suppose the goat left, too; the next owner who came into No. 22 was the second cousin of the owner of No. 21, and the same user went on between relatives, and it was not until 1930 or 1931 that the present plaintiff came. There I had been considerable friction because the previous owner had four children who used the path for all sorts of infantile purposes; they broke the gates and generally misbehaved themselves. The present plaintiff now claims a right of way for all purposes over the path at the back of No. 21, and the owner of No. 21, who has had this grant which did not expressly reserve any such right, objects.

The law, as I understand it, is this. Before the decision in *Wheeldon* v. *Burrows* (2), or, perhaps, I ought to say before the decision of LORD WESTBURY in *Suffield* v. *Brown* (4) in 1863, there were a number of conflicting authorities as to the circumstances in which an easement, continuous and apparent, or a continuous and apparent use of land belonging to the same owner, when a severance took place, would or would not continue to be a continuous and apparent use. The question came before Lord Westbury in *Suffield* v. *Brown* (4) at a time when there was considerable conflict in the authorities. In *Suffield* v. *Brown* (4) the facts were these. A man owned a large plot of land on which there was a dock and, adjoining it, a coal wharf; the dock was used by comparatively large ships, and large ships at that time used to have projecting bowsprits, and whenever the dock was used it was quite obvious to anybody coming there that the ships' bowsprits were sticking over the coal wharf. Presently there came a time when the owner of the whole of the land sold the coal wharf and granted to the purchaser the freehold of the coal wharf without any reference to the fact that the ships' bowsprits were in the habit of sticking out over it, not continuously because there was not always a ship in the dock. Then, apparently, the question arose: Has the owner of the dock any right over the coal wharf, any easement to allow the ships' bowsprits to stick over the coal wharf? Lord Westbury, reviewing all the previous cases, came to the conclusion that, as there was no express reservation of the right to have a bowsprit sticking over the coal wharf, the vendor had lost that right in spite of the fact that anybody seeing the premises at any time with a ship in them would have seen that the ship's bowsprit was sticking over the coal wharf. There was a question, owing to the previous conflict of cases, whether that decision was right, and the question came before the Court of Appeal in *Wheeldon* v. *Burrows* (2), where *Suffield* v. *Brown* (4) was discussed at great length, with a large number of other cases. The case itself relates to rights of light, and the facts have no particular relevance to the present case, but Thesiger, L.J., delivered the judgment of the court, and he stated two propositions which may be called the general rules governing cases of this kind. He said (12 Ch.D. at p. 49):

> "The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. . . . The second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case."

In going through all the cases he comes to *Suffield* v. *Brown* (4), and he says that that case was rightly decided.

The last edition of Gale on Easements (11th Edn.) refers to these cases at p. 166, and says this:

> "It was the opinion of Mr. Gale that, where two tenements had been connected by some apparent sign of servitude [such as the bowsprit, for instance] and there was a severance by the grant, whether of the quasi-dominant or of the quasi-servient tenement, an easement was by implication created in favour of the quasi-dominant property. Looking upon the quasi-easement as a quality added to the dominant close by the owner of both tenements, he held that this quality remained impressed upon it for the benefit of either grantee or grantor. And, in his view, the doctrine that both parties are equally bound to respect the disposition of the property derived additional weight from its coincidence with the analogous case of easements commonly called of necessity, which it is quite clear are equally implied in favour of both parties. He saw no reason why a purchaser should not exercise caution in ascertaining what easements his projected purchase is liable to in favour of his vendor as well as in favour of other adjoining owners. This opinion, which was shared by Mr. Willes [who was the editor of the 3rd Edn. of Gale] must now be considered to be overruled, the courts considering that the operation of the doctrine in

> question, on a sale of the quasi-servient tenement, is prevented by the principle that 'a man cannot derogate from his own grant,' "

except in certain very limited cases.

Counsel does not object to that statement in Gale, as I understand, but he says in this case there is something which comes within the exception which one of the judges has called the rule of *Thomas* v. *Owen* (1). In my view, that case turns entirely upon very special facts which do not exist in this case. The facts there are these. There was land belonging to Sir Richard Bulkeley, part of which before 1873 was let to a farmer on a yearly lease—he had a lease from year to year—and from that farm through the rest of Sir Richard Bulkeley's land there was an old lane with made hedges and fences all along its sides which passed through Sir Richard Bulkeley's land and was not and could not be used for any other purpose than going to the farm, of which the tenant had a lease from year to year. Sir Richard Bulkeley then granted a lease of the land through which the lane passed, by acreage, including the soil of the lane. That grant was made in 1873. Five years later he granted a longer lease than a year-to-year lease to the tenant of the original land who used the lane. For some reason which is not apparent the tenant who had his grant in 1873 claimed that he could stop the first tenant from using the lane because he said he had a grant from the landlord of a lease of all the land absolutely without mentioning any right or reservation to the tenant of the farm, who had the lane, to go over the land. The Court of Appeal decided that there must be a right on the part of the original farmer to go over the lane which led to his land, because otherwise Sir Richard Bulkeley, in granting the lease in 1873 to the servient tenement, would be derogating from his own grant. Fry, L.J., gave the judgment of the court, and, in my view, that judgment proceeds on the finding that there was a legal right in the first farmer, the tenant who originally had a year-to-year lease, to use that lane, and that since Sir Richard Bulkeley had granted the farm with that right attached to it, he could not derogate from his grant by granting the whole of the land through which the lane passed. Those are the facts in *Thomas* v. *Owen* (1), as I understand them, and that is the grant on which that case, on its own peculiar facts, was decided.

The only way in which counsel for the plaintiff, accepting the two statements I have read from Gale on Easements, can bring himself within *Thomas* v. *Owen* (1) is to say that in this case there was a legal right in 1922 which prevented the owner of No. 22 from granting No. 21 free from that right; and when one inquires what the right is it turns out to be an alleged right of way of the weekly tenant, who is supposed to have had the grant from his landlord, of a way for all purposes behind the premises of No. 21. I can find no evidence whatever of that right. The user from 1908 to 1919 is amply explained by permission and friendly use without any question of a claim of right. There was the right to use the path for certain purposes, namely, to go to the well; but that is not the right which is being claimed in this case, and the position seems to me to be exactly the same as it was in *Aldridge* v. *Wright* (3).

I am not going into the facts of that case; we went into them very carefully at the time, but the conclusion I came to in that case was that I saw no evidence of a claim of user as of right admitted or acquiesced in, and I said in my judgment ([1929] 2 K.B. at p. 124), stating what might be an exception to *Wheeldon* v. *Burrows* (2):

> "Another is where there is at the time of the severance a formed road, or formed drain, or watercourse, used before the severance as of right by the tenant under the grantor of the alleged dominant tenement, in which case, as I understand it, it is suggested that the grantor could not grant one set of premises so as to destroy the right of the tenant of another set of premises in respect of the premises he occupies over the premises so granted. There must be an implied reservation of an existing right."

A That is the position that I take in this case, and in doing that I differ from TALBOT, J., because he thinks he can find there was a claim as of right acquiesced in. I think, on the facts I have stated, any user is amply explained by permission being asked for it and by possible use, although we have very little evidence about the well, of the reserved right of going along the path to get to the well. In these circumstances, which I have only dealt with at length because if I ever differ from B TALBOT, J., I am anxious to explain why I do so, having the respect for him which I have indicated, I think the appeal in this case from the Divisional Court succeeds and that consequently the judgment of the county court judge must be restored, I regret to say with costs, because I think this case is an absolute misfortune for the people who are behind the lawyers in this case—that is, the unfortunate owners of Nos. 21 and 22.

C

LAWRENCE, L.J.—I agree. The judgment of the Divisional Court in this case was based upon the decision of this court in *Thomas* v. *Owen* (1). In my opinion, that case is not, as stated in the judgment appealed from, a governing authority for the decision in this case. In that case two well-established principles were considered by the Court of Appeal and applied (and that is where the difficulty lay) D to the very special facts there prevailing. No new principle was laid down. The two principles to which I refer are, first, that the grantor may not derogate from his grant, and, secondly, that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Therefore, the first question which the court had to consider in *Thomas* v. *Owen* (1) was: Had the grantor granted a right of way over the lane in question to his yearly tenant of E the quasi-dominant tenement at the time when he granted the lease to the tenant occupying the quasi-servient tenement?

The facts there were that the lane in question was a made road having turfed banks with a hedge on the top on both sides throughout its entire length. There was no communication on either side with the defendant's land, and it served no use for the defendant's farm except in so far as the tenant might graze his cattle F upon it. Its only visible purpose and reason for existence was to afford access from the high road to the plaintiff's farm. The plaintiff had been in occupation as yearly tenant for many years before he took his lease in 1878. The defendant had been in occupation of his tenement for many years before he took a lease in the year 1873. During the tenancies of both these parties the plaintiff alone had used the lane as a means of access to his farm and he had repaired it. He had never asked or G received permission from the defendant for that user nor had his predecessors in title. In 1873 the common owner of both farms granted a lease to the defendant of the farm which he had been occupying as yearly tenant, and the lease included the site of this road without making any mention of the right which his neighbour, the plaintiff, had to use it in connection with his property, nor reserving any right to the grantor to use that lane. In 1878 the common owner granted a lease to the H plaintiff of his farm with the appurtenances, which expression the Court of Appeal held was sufficient to include a right of way over this lane if it was then included in the yearly tenancy. The Court of Appeal came to the conclusion, on those very special facts, paying special regard to the fact that the lane was of no use to the defendant as a road and that it had been used and repaired exclusively by the plaintiff for very many years, that a reservation of the right of way ought to be I implied in the 1873 lease because the right had already been granted to the yearly tenant of the quasi-dominant tenement. That decision was a decision upon those special facts, and I do not understand the phrase "the principle of *Thomas* v. *Owen* (1)." The court did not purport to lay down any new principle. The first question which it decided was that on those special facts there was a grant to the plaintiff as yearly tenant of the right to use that road in connection with his farm, and then, dealing with the second established proposition, it was held that a reservation ought to be implied in the lease of the defendant in order to implement the grant which had already been made of the road in question to the plaintiff. I would further point out that the lease to the defendant in that case, unlike the grant in the present case, did not contain any reservation of another right of way, but a circumstance which enabled the court more readily to draw an inference that there was an implied reservation.

What are the facts here? They seem to me to be totally different and distinguishable. We find here, without going through them in any very great detail, that, whatever scheme there might have been when this terrace of five houses was originally built to have a back way common to all, that scheme was put an end to immediately by Miss Alford, the purchaser or the owner of the two houses, Nos. 21 and 22. She at once erected a fence across the back passage. Therefore, any scheme that there might have been in the minds of the architect and the builder that there should be a passage at the rear of the whole terrace for the use of all the occupants came to an end before it was in any way put into force. Then there remained this, that at the back of the two houses belonging to Miss Alford there was a passage which was paved in the same way as the backyards, with firebricks; it was not a passage that was, as in *Thomas* v. *Owen* (1), laid out for the purpose of No. 21 exclusively; it was open to No. 22, both from his back door and from his garden, and it was comprised in his holding—in other words, it served as much for the use of the owner of No. 22 as the owner of No. 21. Miss Alford let those houses to different tenants on weekly tenancies, and, curiously enough, although she was called as a witness, she was not asked and did not state whether she had granted to the tenant of No. 22 the right to go over the land of No. 21. I do not think it would have made much difference in this case if she had given such a right, because I cannot bring myself to believe that the rule as applied in *Thomas* v. *Owen* (1) could be applied in such a case as this, where there is only a weekly tenancy. But we have the fact that no evidence was given of any right conferred upon the weekly tenant of No. 22 to go over the land of No. 21. What was shown was that in fact the tenant of No. 22 went over the back of No. 21, and I can conceive many kinds of arrangements by which that fact was brought about. Miss Alford may have agreed with the tenant of No. 21—"so long as these houses are in my ownership you must submit to my tenant of No. 22 using the back way"—but all that is mere speculation.

There is one fact, however, which seems to me, in the circumstances of this case, to be quite conclusive. On the severance of the premises in 1919 or 1920 the conveyance of the tenement of No. 21 contained a reservation for the benefit of the adjoining owner of a right of way to a well, and that would be alone sufficient to explain the opening. There is a well-known rule that the court ought not to imply a further reservation unless it is driven to do so by the special circumstances of the case, such as occurred in *Cory* v. *Davies* (5); but here I find no reason whatsoever for inferring that Miss Alford, when she conveyed No. 21 to Mr. Waldron, intended to reserve to herself, as owner of No. 22, any right of way except the right to go across the land for the purpose of reaching the well. She, apparently, granted no such right to Mr. Fox when he bought No. 22, as he asked permission to use the passage from the defendant. It is common ground that the right in connection with the well has been extinguished by reason of the well having been closed by the local authorities for sanitary reasons, and, of course, that is not the right of way which is now being claimed.

In those circumstances it seems to me that *Thomas* v. *Owen* (1), upon which the Divisional Court founded itself, is not an authority governing the present case, and except for that case I do not think it is suggested that in this case there is any ground for making any exception to the rule established by *Wheeldon* v. *Burrows* (2). We are not dealing here with a case where there are interdependent easements, nor are we dealing with a case of contemporaneous conveyances; it is a simple case of an owner of two houses adjoining one another selling the one without reserving to herself any right except for one specified purpose, to go over the property which she has sold.

For these reasons I agree that this appeal succeeds and should be allowed.

GREER, L.J.—I am of the same opinion, and I would have said nothing more but for the fact that we are differing from the decision of the Divisional Court.

I have read the evidence in the county court, the learned county court judge's judgment, the judgment of the Divisional Court, and I have re-considered all the cases that this court dealt with in *Aldridge* v. *Wright* (3).

The sheet anchor of counsel's justifiably persistent argument in support of the judgment given below is *Thomas* v. *Owen* (1). This court had the opportunity in *Aldridge* v. *Wright* (3) of considering a large number of decisions that had to deal with similar questions to that which is involved in this case, and I, being then rather young in the work of the Court of Appeal, had the temerity to do what one learned judge said he was not ambitious enough to do, namely, try to collect and put together the exceptions which had been established to the rule laid down in *Wheeldon* v. *Burrows* (2). As I understand it, the rule in *Wheeldon* v. *Burrows* (2) is this: It is easy to imply into a grant, when there are no words in the grant, the grant of what has been enjoyed as an apparent and continuous easement, but it is impossible to imply reservations, even of apparent and continuous easements, by the grantor, in the grantor's own favour, because that would amount to a derogation from his grant. But the courts have been faced with the question whether in some cases there are exceptional circumstances which justify departure from that rule, and one of these cases where the exception was established is *Thomas* v. *Owen* (1), and I ventured to summarise the effect of it in these words ([1929] 2 K.B. at p. 130):

> "If the owner of two adjoining properties, A and B, grants to the tenant of A a tenancy from year to year with a right of way during his tenancy over B, and subsequently leases B, the lease of B is subject to a reservation of the right of way which has ex hypothesi been granted to the tenant of A if it is shown that the lessee of B was aware of a long-continued exercise of the right by the tenant of A."

I am still of the opinion that that is a correct summary of the decision in *Thomas* v. *Owen* (1), because that case related to the position as between the grantees of two adjoining farms, each grantee having been for a long time the tenant from year to year of his particular farm, and the grantee who was claiming the right to exclude the grantor's subsequent lessee from the right of way had known for many years of the continuous exercise of the right which it was alleged must be treated as being reserved. The case is only an illustration of the proposition, of which there may be many in the decisions, that a man cannot grant to A what he has already given to B, and therefore in order to give effect to what he has already given to B, if the grantee knows the facts, there must be assumed by implication an implied reservation of that which would enable him to perform his obligations to his tenant under his existing lease. I agree with my Lords that the facts of that case have no application to the facts of the present case, especially having regard to the fact, which I understand is conceded, that if the case turns on which of the two properties was first let, then the evidence shows that the property that was first let to a weekly tenant was No. 21 and not No. 22.

For these reasons I agree that this appeal should be allowed, with costs. I again express my regret that two people who have to live in adjoining houses cannot come to some sensible agreement as to the user of this passage which is limited to that which is convenient and legitimate to both and excludes from it that which is inconvenient and troublesome to the tenant of No. 21.

Appeal allowed.

Solicitors: *Pennington & Son*, for *Lemon & Humphreys*, Swindon; *Church, Adams, Tatham & Co.*, for *Withy & Pooley*, Swindon.

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

Re RAGDALE. PUBLIC TRUSTEE *v.* TUFFILL AND OTHERS

[CHANCERY DIVISION (Farwell, J.), December 20, 1933]

[Reported [1934] Ch. 352; 103 L.J.Ch. 181; 150 L.T. 459; 50 T.L.R. 159; 78 Sol. Jo. 48]

Will—Construction against intestacy—Gift over after death of survivor of life tenants.

A testator gave the residue of his estate upon trust for payment of one-half of the net income to R., and of the other half thereof to T., and "from and after their decease" to pay the principal as well as the income to a charity. R. predeceased the testator.

Held: the will should be construed so as to exclude an intestacy unless the language necessarily led to that result; on its true construction, the gift over to the charity did not take effect until after the deaths of both R. and T.; and, therefore, T. was entitled to the whole income of the fund for life.

Notes. Considered: *Re Riall, Westminster Bank* v. *Harrison*, [1939] 3 All E.R. 657; *Re Foster, Coomber* v. *Hospital for the Maintenance and Education of Exposed and Deserted Children* (*Governors and Guardians*), [1946] 1 All E.R. 333. Referred to: *Re Pringle, Baker* v. *Matheson*, [1946] 1 All E.R. 88.

As to implying gifts in wills, see 34 HALSBURY'S LAWS (2nd Edn.) 427 et seq., and for cases see 44 DIGEST 563–569, 1250 et seq.

Adjourned Summons.

The following statement of facts is taken from the judgment of FARWELL, J.:

The testator died on March 31, 1933, having made his will on March 11, 1930. The will has the merit of brevity, but it raises a curious question of construction which is not free from difficulty. After appointing the Public Trustee his sole executor and trustee and providing for certain legacies the will continued:

> "All the rest residue and remainder of my estate of whatsoever nature or kind the same may be and wheresoever situate I give to my trustee upon trust to sell and convert all such parts thereof as do not already consist of money into money and invest the same in and upon such stocks funds and securities as are authorised for trust funds in trust to pay one-half of the nett income interest or dividends arising therefrom to my sister-in-law Rose Thornton Ragdale for her life and the remaining half of the nett income interest or dividends to my cousin Florence Tuffill for her life and from and after their decease to pay the principal as well as the income to King Edward the VII's Hospital Fund for London."

The sister-in-law, Mrs. Ragdale, died in the lifetime of the testator, so that the gift to her does not take effect. The estate is not a large one. The language of the will is capable of three possible constructions. First of all, it is said on behalf of Florence Tuffill that in the events which have happened she is entitled to the whole of the income although in terms she gets only half thereof; I am asked to imply in the events which happened a gift to her of the whole. On behalf of the next-of-kin it is said that the gift over to the hospital does not take effect till the death of both ladies, that there is nothing in the will from which I can imply a gift of the half-share of income to the survivor, and, there being no effective distribution of the half-share of the income, it should go to the next-of-kin as on an intestacy. On behalf of the Hospital Fund it is said that each of the ladies is to take a half-share in the income and no more, and there is no implication to be drawn in favour of survivorship; I am asked to read the words "from and after their decease" as "from and after their respective decease," and to say that in the circumstances the half-share of the income goes at once to the Hospital Fund.

Henry Johnstone for the Public Trustee.
Vernon for Florence Tuffill.
Richmount for the next-of-kin.
Greenland for the Hospital Fund.

FARWELL, J. [after stating the facts:] It is not easy to ascertain from the language used in the will and in the events which have happened what course is the correct one to follow. I am not entitled to speculate on what the testator might have intended. I have to construe the will on the language used and ascertain the intention from that language. Taking the will as a whole, I come to the conclusion that I ought to exclude that construction which will result in an intestacy unless the language necessarily leads to that result. I think I can find in the language of the will two possible alternatives: one in favour of the Hospital Fund to take immediately; the other that the survivor of the ladies takes the disputed half-share of the income for her life. On the one side, if I prefer the Hospital Fund I have to read "after their decease" as "after their respective deaths"; on the other, I have to read into the will that which is not in the will. In my opinion, on the true interpretation of the will, the testator did not intend that the Hospital Fund should take till both ladies were dead, and so I cannot read "after their decease" as "after their respective decease." Looking to all the terms of the will I come to the conclusion that the Hospital Fund does not take until the death of Florence Tuffill and that Florence Tuffill is entitled to the disputed half-share of the income for her life, and I so declare.

Solicitors: *Wm. Bird*; *W. H. Mason & Son*; *Freshfields, Leese, & Munns.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

LONDON AND NORTH-EASTERN RAIL. CO. *v.* BRENTNALL

[HOUSE OF LORDS (Lord Buckmaster, Lord Warrington, Lord Tomlin, Lord Russell and Lord Wright), February 2, 1933]

[Reported [1933] A.C. 489; 102 L.J.K.B. 438; 148 L.T. 530; 49 T.L.R. 229; 77 Sol. Jo. 116; 26 B.W.C.C. 225]

Workmen's Compensation—"Arising out of and in the course of employment"—Accident at workman's hostel—Attendance at hostel between periods of work compulsory—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 1 (1).

A railway company provided a hostel for the use of any employee who was not able to return home between periods of work. Such an employee was bound to go to the hostel to take the rest which it was essential he should have for the proper conduct of his work. The respondent workman, who was an engine driver, after booking off, was walking down an asphalt slope, part of the premises of the hostel, when he slipped and fell whereby he suffered injury.

Held: the accident arose out of and in the course of the workman's employment, and, therefore, he was entitled to compensation.

Notes. The Workmen's Compensation Act, 1925, was repealed by the National Insurance (Industrial Injuries) Act, 1946, which prescribes a system of insurance against injuries caused by industrial accidents, but s. 1 (1) of the latter Act provides that the insurance shall be "against personal injury caused . . . by accident arising out of and in the course of" employment, thus adopting the wording of s. 1 (1) of the Act of 1925. See also s. 7 (1).

Considered: *Dunning* v. *Binding* (*No. 2*) (1932), 148 L.T. 378. Distinguished: *Lucas* v. *Postmaster-General*, [1939] 3 All E.R. 660. Considered: *Weaver* v. *Tredegar Iron and Coal Co.*, [1940] 3 All E.R. 151. Referred to: *Gaskell* v. *St. Helen's Colliery Co.*, [1934] All E.R. Rep. 633; *Alderman* v. *Great Western Rail. Co.*, [1937] 2 All E.R. 408.

As to "accidents" within the Workmen's Compensation Acts, see 34 Halsbury's Laws (2nd Edn.) 816 et seq., and for cases see 34 Digest 266 et seq. For National Insurance (Industrial Injuries) Act, 1946, see 16 Halsbury's Statutes (2nd Edn.) 797.

Case referred to:

(1) *St. Helen's Colliery Co., Ltd.* v. *Hewitson*, [1924] A.C. 59; 93 L.J.K.B. 177; 130 L.T. 291; 40 T.L.R. 125; 68 Sol. Jo. 163; 16 B.W.C.C. 230; 34 Digest 280, *2364*.

Appeal by the employers from an order of the Court of Appeal (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), affirming an award made by His Honour Judge Greene, K.C., at Sheffield County Court in an arbitration under the Workmen's Compensation Act, 1925, in favour of the respondent workman.

J. E. Singleton, K.C., and *Gilbert J. Paull* for the appellants.

W. Shakespeare and *G. Raymond Hinchliffe* for the respondent were not called upon to argue.

LORD BUCKMASTER.—This is an appeal from the Court of Appeal, who have affirmed an award made by the learned county court judge, sitting as an arbitrator, in a dispute between the London and North-Eastern Rail. Co. and a man named James Herbert Brentnall, who was an engine driver in their service. The question is the old one arising under the Workmen's Compensation Act: Was Brentnall injured by reason of an accident that arose out of and in the course of his employment with the appellant company?

The facts of the matter are these. The engine driver was engaged by the appellants to drive an engine from Woodford Halse, where he lived, to Sheffield, and back again. He was under an obligation, as has been found by the county court judge, in the intervals between his journeys, to go and stay at the hostel, which had been provided by the appellant company for the use of their men. He was bound not only to go there, but the county court judge finds as a fact that if when he was there he was not taking proper rest it became the duty of the caretaker of the hostel to let the people in the locomotive shed know of the fact. Subject to this he was free to go where he pleased. On April 16, 1931, Brentnall left Woodford Halse at 12.40 a.m. and took the 1.30 a.m. train to Sheffield. He reached Sheffield at seven in the morning. He booked off at five minutes past nine and walked to the hostel in Sheffield, which the appellants had provided, at a place called Wallace Road, about fifteen minutes' walk away from the station. After arriving at the hostel at 9.45, on his way to the lavatory he slipped and injured himself. It is satisfactory to know that the injury was not serious, and the claim is merely for damages from April 16 to May 6. The amount involved is very small, but the House will, no doubt, accept the statement of the railway company that it is not the amount that is in dispute that has caused them to appeal in this case, but their anxiety to try to secure some definite decision as to what is the true extent of their liability in cases such as the present.

I am afraid that it would be impossible to give them any ruling that would extend beyond the special facts and circumstances of this case. It is not, in my opinion, a prudent course to attempt in a case of this kind to lay down general principles which may in the end be said to apply to matters that were not within the contemplation of the judge who is attempting to enunciate the doctrine. In my opinion, this matter falls to be determined by a very simple consideration. This man, as part of his contract of service, was bound to go to this hostel—that is the clear conclusion of the learned county court judge—and he was bound to go to the hostel for a particular purpose, the purpose of obtaining rest, and, indeed, it was essential for the proper conduct of his work that he should have rest during the day, for he had to take the train back again at 7.40 at night from Sheffield to Woodford Halse. From the time that he left Woodford Halse in the morning, certainly until the time when he returned at night, and, for all I know, for a longer period—but the actual contract of service is not before us—he was in the employment of the railway company, and, as part of the terms of his contract of service, on the spot where the accident occurred. Now it is said that, none the less, the accident did not arise out of and in the course of his employment. That it arose out of his employment, upon the facts as I have stated them, seems to me to be indisputable. It was also in the course of his employment, if due weight is given to the circumstances, to which I have already referred, namely, that it was part of his employment that he should go to this place in order that he might obtain adequate rest between his two journeys.

I have grave doubts whether the citation of other cases is of great assistance in determining these matters, but it may at least be observed that in *St. Helens Colliery Co., Ltd.* v. *Hewitson* (1) LORD WRENBURY made quite clear that there was all the difference between the thing which a man, by virtue of his contract of service, had the right to do and that which, by virtue of his contract of service, he was compelled to do. In that case a man had the advantage, by reason of his contract of service, of using a particular train to get to and from his work. While using that train an accident occurred, and it was held that the accident, occurring in the use of the train, was not one that arose out of and in the course of his employment, because he was free either to take the train or to leave it; but had he been bound to take the train there could have been no doubt as to what the conclusion of the House would have been. I find it very difficult indeed to distinguish between the case where a man is compelled to take a particular means of going to his work, and a case where a man is compelled to go to a particular place where he has to rest between the different spells of his work, and I cannot help thinking that, if authority were required, *St. Helens Colliery Co., Ltd.* v. *Hewitson* (1) is sufficient for the purpose. I do not think it profitable to examine the extent to which domestic servants might in one case or another be entitled to recover for injuries that arose while their term of service was on foot. It is wiser to confine each case to the particular circumstances in which it arises, and if I were asked to select the judgment in this case which most commended itself, to my mind, it would be the brief judgment of ROMER, L.J. In my opinion, this appeal fails and should be dismissed.

LORD WARRINGTON.—I agree.

LORD TOMLIN.—I concur.

LORD RUSSELL.—I concur.

LORD WRIGHT.—I also agree.

Appeal dismissed.

Solicitors: *I. B. Pritchard*; *Pattinson & Brewer.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

HARTE *v.* WILLIAMS

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Lawrence, JJ.), November 1, 1933]

[Reported [1934] 1 K.B. 201; 103 L.J.K.B. 108; 150 L.T. 238; 30 Cox C.C. 57]

Solicitor—Unqualified person preparing instrument—Estate agent—"Agreement under hand"—Instrument relating to real estate—Void lease—Omission of seal—Stamp Act, 1891 (54 *&* 55 *Vict.*, *c.* 39), *s.* 44.

An estate agent, who had none of the legal qualifications named in the Stamp Act, 1891, adapted a printed form of lease published by the Solicitors' Law Stationery Society, Ltd., and filled in the names of the parties, parcels, term, and rent. He caused to be made one copy and two engrossments of the document, which was in the form of a full repairing lease for a long term. References to the seal in the testatum and attestation clause were omitted, and the document bore no seal. It was signed by the lessor under hand, a counterpart being signed by the lessee. Subsequently, an account was delivered to the lessee containing items for "preparing copy lease" and "stamping lease and counterpart." The document did not in fact bear any stamp denoting compliance with the requirements of s. 28 of the Finance Act, 1931.

Held (LAWRENCE, J., dissenting): an instrument which purported to be a lease was not to be regarded as an instrument under hand only, and, as such, excluded from the operation of s. 44 of the Stamp Act, 1891, merely because it was not in fact a valid lease, and, therefore, the estate agent had committed an offence under s. 44 in having prepared the document without being possessed of the necessary qualifications.

Notes. Section 44 of the Stamp Act, 1891, was repealed by the Solicitors Act, 1932, but was reproduced in s. 47 of the latter Act. Section 47 was subsequently amended by the Solicitors Act, 1941, s. 23 (1), which placed on the defendant the onus of proving that what he did was not done for or in expectation of any fee, gain or reward. The Solicitors Act, 1932, is repealed by the Solicitors Act, 1957, s. 20 of which re-enacts s. 47 of the 1932 Act, as subsequently amended. Section 60 of the Finance Act, 1921, was repealed by the Act of 1932, its effect being included in s. 47.

Applied: *Kushner* v. *Law Society*, [1952] 1 All E.R. 404.

As to unqualified persons acting as solicitors, see 31 HALSBURY'S LAWS (2nd Edn.) 312 et seq., and for cases see 42 DIGEST 411 et seq. For Solicitors Acts, 1932, 1941, and 1949, see 24 HALSBURY'S STATUTES, 16, 95, 112; and for Solicitors Act, 1957, see ibid., vol. 37.

Case referred to:

(1) *Taylor* v. *Crowland Gas and Coke Co.* (1854), 10 Exch. 293; 23 L.J.Ex. 254; 23 L.T.O.S. 194; 18 Jur. 913; 2 W.R. 563; 2 C.L.R. 1247; 156 E.R. 455; 12 Digest (Repl.) 306, *2347*.

Case Stated by justices for the borough of Hastings.

The appellant, Richard Harte, was charged on the information of the respondent, as solicitor for and on behalf of the Law Society, for that he

> "not being duly qualified did unlawfully either directly or indirectly for or in expectation of a fee given or received draw or prepare an instrument relating to real estate, to wit, a lease dated Sept. 27, 1932, and made between Rosa Harte (married woman), of the one part, and Frederick John Miles, of the other part, of certain property known as 12, High Street, in the said borough, contrary to s. 44 of the Stamp Act, 1891, and s. 60 of the Finance Act, 1921."

At the hearing of the information it was proved that: (i) The appellant held none of the legal qualifications named in the Stamp Act, but carried on business as an estate agent. (ii) In or about August, 1932, the appellant negotiated on behalf of his wife, the owner, with one Miles, a lease for twenty-one years of 12, High Street, Hastings. (iii) On or about Aug. 27, 1932, the appellant volunteered to prepare the lease so as to save the solicitor's fee and said that he was entitled to do that. (iv) The appellant adapted a printed form of lease published by the Solicitors' Law Stationery Society, Ltd., and filled in the names of the parties, parcels, term, and rent, and caused a typewriting agency to make one copy and two engrossments of this document which was in the form of a full repairing lease for a long term. He directed the typist to omit the reference to a seal in the testatum and attestation clause and put on no seal. (v) On Oct. 6, 1932, Miles signed a counterpart, and on that occasion the appellant stated that he had saved Miles six or seven guineas solicitors' fees. (vi) In this form the document was signed by Rosa Harte, the lessor, under hand. It was handed by the appellant to Miles as the lease of the premises. (vii) The appellant admitted in evidence that he expressly omitted any seal because he was aware that he could not charge for preparing a deed. (viii) The appellant had volunteered to have the lease properly stamped. The document did not in fact bear any stamp denoting that the requirements of s. 28 of the Finance Act, 1931, had been complied with. The appellant had no knowledge of the section, and, therefore, had taken no steps to comply with its provisions. Consequently, by s. 28 (4) of the Act, the document was deemed not to have been duly stamped and could not be used as evidence in any civil proceeding. (ix) The appellant, on Dec. 7, 1932, delivered to the tenant an account containing (inter alia) an item "Preparing copy lease, £1 5s.; stamping lease and counterpart, £1." Miles had not asked for a copy of the lease, nor had the question of a copy been mentioned at any time and (save as hereinafter mentioned) none was supplied. The appellant explained the charge by producing an account which he alleged related to the typing of the document signed by Mrs. Harte, the counterpart signed by Miles, and a copy. This account did not amount to more than 12s. 3d. He also alleged that the paper parchment on which these were typed cost 1s. or 1s. 3d. each, and that there were three of them. As to the balance, he said that he had all the trouble of the matter and there were the running expenses of the office. In fact a copy would not cost more than 5s., and the justices came to the conclusion that the charge was made by the appellant for the purpose of obtaining some recompense for his trouble in preparing the lease of the premises and was made in the form in which it was in order to conceal the fact that he was making a charge for preparing the instrument. On Jan. 23, 1933, after disputes had arisen between the parties, what purported to be a copy of the document was sent by the solicitors of Mrs. Harte to the solicitors of Miles, and was returned on the ground that no copy had been asked for. In fact it was not a copy, as the document signed by Mrs. Harte was witnessed by one H. W. Clayton and the purported copy showed that the appellant was the witness. Miles repudiated the charge and the sum had not been paid to the appellant.

It was contended on behalf of the appellant (a) that the document in question, though void in law and having no legal effect as a lease under the Real Property Act, 1845 (now s. 52 of the Law of Property Act, 1925), was good and had equitable effect as an agreement for a lease; (b) that, being in fact an "agreement under hand only," it was expressly excluded from the operation of the Stamp Act, 1891, by s. 44 (2), and was, accordingly, not an "instrument" within the meaning of that section; and that the statute having specially defined the word "instrument," the word permitted of no inconsistent interpretation; (c) that, even if it were in law such an instrument, what the appellant really intended to charge for amounted to no more than making engrossments of a document which was in substance drawn and prepared by the Solicitors' Law Stationery Society, Ltd., and as such exempt under s. 44 (1) (b); and that the appellant was entitled to draw or prepare even a deed so long as he did not expect to make a profit from doing so, and it had not been shown that he did expect to make a profit on drawing or preparing.

For the respondent it was argued: (a) That s. 44 (1) of the Stamp Act, 1891, prohibited any person not being qualified as therein stated from drawing or preparing any instrument relating to real or personal estate for or in expectation A of any fee, gain, or reward, and that on the facts hereinbefore stated and proved the defendant had prepared such an instrument for or in expectation of a fee. (b) That it was for the defendant to show that he was within any of the exceptions, and that he had not done so. (c) That he was not a person employed merely to engross the instrument. (d) That the instrument was not an agreement under hand only but a void lease. (e) That the circumstances that a void lease might operate B (if at all) under the principles of equity did not make it an agreement under hand only. (f) That an agreement under hand only meant an instrument valid and intended to operate in law as such.

The justices, being of opinion that the document was an instrument within the meaning of the Act, notwithstanding proviso 2 (b), and that it was not an engrossment within proviso 1 (b) of the Act, convicted the appellant. They fined him C £10 and ordered him to pay £7 7s. costs. The question upon which the decision of the court was desired was whether the justices upon the above statement of facts came to a correct decision in point of law.

By the Stamp Act, 1891, s. 44:

> "Every person who (not being a barrister, or a duly certified solicitor, law D agent, writer to the signet, notary public, conveyancer, special pleader, or draftsman in equity) either directly or indirectly, for or in expectation of any fee, gain, or reward, draws or prepares any instrument relating to real or personal estate, or any proceeding in law or equity, shall incur a fine of £50. Provided as follows . . . (2) The expression 'instrument' in this section does not include . . . (b) an agreement under hand only."

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By the Finance Act, 1921, s. 60, a fine incurred under the above section is now recoverable summarily.

Dutton Briant for the appellant.

Roland Burrows, K.C., and *Alan Bell* for the respondent.

LAWRENCE, J.—As I have the misfortune to differ from my brother judges in F this case, it is for me to deliver the first judgment.

This is a question which arises upon the construction of s. 44 of the Stamp Act, 1891. The question is whether the appellant, in drawing and preparing a document, which is called a lease, for or in expectation of a fee, gain, or reward, was preparing that instrument relating to real or personal estate within the meaning of s. 44. In my judgment, he was not. The statute is a penal statute interfering G with the liberty of the subject. The onus of establishing that he was drawing or preparing an instrument within that section clearly was upon the prosecution. We have not got to consider any question of fraud or false pretences or anything of that sort; it is simply a question whether the appellant was brought within the words of the penal statute. In order to arrive at the true construction of the statute, it is necessary to read the main part of the section with proviso (2), which H is in these terms:

> "The expression 'instrument' in this section does not include an agreement under hand only."

Thus the offence is drawing or preparing an instrument relating to real estate not including agreements under hand only. It is not an offence to draw or prepare an agreement relating to real estate if that instrument is an agreement under hand I only. Those words, "an agreement under hand only," seem to me clearly to refer to the two categories which I think exhaust the genus of agreement, namely, agreements under seal and agreements under hand only. The instrument in this case was designedly drawn without seal, and, in my view, it falls into the category of agreements under hand only. AVORY, J., referred during the course of the argument to the word "delivered," which occurs at the end of the instrument, but no reference to that word was made by counsel for the respondent in his argument, and I do not think that its presence in the instrument prevents the instrument

A being an agreement under hand only. I do not think the fact that the instrument was called a lease makes any difference, I do not think it makes any difference whether it is called a lease or a conveyance, or whether any other name is given to it. It is, undoubtedly, an instrument relating to land, and the only question is whether it is an agreement under hand only, which I hold it is. It is said that this avoids the mischief at which the statute aims, but, in my view, it is highly B unlikely that anyone would find it profitable employment to draw instruments of this sort, which are void. Void leases or void conveyances, although they may be enforceable in equity, have not the same force as the valid document which they purport to be. I think, therefore, that the mischief at which the statute aims will not be fostered by the construction which I put upon the Act, but, even if it were, I should still be compelled to give to a penal statute the construction which, in C my opinion, it naturally bears.

For these reasons I think that the question which is put to us ought to be answered in the negative, and that the justices ought to be directed that the appellant was entitled to be acquitted.

AVORY, J.—In my opinion, the justices were right in holding that the document D in question was an instrument within the meaning of the Act, notwithstanding proviso (2) (b), and, accordingly, were justified in convicting the appellant of the offence set out in the information, namely, that he

> "did unlawfully either directly or indirectly for or in expectation of a fee given or received draw or prepare an instrument relating to real estate, to wit, E a lease dated Sept. 27, 1932."

To get rid of one point which has been made by counsel for the appellant, let me say that I do not assent to his proposition that the words "to wit, a lease dated Sept. 27, 1932," in this information mean a valid lease. Counsel argued that, in order to support this information, it was necessary on those words to prove that the appellant had prepared a valid lease. In my opinion, the words "to wit, a F lease dated Sept. 27, 1932," merely mean, to wit, a document purporting to be a lease dated Sept. 27, 1932. Indeed, an illustration given by my Lord during the argument shows that that is the real meaning of the words. Suppose a man is charged with forging a note of the Bank of England, to wit, a £5 note. That does not mean that it is a genuine £5 note; it only means that it is a note purporting to be a £5 note of the Bank of England.

G I think it is now necessary to look at the facts which are found in this case in order to see whether the offence under s. 44 has been committed. The case finds that in August, 1932, the appellant negotiated on behalf of his wife, who was the owner, with one Miles a lease for twenty-one years of No. 12, High Street, Hastings; that on or about Aug. 27, 1932, the appellant volunteered to prepare the lease so as to save the solicitor's fee, and said that he was entitled to do that; H that he thereupon adapted a printed form of lease, which was in the form of a full repairing lease for a long term, but directed the typist to omit the reference to a seal in the testatum and attestation clauses, and to put on no seal, and the appellant stated that in doing what he had done he had saved Miles, the lessee, six or seven guineas solicitor's fees. The document was handed by the appellant to Miles as the lease of the premises, and the appellant admitted in evidence that he I expressly omitted any seal because he was aware that he could not charge for preparing a deed. He had volunteered to have the lease properly stamped.

On that set of facts, the question is: Did he, within the meaning of s. 44 of this Act of Parliament, "for or in expectation of any fee, gain, or reward, draw or prepare any instrument"—which means any document in writing—"relating to real or personal estate," which was not within the meaning of the proviso an agreement under hand only. In construing this section I have no doubt that we ought to adopt the words of BARON PARKE in *Taylor* v. *Crowland Gas and Coke Co.* (1), where he said, dealing with a statute which was in almost identical terms:

> "Now looking at the statute, I am of opinion that the object of the legislature was to confine the practice of drawing the instruments therein specified to a certain class supposed to have a competent knowledge of the subject, and to protect the public against mistakes of inexperienced persons in matters of this kind; and with that view, the legislature has prohibited these acts being done except by a particular class of persons."

I would only add to that, that, in my opinion, the object is not only to protect the public against the mistakes of inexperienced persons, but a fortiori to protect the public against the wilful acts of inexperienced persons who know that they are committing a breach of the law and are seeking to avoid the consequences.

The argument of counsel for the appellant seems to me to involve reading into s. 44 the word "valid," which does not occur there at all. He contends that the offence is committed only when a person for fee or reward draws or prepares a valid instrument relating to real or personal property, and that, though the appellant here was drawing a document which purported to be a lease, which he represented to be a lease, of which he had copies made and sent purporting to be copies of a lease, because that document in fact was not a valid lease, not being under seal, therefore he was not preparing an instrument relating to real or personal estate, but merely an agreement under hand only. In my view, it is impossible that the appellant can be heard to say that he was preparing an agreement under hand only, and, therefore, the justices were right in the conclusion to which they came and in convicting the appellant.

LORD HEWART, C.J.—While I differ with regret and respect from the judgment of LAWRENCE, J., I am clearly of opinion that this appeal ought to be dismissed. I need not repeat what has been said by AVORY, J., but it seems to me that the arguments urged before the justices on behalf of the respondent were sound, and, in particular, the argument that s. 44 (1) of the Stamp Act, 1891, prohibited any person, not being qualified as therein stated, from drawing or preparing any instrument relating to real or personal estate for or in expectation of any fee, gain, or reward. On the facts stated in this case, as proved, the appellant had prepared such an instrument in expectation of a fee or reward, and this instrument was not an instrument under hand only, but a void lease. An agreement under hand only means an instrument valid and intended to operate in law as such. The document here, which we have had in our hands, bears all the marks of a lease, except that it is not under seal, and I think that the words of BARON MARTIN, no less than the words of BARON PARKE, in *Taylor* v. *Crowland Gas and Coke Co.* (1) (10 Exch. at p. 297) are in point. It is quite true the learned baron was referring to a slightly, but only slightly, different enactment (44 Geo. 2, c. 98), but his observations apply no less clearly to the present section. His words were these:

> "Upon carefully reading the enactment, it is obvious that it was intended to secure to a particular class the sole employment and practice in conveyancing."

I agree entirely with the judgment of AVORY, J., and think that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Wright & Webb*, for *Willett & Philips*, Bexhill; *Blyth*, *Dutton*, *Hartley*, *& Blyth*, for *Menneer*, *Idle*, *Brackett*, *& Williams*, St. Leonards-on-Sea.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

DENNIS *v.* MALCOLM

[Chancery Division (Clauson, J.), November 22, December 2, 6, 1933]

[Reported [1934] Ch. 244; 103 L.J.Ch. 140; 50 T.L.R. 170; 150 L.T. 394]

Education—School—Conveyance under School Sites Act, 1841*—Reverter on cesser of use of school—Conveyance of freehold expressly under and for the purposes of the Act of* 1841*—School Sites Act,* 1841 (4 *&* 5 *Vict., c.* 38), *s.* 2.

Land Registration—Refusal of registrar to register land with absolute title—Right of appeal from registrar—Land Registration Act, 1925 (15 *Geo.* 5, *c.* 21).

In 1876, by a deed expressed to be made under and for the purposes of the School Sites Act, 1841, a piece of land at Cheam was granted to the minister and churchwardens of St. Philip's, Cheam, and their successors, for the purpose of a school in pursuance of s. 2 of the Act which provides that when land ceases to be used for the purposes mentioned in the Act, it should "immediately revert to and become a portion of the [grantors'] estate held in fee simple or otherwise . . . as fully to all intents and purposes as if this Act had not been passed." On March 22, 1932, the land ceased to be used as a site for a school and thus ceased to be used for the purposes mentioned in the Act. The grantees, wishing to sell the land, applied in May, 1933, to the Land Registry to have the land registered with an absolute title, but the Chief Land Registrar, on the ground of the reverter clause in the Act, refused so to register the land. The grantees appealed, contending that on the true construction of the Act the land should thenceforth be held as if the Act had not been passed, but as if the grant to them had nevertheless been made.

Held: (i) the deed of grant was so expressed that it operated only under the Act, and the effect of dealing with the matter "as if [this] Act had not been passed" was, therefore, to cause the land to revert as if the grant had never been made;

(ii) reverter, therefore, took place on March 22, 1932;

(iii) the Chancery court has no jurisdiction to direct the registrar to register an absolute title about which he is not satisfied.

Quære (i) whether, if the deed of grant had been differently expressed so as to show that it was intended to operate independently of the Act, reverter might not have taken place despite the cesser of user.

(ii) whether, in the absence of a decision or direction by the registrar, an appeal lies from his mere refusal to proceed further with a registration.

Notes. The Minister of Education may now by a direction prevent reverter taking place in cases where the person to whom the land would revert cannot be found or relinquishes his rights: Education Act, 1944, s. 86 (2); 8 Halsbury's Statutes (2nd Edn.) 216.

Applied: *Re Cawston's Conveyance, St. Luke, Bromley Common* v. *Cawston,* [1939] 3 All E.R. 1.

As to reverter of land or failure of purpose under the School Sites Acts, see 13 Halsbury's Laws (3rd Edn.) 703, para. 1434; as to the non-subjection of such reverter to the rule against perpetuities, see 25 Halsbury's Laws (2nd Edn.) 122, para. 218; as to appeals from the refusal of a land registrar to give effect to an application for registration, see 19 Halsbury's Laws (2nd Edn.) 449, para. 927, and ibid. 584, para. 1446. For the School Sites Act, 1841, s. 2, see 8 Halsbury's Statutes (2nd Edn.) 335.

Case referred to:

(1) *J. H. Robertson's Application for Letters Patent,* [1930] 1 Ch. 186; 99 L.J.Ch. 145; 142 L.T. 307; 46 T.L.R. 17; 47 R.P.C. 215; Digest Supp.

Adjourned Summons. A

In 1876 by a deed expressed to be made under and for the purposes of the School Sites Act, 1841, a piece of land at Cheam was granted to the minister and churchwardens of St. Philip's, Cheam, and their successors for the purpose of a school under the authority of s. 2 of the Act, which provided that when the land ceased to be used for the purposes of the Act, i.e., for a school, it should immediately revert to and become a portion of the estate held in fee simple or otherwise, as B fully and to all intents and purposes as if the Act had not been passed. On March 22, 1932, the land ceased to be used as a site for a school. The grantees, wishing to sell the land, applied on May 9, 1933, to the Land Registry to have the land registered with an absolute title. The Chief Land Registrar, however, refused to register the land with an absolute title, and he gave as the principal reason for his refusal the fact of the reverter clause in the Act. A summons was therefore C taken out by the present trustees of the school as constituting the grantees, asking that the refusal of the registrar to register the land might be reversed, and that he might be directed to register such trustees as the proprietors of the land with an absolute title.

The School Sites Act, 1841, s. 2, is as follows:

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> "And be it enacted that any person being seised in fee simple, fee tail, or for life, of and in any manor or lands of freehold, copyhold, or customary tenure, and having the beneficial interest therein, or in Scotland being the proprietor in fee simple or under any entail, and in possession for the time being, may grant, convey, or enfranchise by way of gift, sale, or exchange in fee simple or for a term of years any quantity not exceeding one acre of such E land, as a site for a school for the education of poor persons, or for the residence of the schoolmaster or schoolmistress, or otherwise for the purposes of the education of such poor persons in religion and useful knowledge; provided that no such grant made by any person seised only for life of and in any such manor or lands shall be valid, unless the person next entitled to the same in remainder in fee simple or fee tail (if legally competent) shall be a party to and join in F such grant; provided also, that where any portion of waste or commonable land shall be gratuitously conveyed by any lord or lady of a manor for any such purposes as aforesaid the rights and interests of all persons in the said land shall be barred and divested by such conveyance; provided also, that upon the said land so granted as aforesaid, or any part thereof, ceasing to be used for the purposes in this Act mentioned, the same shall thereupon immediately G revert and become a portion of the said estate, held in fee simple or otherwise, or of any manor or land as aforesaid, as fully to all intents and purposes as if this Act had not been passed, nothing herein contained to the contrary."

Edward Jones, K.C., and *Baden Fuller* for the applicants, the grantees of the land.

Sir Gerald Hurst, K.C., and *J. V. Nesbitt* for the respondents, the trustees of H the will of the grantor.

CLAUSON, J.—In 1876 Mr. Antrobus, owning land at Cheam, granted under the powers of the School Sites Act, 1841, a piece of land to the minister and churchwardens of St. Philip's, Cheam, and their successors for the purpose of a school. The grant contained at the end a proviso or condition of reverter differing in some I respects from that contained in the Act. It is not suggested that that clause of reverter can have any operation. At some date in the year 1932 the property, the subject of the grant, ceased to be used as a school. If, before it had ceased to be used as a school and while it was still being used as a school, the grantees had thought proper to make arrangements to sell the site in order to buy another site and to continue the school on another site, or raise money to continue another school, it is possible that the grantees might, notwithstanding the clause of reverter, have been able to sell their land under the School Sites Act. They did not do that. The result is that the school was closed and ceased to be used as a school. Some time afterwards negotiations began for the sale of this piece of land to a purchaser.

It will be obvious to anybody who has perused s. 2 of the School Sites Act, 1841, that very serious questions arose as soon as the property ceased to be used as a school, because the section, while enabling persons to convey land under this Act for the purposes of a school, contains a proviso at the end that

> "when land or any part thereof ceases to be used for the purposes in this Act mentioned [those purposes being] as a site for a school for the education of poor persons, or for the residence of the schoolmaster or schoolmistress, or otherwise for the purposes of the education of such poor persons in religious and useful knowledge, the same [that is, the land] shall thereupon immediately revert to and become a portion of the said estate held in fee simple or otherwise, or of any manor or land as aforesaid [that is, the estate of which the grantor was the owner] as fully to all intents and purposes as if this Act had not been passed, anything herein contained to the contrary notwithstanding."

Accordingly, if the event occurs—I am assuming for the moment it has occurred and nobody before me now disputes it has occurred—that the site has ceased to be used for the purpose of the school, this reverter clause seems to come into operation, and it comes into operation as if this Act had not been passed. There are two sections—s. 3 and s. 4—dealing respectively with the Duchy of Lancaster and the Duchy of Cornwall, under which similar provisions are made to enable the Duchy lands in each case to be conveyed as a site for a school, and there is a similar reverter provision with, however, this added difference, that whereas the reverter under the section with which I have to deal is to take place "as if this Act had not been passed," in the case of the other two sections the reverter is to take place "as if this Act or as if any such grant as aforesaid had not been made."

An exceedingly ingenious argument has been founded upon the section; it has been said that you must pay great attention to that difference. The section says that the reverter must operate as if the Act had not been passed, but it does not say as if the grant had not been made, so you must take the grant, hold it as an existing grant, assume the Act has not been passed, and see what happens. When I turn to the grant I find the utmost care has been taken to explain that the grantor, Mr. Antrobus, was acting under the authority of the School Sites Act, and that he was making the grant to the minister and churchwardens and their successors for the purposes of the said Act. It is plain that the deed is intended to operate, and to operate only, under the Act, and that the effect of dealing with the matter as if the Act had not been passed is to destroy the authority under which, and under which alone, the grant was intended to operate; it has precisely the same meaning as if the statute had said that the reverter is to take place as if the grant had not been made. That is the effect of this particular deed. If the deed had gone on to use some such expression as "under the authority of the Act," or "any power enabling," or something of that kind it might have been different. My view is that in the events that have happened the reverter clause has become operative.

Having now expressed my view as to the construction of the Act, I have to deal with some other matters which were indicated in argument. Notwithstanding that the actual point on which I have to express my opinion is not of great complexity, the case causes me a great deal of trouble. It appears that during the negotiations for the sale of the land it occurred to somebody that, as there was obviously a difficulty about the title, the best course to take was to get the title of the grantees registered as an absolute title. There were several lions in the path. The first lion in the path was as to the minister and churchwardens of Cheam. It is exceedingly doubtful if there was at the time of the grant a minister and churchwardens of Cheam. It is said it should be read as if it were a grant to the rector, warden and churchwardens of Cheam; it may be a misdescription. There is that difficulty. Everybody seems to have rather assumed, apparently after some discussion, that the grant ought to be so construed. Whether that is right or not I express no view whatever. The matter went before the Land Registry, and in the ordinary course a report on the title was made by conveyancing counsel. Counsel, after adverting to the difficulties I have just mentioned, and also adverting to the possibility of there being a question whether the title had been affected by the operation of the Act, took the point that the title must be subject to the reverter clause. The Land Registry then communicated with the rector and churchwardens of Cheam, the persons seeking to be registered with an absolute title, informing them that they did not see their way, having regard to the report of counsel, to grant an absolute title. Next a summons was taken out intituled

> "in the matter of the freehold property known as [then it describes the school in Cheam] . . . whereof is pending an application to register No. P 111335 comprised in a deed poll dated Dec. 30, 1876, and made by Hugh Lindsay Antrobus [it then mentions the Land Registration Act, 1925] for the decision of the court on the questions following."

Then there is a string of questions asking the court to decide whether the applicants, that is, the present rector and churchwardens of Cheam, have the right to sell the property; whether the property ceases to be used for the purpose of the Act when in the course of being sold; what the operation of the deed is, and:

> "A declaration that in the events which have happened the applicants are the trustees of the said property and have power to sell and convey the same to a purchaser free from any right, claim, or interest of the respondents under the said deed or the said Act."

Then:

> "Whether the applicants, or alternatively the respondents, are entitled to be registered as the proprietors of the said land with an absolute title."

That summons was served on the present trustees of the will of the original grantor. Whether or not they are persons of whom it can be predicated that they are the owners of the estate held in fee simple or otherwise, part of which was granted by the grant of 1876, I do not know. It is left in doubt. That summons happens, by the chance of the ballot, to be assigned to me. However it came on, under the arrangements for the disposal of business under which we operate in this Division, before BENNETT, J. After some discussion had taken place as regards the power the court had and whether the court had any power under the summons to make such a declaration as asked, it was suggested that, notwithstanding the form of the summons, it was an appeal from the decision of the registrar to register the applicants' title with an absolute title. Thereupon, BENNETT, J., pointed out that if it was an appeal from the registrar the only person to deal with that was myself, as I am the judge named by the Lord Chancellor under the provision of the Act as the person to deal with appeals from the registrar. The application was made to me to hear it, to which I consented, but I took the precaution of requiring the parties to amend so as to turn the summons into a thing I could deal with—an appeal from the registrar. Accordingly, the summons is now in this form:

> "that the refusal of the Land Registrar to register the above property pursuant to the application be reserved and that the Land Registrar be directed to register the applicants as the owners of the land with an absolute title."

I have expressed my view on the point on which the parties are anxious that my view should be expressed. My view accords entirely with that of the Chief Land Registrar to the extent that, whoever it is that is entitled to come in under the reverter clause, it is quite impossible for the Land Registrar to register the title as an absolute title.

Nevertheless, the question arises: Does any appeal lie to me in this matter? I do not propose to express any opinion to be treated as final or binding on any other judge; I only draw attention to difficulties. It is quite true, if there is an appeal, that I am the judge to whom an appeal comes from an order or direction of the registrar. He certainly has not made an order. Has he given a direction? All he says is that he does not propose to proceed further with the matter. I have grave doubts whether there is an order or direction from which an appeal can be made. If there was any direction it seems to me, I confess, it was a direction of an administrative character. I have looked at the matter with some anxiety and I am not disposed to allow it to be thought that in my view the court has power as the Act stands now to direct the registrar to register an absolute title about which he is not satisfied. I do not want to say more than that. I do not want to envisage the possibility the registrar might take some quite broad view as to some difficulty or something of that kind. It may be by the process of mandamus or some other process the registrar can be controlled. As to that, I do not wish to say anything. I do not wish it to be supposed that I am of opinion that I have jurisdiction to sit by way of appeal from a difficulty which the registrar feels in registering a title as absolute. Elaborate provisions are made in the Act for dealing with difficulties that arise; the registrar can put matters in train to be decided by a competent court of jurisdiction, and there may be an appeal to alter his answer in some proceeding in which all parties are present. Accordingly, I do not see any administrative difficulty if my jurisdiction is the right one. In the circumstances what am I to do with this summons? I propose, save with regard to certain matters I will mention, to make no order on the summons. However, I must order the costs of those who have been brought here on this summons to be taxed and paid by the applicants; and I have no doubt as to my jurisdiction to do that: see *J. H. Robertson's Application for Letters Patent* (1); I have the jurisdiction which any judge of the Supreme Court has to order any person who wrongly invokes the court to pay the costs of such invocation.

[His Lordship then gave leave for the summons to be amended so as to be entitled "In the matter of the trusts of the deed of grant of 1876 and the School Sites Act, 1841," and to be made inter partes, and to ask for the determination of the question whether, upon the true construction of the grant and the Act, and in the events which had happened, the reverter took place on March 22, 1932. The summons was amended accordingly, and again came on for hearing on Dec. 6. CLAUSON, J., then declared that reverter took place on March 22, 1932.]

Solicitors: *Geo. Thatcher & Son*; *Farrer & Co.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

TRELOAR *v.* FALMOUTH DOCKS AND ENGINEERING CO., LTD.

[HOUSE OF LORDS (Lord Buckmaster, Lord Warrington, Lord Tomlin, Lord Russell and Lord Wright), January 30, 1933]

[Reported [1933] A.C. 481; 102 L.J.K.B. 708; 49 T.L.R. 250; 148 L.T. 507; 26 B.W.C.C. 214]

Workmen's Compensation—"Arising out of and in the course of employment"—Act which might have resulted in death if done apart from work—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 1 (1).

If a man is engaged in doing work and does something which he might do outside the work, but which, none the less, happens in the course of and arising out of his work, and it causes his death, the accident has arisen out of and in the course of his employment.

Notes. The Workmen's Compensation Act, 1925, was repealed by the National Insurance (Industrial Injuries) Act, 1946, which prescribes a system of insurance against injuries caused by industrial accidents, but s. 1 (1) of the latter Act provides that the insurance shall be "against personal injury caused . . . by accident arising out of and in the course of" employment, thus adopting the wording of s. 1 (1) of the Act of 1925. See also s. 7 (1).

Followed: *Lochgelly Iron and Coal Co.* v. *Walkenshaw* (1935), 28 B.W.C.C. 230. Considered: *Whittle* v. *Ebbw Vale Steel, Iron and Coal Co.*, [1936] 2 All E.R. 1221. Referred to: *Davis* v. *McNamara & Co.* (*1921*), *Ltd.* (1932), 25 B.W.C.C. 550; *Walker* v. *Bairds and Dalmellington, Ltd.*, [1935] All E.R. Rep. 153; *Moore* v. *Tredegar Iron and Coal Co.* (1938), 31 B.W.C.C. 359; *Fife Coal Co.* v. *Young*, [1940] 2 All E.R. 85; *Patrick* (*James*) *& Co.* (*Pty.*), *Ltd.* v. *Sharpe*, [1954] 3 All E.R. 216.

As to "accidents" within the Workmen's Compensation Acts, see 34 HALSBURY'S LAWS (2nd Edn.) 816 et seq., and for cases see 34 DIGEST 266 et seq. For National Insurance (Industrial Injuries) Act, 1946, see 16 HALSBURY'S STATUTES (2nd Edn.) 797.

Case referred to:

(1) *Muscroft* v. *Stewarts and Lloyds, Ltd.* (1928), 140 L.T. 64; 21 B.W.C.C. 274, C.A.; Digest Supp.

Appeal from an order of the Court of Appeal (LORD HANWORTH, M.R., SLESSER and ROMER, L.JJ.), setting aside an award made by HIS HONOUR JUDGE LIAS, sitting as an arbitrator under the Workmen's Compensation Act, 1925, in Falmouth County Court.

The facts as set out in the award were as follows: I find that there is not sufficient evidence to prove an accident arising out of and in the course of the employment which was the cause of the deceased's death. Two accidents are alleged: (i) That deceased strained himself in trying to brake a swinging sling of sacks with his hook. It was not a great strain. In Truscott's words [Truscott was a fellow workman]: "It switched him around a bit, of course; he let go the hook." It does not appear to have interfered with his work, and it happened about a quarter of an hour before he died, and cannot be said with certainty to be immediately or mediately connected with his death. (ii) The second accident suggested is that the deceased, while sitting on a sack, raised his hook above his head, intending to strike it into a sack, and that the mere raising of his arm was sufficient to cause him to fall forward with his head on the sack he intended to strike. He did not in fact strike it, because the hook, according to Truscott, fell between his feet. It is alleged that this second accident was the immediate cause of death.

It is common ground that the deceased was suffering from heart disease. The cause of death was given as myocarditis and syncope in the certificate given by Dr. Brown, who had previously attended him, and except that the coroner was informed, there is no suggestion of accident in the certificate. Dr. Brown has since died. Both Dr. Kiernan and Dr. Wade, who gave evidence, described two kinds of heart disease from which deceased might have been suffering: (i) Myocarditis; (ii) aneurism of the aorta. In the absence of a post-mortem examination it is impossible to say definitely which he was suffering from; but from the fact that Dr. Brown diagnosed myocarditis as well as the circumstances of the deceased's death and the evidence of Dr. Wade, I am strongly inclined to believe that it was myocarditis. Dr. Wade said that disease of the coronary arteries causes myocarditis, and death may occur instantaneously at any time. In cases of aneurism, death follows shortly after a strain, the shortest interval known being two or three minutes. He added the fact that the deceased died in a minute-and-a-half makes myocarditis more likely. He also admitted in cross-examination that acute dyspepsia is one very probable cause of death resulting from myocarditis, and it must be remembered that deceased's previous complaints of pain in the chest referred to by his widow only happened when he ate heavy food. The probability of death resulting from disease of the coronary arteries without any intermediate exciting cause was discussed by the medical witnesses in *Muscroft* v. *Stewarts and Lloyds, Ltd.* (1). I tried the case, and I remember being told that death might occur even in sleep. The position, therefore, appears to be this. The deceased was suffering from a form of heart disease from which death might result at any time. The exciting cause of death, if any exciting cause were necessary, need only be slight; it might have been strain or a slight muscular effort or an attack of dyspepsia. If the doctors in *Muscroft's Case* (1) were right, there need be no exciting cause. Whatever the probabilities were that the deceased's work may have contributed in some way to his death, they are not conclusive. If death had followed the first alleged accident more closely, it would have been possible to decide in favour of the applicant with some degree of certainty. But the interval of time is too great, and, as it apparently had no effect on the deceased's work, I exclude this accident as a contributory cause of death. With regard to the second accident, if the mere raising of the hand with the intention of striking a sack which is said to constitute it can properly be described as an accident, which I doubt, I have still to find that death resulted from it. It seems to me to be no more than a physical movement which a man might make at any time, whether he was working or not, and that there was nothing fortuitous about it.

But supposing there was an accident. I do not think it can be said to have been proved affirmatively that death resulted from it when it might equally well have from a number of other causes, for example, indigestion, or even from the natural course of the disease. I come to this conclusion with regret, because the applicant has lost her husband on whom she was totally dependent, and if she had proved her case she would have been entitled to £255 5s. 4d. Award for respondents with costs.

The Court of Appeal held that there was no evidence upon which the county court judge could find as he did, and that the death was contributed to by the ordinary course of the work, it not being necessary, in order so to hold, to prove that there had been some abnormal strain caused by the work; consequently the accident arose out of the employment and the dependant on the earnings of the deceased was entitled to compensation under s. 1 (1) of the Workmen's Compensation Act, 1925. The employers appealed.

Sir Walter Greaves-Lord, K.C., and *W. H. Duckworth* for the appellants.

G. H. Shakespeare and *J. Lhind Pratt* for the respondent were not called upon to argue.

LORD BUCKMASTER.—This is an appeal from the Court of Appeal, who set aside an award of the learned county court judge and awarded a sum of £255 5s. 4d. to the respondent, the widow of a workman who met his death in the appellants' service on May 25, 1931. The circumstances attending the death of the respondent's husband are these. He was engaged in loading and discharging from a ship known as the *Highland Coast* at the Falmouth Docks. He left his home at five o'clock in the morning, and his widow's evidence is that he was in a perfect state of health, so far as she could tell. He began work at 6 a.m., and he worked in a hold known as No. 3 hold in the ship. The business that he was engaged in doing there was chiefly that of discharging bags of sugar, but in addition they took on and loaded a certain number of bags of china clay. The china clay bags weighed from one to two hundredweights, and two men would lift them, in cases where they were lifted, which was not universal, to a place 3 ft. or 4 ft. high. There is evidence that this man was engaged in lifting two or three of these sacks. At 8.30 a.m. there was a halt for breakfast, and the work was said to have been resumed at nine o'clock, though I can find no direct evidence pointing to that time. It is, however, immaterial. After the breakfast interval was past work was resumed in No. 2 hold, where the men were engaged in removing and packing large bags which were swung in by a crane. In the course of this work, while one of these loads of bags, weighing from eleven hundredweights to a ton—it is impossible to say exactly what was its weight, because there were said to be eleven bags weighing from one to two hundredweights each—is swinging in, it becomes the duty of the men to steady the load, and the evidence shows it requires three men for this work. This work in one instance this man undertook by himself; he caught hold of this swinging mass of matter and was pulled by it, but not pulled off his feet, because he let go. Three or four loads are then dealt with, and finally, as he is lifting his hand to put his hook into another load, he falls down and dies.

That the man had heart disease is not in dispute. What the form of heart disease was has never been made clear, because there never was a post-mortem examination. It might be myocarditis, it might be an aneurism, or it might be angina; it is not quite clear which it is, but that he had one form or other of heart disease and died as the result of that disease that morning is beyond controversy. The question is whether the work that he was engaged on was work which brought about his death; in other words, if he had not been engaged on that work that morning would he have died? I must say it appears to me that the learned county court judge has misunderstood what he really had to do. He was not bound to find what particular form of heart disease the man died from, nor was it necessary for him to examine in detail the exact periods of time that elapsed between the time when he had first caught hold of this swinging load and the time he died. Those things were really entirely unnecessary because the doctor who gave evidence said in plain language that it was inconceivable that the work had no effect on the deceased, and there really was no effective evidence the other way. The original statement might be a little modified, but there is no doubt the medical evidence was all in agreement that the strain might produce his death due to either form of heart disease, subject only to this, that the doctors proceeded to measure the periods that might elapse between the result of the strain and the death according to the character of the disease. There is no evidence whatever that leads to the opinion that without the work on which this man was engaged he, none the less, would have died from this disease.

The learned county court judge appears to think that, as a man suffering from such affection might in cases of acute indigestion die as a result of the indigestion, this consideration cannot be eliminated. But there is no evidence that this man had an attack of indigestion that morning; on the contrary, his wife said he left home perfectly well, and none of the workmen with whom he worked said that he complained of indigestion. There is no matter that I can see which justified the learned county court judge in considering that as a ground of death which it was essential for the plaintiff to exclude. Indeed, if that were necessary, it is impossible to see how it could have been excluded, except by a post-mortem examination. But there is something more in the judgment which I think is open to serious criticism. The man did in fact die when he was lifting his hand to fasten his hook into another swinging bale of sacks. It is accepted that a man suffering from heart disease does incur great peril if he lifts his hand above his head. The lifting of his hand after what had taken place might well have been the cause that ultimately either ruptured the artery or produced the special condition that immediately preceded death, but the learned county court judge says it is no more than a physical movement a man might make at any time, whether he was working or not, and there is nothing "fortuitous" about it. If he means that the lifting of his hand in the course of his work was the reason why the artery was ruptured and why death followed, yet because he might lift his hand when he was not working there was no accident and nothing fortuitous about it, I dissent entirely from that proposition. If a man who is engaged in doing work and as part of that work and in the course of it does something which he might do outside, but which, none the less, happens in the course of and arising out of his work, and it causes his death, the accident has arisen out of and in the course of his employment. I put to counsel in the course of this case an illustration which appears to me perfectly sound.

Supposing a workman is engaged in putting books on library shelves and he lifts the books, and in the course of lifting the book or books to put them on the library shelves, owing to the fact that the action of lifting his arm causes a strain upon his heart which his heart cannot bear, and he falls down dead, none the less the accident arises out of and in the course of his employment. I can see no reason why the learned county court judge should have disregarded this incident when in fact it followed that which, even without the evidence, everybody admits must have been a severe strain upon the man. The evidence is quite clear that the man was engaged in work which was very heavy; he had actually been engaged on two operations where the strain must have been severe, and, following upon that, when he tried to fasten the last sack, the strain was too much and he fell down dead. I see no reason whatever to differ from the opinion of the Court of Appeal, nor do I see any reason to send this case back once again to the county court judge, because I think the judgment of the Court of Appeal should be accepted in all respects.

LORD WARRINGTON.—I entirely concur and I only want to say a few words. I put my opinion upon two broad grounds. All we have to determine, or all the learned county court judge had to determine, is whether the work in which the man was engaged this morning contributed to his death. Now, the man began work at six o'clock. He had worked on heavy work for two hours or two-and-a-half hours, and the evidence is that at the end of that time, when they broke off for breakfast, he was suffering from a kind of faint; he said he felt queer, and one of his friends working with him said it was a kind of faint. They resumed work after breakfast and they continued work, some of it being heavy and some of it imposing a violent strain upon those who were doing it, until the man, after raising his hand with a view to doing some work with his hook, fell down and died. It is undisputed that the man suffered from heart disease. The doctor who attended him gives that as his diagnosis, and he mentions the particular form of heart disease, namely, myocarditis. What the particular form was has not been definitely ascertained, but it does not matter. He suffered from a disease which was liable, under the stress of violent exertion, to cause death. In my opinion, the learned county court judge has misdirected himself in this particular, that he has examined only the two special incidents which were mentioned as taking place after breakfast. In my opinion, that is not enough; he ought to have considered the whole of the events of that morning, from the moment the man left home and went to his work, and what happened during the continuance of that work. If that is considered, then I think the true answer to the contention that we are here bound by the finding of fact is twofold. First, that the learned county court judge misdirected himself in the way I have indicated, and, secondly, that there was no evidence capable of supporting a finding that the work the man did on this morning had not contributed to his death. The doctor who was called as a medical expert says: "It is inconceivable the work had no effect on the deceased. I think it was rather heavy work. If the deceased was suffering from heart disease the work would affect him." Here we find the man admittedly suffering from heart disease, and the evidence, looked at as a whole, is, I think, that the work did affect him, as the doctor says, and brought about his death.

LORD TOMLIN.—I concur.

LORD RUSSELL.—I am of opinion that the order made by the Court of Appeal in the present case was the correct order to make, and I desire to add nothing further.

LORD WRIGHT.—I concur.

Appeal dismissed.

Solicitors: *Clifford-Turner, Hopton, & Lawrence*, for *Nalder & Son*, Truro; *Pattinson & Brewer*, for *Ratcliffe & Son*, Falmouth.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re SIMMS. Ex parte THE TRUSTEE *v.* WILLIAM SIMMS, LTD., AND S. H. GILLETT

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), July 12, 13, 14, 17, 1933]

[Reported [1934] Ch. 1; 103 L.J.Ch. 67; [1933] B. & C.R. 176; 149 L.T. 463]

Bankruptcy—Property available for distribution—Relation back of trustee's title—Bankrupt's business sold to company—Appointment of receiver of company—Receiver treated by trustee as trespasser—Bankruptcy Act, 1914 (4 *& 5 Geo. 5, c.* 59), *s.* 37 (1).

S. carried on the business of a builder, and on Jan. 9, 1929, sold it to a limited company in return for shares in the company. On Jan. 14, 1929, debentures were issued by the company. On Feb. 14, 1929, a receiver was appointed on behalf of the debenture holders. The receiver entered into possession of the assets of the business which he proceeded to carry on for the benefit of those who, he thought, were entitled to it, completing twenty outstanding contracts for work, but on May 23, 1929, S. was adjudicated bankrupt, and on April 13, 1930, the trustee in the bankruptcy obtained an order that the sale on Jan. 9, 1929, to the company was a fraudulent transfer and an act of bankruptcy. The amount due from the receiver to the trustee in bankruptcy was not agreed, and on Dec. 23, 1931, the trustee elected to treat the receiver as a trespasser.

Held: the trustee, having elected to treat the receiver as a trespasser and insisted on damages for conversion of the plant and machinery used by the receiver in completing the contracts, was not entitled to recover the profits earned by the completion of the contracts either as further damages for conversion, or as damages for intermeddling with the contracts in respect of which the money was received, or as money had and received to the use of the trustee.

Notes. Referred to: *Joly* v. *Pinhoe Nurseries, Ltd.*, [1936] 1 All E.R. 841; *Transvaal and Delagoa Bay Investment Co.* v. *Atkinson*, [1944] 1 All E.R. 579.

As to the relation back of the title of the trustee, see 2 HALSBURY'S LAWS (3rd Edn.) 447 et seq., and for cases see 5 DIGEST 638 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to:

(1) *Re Goldburg, Ex parte Page*, [1912] 1 K.B. 606; 81 L.J.K.B. 663; 106 L.T. 431; 19 Mans. 138; 10 Digest (Repl.) 823, *5376*.

(2) *Re Riddeough, Ex parte Vaughan* (1884), 14 Q.B.D. 25; 33 W.R. 151; 1 Moor. 158, D.C.; 5 Digest 1108, *9035*.

(3) *Re Hirth, Ex parte Trustee*, [1899] 1 Q.B. 612; 68 L.J.Q.B. 287; 80 L.T. 63; 40 W.R. 243; 15 T.L.R. 153; 6 Mans. 10, C.A.; 5 Digest 645, *5786*.

(4) *Davis* v. *Oswell* (1837), 7 C. & P. 804; 173 E.R. 351, N.P.; 43 Digest 521, *590*.

(5) *Bodley* v. *Reynolds* (1846), 8 Q.B. 779; 15 L.J.Q.B. 219; 7 L.T.O.S. 61; 10 Jur. 310; 115 E.R. 1066; 43 Digest 522, *601*.

(6) *France* v. *Gaudet* (1871), L.R. 6 Q.B. 199; 40 L.J.Q.B. 121; 19 W.R. 622; 43 Digest 520, *583*.

(7) *The Argentino* (1888), 13 P.D. 191; 58 L.J.P. 1; 59 L.T. 914; 37 W.R. 210; 6 Asp.M.L.C. 348, C.A.; affirmed sub nom. *Gracie (Owners)* v. *Argentino (Owners), The Argentino* (1889), 14 App. Cas. 519, H.L.; 17 Digest (Repl.) 80, *27*.

(8) *Weld-Blundell* v. *Stephens*, [1920] A.C. 956; 89 L.J.K.B. 705; 123 L.T. 593; 36 T.L.R. 640; 64 Sol. Jo. 529; 42 Digest 981, *115*.

(9) *Re Polemis and Furness Withy and Co., Ltd.*, [1921] 3 K.B. 560; 90 L.J.K.B. 1353; 126 L.T. 154; 37 T.L.R. 940; 15 Asp.M.L.C. 398; 27 Com. Cas. 25, C.A.; 17 Digest (Repl.) 114, *269*.

(10) *Moon* v. *Raphael* (1835), 2 Bing. N.C. 310; 1 Hodg. 289; 2 Scott. 489; 5 L.J.C.P. 46; 132 E.R. 122; 17 Digest (Repl.) 167, *625*.

(11) *Fyson* v. *Chambers* (1842), 9 M. & W. 460; 11 L.J.Ex. 190; 152 E.R. 195; 5 Digest 725, *6294*.

(12) *Buckland* v. *Johnson* (1854), 15 C.B. 145; 23 L.J.C.P. 204; 23 L.T.O.S. 190; 18 Jur. 775; 2 W.R. 565; 2 C.L.R. 784; 139 E.R. 375; 12 Digest (Repl.) 633, *4888*.

(13) *Smith* v. *Baker* (1873), L.R. 8 C.P. 350; 42 L.J.C.P. 155; 28 L.T. 637; 37 J.P. 567; 5 Digest 905, *7428*.

(14) *Moses* v. *Macferlan* (1760), 2 Burr. 1005; 1 Wm. Bl. 219; 97 E.R. 676; 12 Digest (Repl.) 605, *4679*.

(15) *Sinclair* v. *Brougham*, [1914] A.C. 398; 83 L.J.Ch. 465; 111 L.T. 1; 30 T.L.R. 315; 58 Sol. Jo. 302; 12 Digest (Repl.) 316, *2436*.

(16) *Lumley* v. *Gye* (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 17 Jur. 827; 1 W.R. 432; 118 E.R. 749; 42 Digest 987, *169*.

(17) *Quinn* v. *Leathem*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 50 W.R. 139; 17 T.L.R. 749; 42 Digest 971, *30*.

(18) *Towers* v. *Barrett* (1786), 1 Term Rep. 133; 99 E.R. 1014; 12 Digest (Repl.) 262, *2028*.

(19) *Andrews* v. *Hawley* (1857), 26 L.J.Ex. 323; 12 Digest (Repl.) 634, *4900*.

Appeal from an order of CLAUSON, J.

The facts and arguments appear from the judgments.

Gavin Simonds, K.C., and *Harold Christie* for the receiver.

Pritt, K.C., and *Tindale Davis* for the trustee.

LORD HANWORTH, M.R.—This is an appeal from a decision of CLAUSON, J., by which he found that there was a liability on the receiver in a sum of £5,600. The figures which left that sum as the true amount which CLAUSON, J., thought was payable by the receiver are somewhat intricate and are bound up with the facts of the case, which must be stated in some little detail.

Simms was a man who carried on business as a builder. On Jan. 9, 1929, he sold his business to a limited company in return for shares, which were handed to him as payment for the transfer of the business. On Jan. 14, 1929, the company issued debentures charged on the goodwill and undertaking and all the assets of the company. The business of the company did not prosper and on Feb. 14 of the said year a receiver was appointed by the debenture holders, Lloyds Bank, Ltd., and he took possession of the premises and of everything as receiver. The receiver, Mr. Gillett, is the respondent to this motion. On March 8 a petition was presented against Simms in bankruptcy and on May 23, 1929, he was adjudicated a bankrupt. The trustee in bankruptcy, after examining the affairs of Simms, came to the conclusion that the sale by Simms of his business to the company was a fraudulent transfer, a transfer in fraud of his creditors, and he took steps to have that declared. On Feb. 28, 1930, judgment was given in the Chancery Division holding that the sale on Jan. 9, 1929, was a fraudulent transfer and an act of bankruptcy and that the whole of the assets thus transferred were distributable among Simms' creditors. The actual order to that effect was drawn up on April 15, 1930.

Matters proceeded and the trustee who was appointed in the bankruptcy communicated with the receiver with a view to obtaining from the receiver the assets of which he had taken possession on Feb. 14, 1929. It will be observed that there was an interval between Jan. 9, 1929, and Feb. 14, when the receiver took possession, during which the business was carried on in name, at any rate, by the limited company. In the course of the negotiations the receiver was satisfied that he would have to make a payment over to the trustee and in May, 1931, he paid £1,000 to the trustee on account of his indebtedness, whatever it might turn out to be.

After some efforts between the parties, legitimate efforts and efforts during which the receiver, as CLAUSON, J., has found, gave every possible assistance that he could to the trustee, it was found impossible between them to adjust the accounts, and ultimately by a letter of Dec. 23, 1931, the trustee wrote and said that he elected to treat the receiver as having gone into possession as a trespasser. It is of great importance to emphasise this election by the trustee in bankruptcy.

There was ultimately a notice of motion which was issued on May 5, 1932, a notice to which I will come in due course. That notice of motion should be mentioned now, for it sought a declaration on behalf of the trustee that, having regard to the order of April 15, 1930, the respondents to that notice of motion, Mr. Gillett by amendment being one of them, "are accountable to the trustee for the assets of the bankruptcy passing to the trustee by virtue of the said order and received and dealt with by them or their servants or agents," and, secondly, as the trustee proposes to treat the respondents, William Simms, Ltd., and the receiver, "as trespassers in respect of the goods and chattels so dealt with by them they are accountable for the goods and chattels so seized and dealt with by them regardless of any loss incurred by them or their agents in furtherance of their dealings with the said chattels and assets." It will be observed, therefore, that as and from Dec. 23, 1931, emphasised as that act is that I have just read, the trustee elected to treat the receiver as a trespasser.

I must now proceed to give some of the figures by which CLAUSON, J., came to the conclusion that £5,600 was due from the receiver. The receiver's solicitors on Jan. 11, 1932, admitted liability for a sum of £2,337 11s. 11d., but that figure really passes away.

Under the notice of motion of May 5, which I have read, the trustee in bankruptcy claimed a sum of £21,993. In his judgment the learned judge says:

> "To this evidence Gillett replied by an affidavit sworn on June 29, 1932, dealing with the whole of the circumstances of the case with some elaboration, and submitting that he was liable to account only for such of the assets of William Simms which passed to the company under the contract of sale of Jan. 9, 1929, as actually came into his hands on or after Feb. 14, 1929. He further submitted that, as the trustee had elected to treat him as a trespasser, he was under no obligation to account to him in respect to any of the contracts which were pending and uncompleted on Feb. 14, 1929, in respect whereof nothing was then due and nothing would become payable until further work had been done and materials had been supplied in accordance with the terms of the various contracts. Gillett further pointed out that he was an agent of the company and not of the bank, and suggested that the bank had not received

A > or dealt with, either by itself or by its servants or agents, any of the assets of the bankrupt which passed to the trustee."

In putting that claim of the receiver into terms of money, he admitted (a) that he would be liable for the proceeds of chattels which were traced to his hands, and (b) the proceeds of book debts received by him, including some retention money, B which would reach his hands by mere lapse of time, but he contended that he was not liable in respect of moneys which came to his hands out of contracts which were pending at the time when he took possession, and, indeed, at the time when the company was formed and which arose only after further work had been done in respect of them and further lapse of time had occurred.

Ultimately on Oct. 13, 1932, points of claim and defence were delivered. The C trustee claimed the sum of £11,507 4s. 1d., but he was prepared to admit as a deduction from that a proportion of certain expenses of what has been called jobbing, that is, a proportion of a sum of £3,409. The receiver admitted a liability in respect of the following matters. There were, at the time when he took over, a total of twenty contracts which were uncompleted. Three ended in a loss; and there were seven contracts which were newly undertaken by the receiver in the D course of carrying on the business. The receiver admitted liability in respect of the retention moneys of eight contracts which had been received without his making an expenditure in respect of them, and also in respect of five items of plant and machinery. Those items total a sum of £2,617 3s. 3d. including a small sum for book debts; but the receiver repudiated any liability to the trustee in respect of the twenty contracts which he carried to completion, and he also claimed E that, if there was, as there was, a certain amount of cost of jobbing allowed by the trustee, by parity of reasoning jobbing ought to be allowed and the overhead charges admitted in respect of three contracts upon which there was a loss and upon the seven contracts which were new. In respect of that, the claim of the receiver was that upon the jobbing of twenty contracts he ought to be paid a sum of £3,289 16s. 0d. and there were losses on the three contracts of F £1,433 7s. 7d., and the overhead charges on those and jobbing would be £2,741 4s. 0d., making a total of £4,174 11s. 7d. and deducting, therefore, those sums of £4,174 and £3,289 from the claim of the trustee, there was only a balance then due from him of £1,425 13s. 3d. and, if that sum be added to the admitted sum of £2,617 13s. 3d., the total allowed would be £4,042 16s. 6d., in respect of which there had already been a payment of £1,000, leaving £3,042 16s. 6d., and G no more due.

There were amended points of claim and defence delivered, and ultimately upon those amended claims of the receiver the case was heard before CLAUSON, J., on April 25, 26, 27 and 28 of this year, and he gave judgment on May 24.

The way in which the claim of the trustee was put forward in his amended points of claim was this. He claimed that the receiver and the company were trespassers H and (or) guilty of conversion and (or) interference with the trustee's contractual rights, and that both of them were severally liable to him in damages for the value of all the said assets and for damages for their conversion and for damages for trespass and were further liable to him for all moneys paid by the building owners under the building contracts as money had and received to his use.

CLAUSON, J., dealing with the whole matter, said this:

I > "A possible way of putting the trustee's case may be to say that the receiver committed a tort in taking possession of the plant, machinery and stock, which must be taken to have belonged to the trustee, and converting it to his own use, and is, accordingly, liable in damages for conversion, and that the measure of damages exceeds the actual value of the plant and machinery by the sum of £5,600 4s. 10d. because, if the conversion had not taken place, the facts show that the trustee could have obtained £5,600 4s. 10d. by using the plant, machinery and stock to complete the twenty contracts. I am disposed to think that this ground forms a sound basis for the claim."

Later in his judgment he says:

> "There is, however, another way in which the trustee puts his claim, namely, a claim for money had and received . . . I am thus led to the conclusion that, strictly, the trustee cannot recover the £13,263 13s. or at all events any part of it in excess of the £5,600 4s. 10d. in an action for money had and received. I do not propose to elaborate the matter further as (as I have already said) I cannot refuse the trustee the right to recover the £5,600 4s. 10d. as damages for conversion."

Is that conclusion right? It was agreed before us by counsel for the trustee that he could recover that sum either as damages for conversion or as money had and received by the receiver to the use of the trustee. He did not seek to establish that he was entitled to damages for interference with the trustee's contractual rights. That was definitely abandoned and the two alternative grounds that were left were either that the trustee could recover this sum as damages for conversion or as money had and received to the use of the trustee.

The authority on which the claim was based was *Re Goldburg, Ex parte Page* (1) ([1912] 1 K.B. at p. 633). In that case a judgment of PHILLIMORE, J., is found where he says:

> "That which the receiver takes possession of, as a trespasser, he must account for, and he cannot set up any claim for anything that he has usefully done. On the other hand, he cannot be charged with any profits that he has made out of the bankrupt's goods; he is merely accountable for those assets of the bankrupt, such as book debts, sovereigns or stock, which are traced to his hands, and he has either to deliver them up or to pay damage for their conversion."

I have some difficulty in following the first part of the sentence which I have quoted, that the receiver cannot set up any claim for anything that he has usefully done. I confess that it would appear to me that that sentence goes beyond what was intended by the learned judge or what was needed for the judgment. If it is to be taken simpliciter as it stands, it seems to me to run counter to a number of decisions, to which attention must be paid.

Shortly put, I think that the decision in *Re Riddeough, Ex parte Vaughan* (2) is one which more accurately states the true liability of the receiver. That case is a decision of the Divisional Court, and, therefore, of higher authority than the decision of PHILLIMORE, J. The case is worth a little examination. From the statement of facts it appears that Vaughan took possession of the debtor's shops and property, and, with the consent of the committee of inspection, carried on his business, and in so doing he made purchases of fresh goods, such as flour and yeast, for the purposes of the business. Ultimately there was an adjudication in bankruptcy. Vaughan rendered an account to the official receiver which showed that he had received under the provisions of the deed a sum of £293 1s. 6d. This sum was made up of £18 18s. "cash in hand from the debtor"; the daily amount of "cash sales" during the carrying on of the business; and one book debt. The account showed per contra that Vaughan had expended sums amounting in the whole to £324 19s. 3d. . . . In other words, he had received in the course of business a sum of £293, but he had expended more than that sum. This was an application by the official receiver that Vaughan should forthwith pay to him the sum of £293 which he had received, independently of what he had paid away. The best indication of the view of the court is found in the argument which took place with counsel. CAVE, J., said in answer to this claim (14 Q.B.D. at pp. 29 and 30): "Surely you can only claim the property of the bankrupt which the appellant actually received." STEPHEN, J., said: "You may treat him as your agent, and then, no doubt, you would have a remedy against him for any misconduct in that character, or you can treat him as a trespasser and recover damages from him. But you cannot have it both ways." CAVE, J., further said: "You are claiming more than is allowed as against a trespasser who converts minerals in a mine; he is entitled to some allowances. You want to make none at all." Again, STEPHEN, J., said: "If, on the other hand, you treat him as a trespasser and claim reparation for the wrong which he has done you, I think you only have compensation for that of which he took wrongful possession," and the answer of counsel was: "We elect to treat him as a trespasser." The result was that the order, so far as it directed the payment of the £293 which had been received by the receiver, was discharged; in other words, that case definitely says that, where there is a man placed in the position of a receiver and carrying on business, you cannot treat him as a trespasser and at the same time ask that you should have the benefit of his conduct after the date at which you treat him as a trespasser, and seek then during that time to treat him as the repository on your behalf of moneys which have come to his hands. *Ex parte Vaughan* (2) seems to me very material to the present case and offers important guidance.

There is no question that the title of the trustee relates back to the date of the transfer to the company. That was decided in *Re Hirth, Ex parte Trustee* (3). Although the title related back, and, therefore, the trustee can do as he pleases, either treat the receiver when he came on the scene as his agent, or treat him as a trespasser, upon the facts which I have already indicated he definitely elected to treat him as a trespasser.

What is the measure of damages in the case of a trespasser to goods? It is measured by their value and their higher value as taken in situ. If authority is wanted for that, *Davis* v. *Oswell and others* (4) decides it. It is true that special damages may in certain cases be allowed, but it must be, as in all other cases of damage, the first result of the tort. In *Bodley* v. *Reynolds* (5), which was cited to us, there was a sum for special damage granted, and that case was explained in *France* v. *Gaudet* (6) (L.R. 6 Q.B. at p. 205) to be intelligible on the basis that there was some notice of an existing contract. No doubt, you can only recover, whether in contract or in tort, for what has been often called such damages as flow directly and in the usual course of things from the wrongful act. I am quoting the words of BOWEN, L.J., in *The Argentino* (7) (13 P. at p. 201), or, as those words have been developed and expanded in the judgment of LORD SUMNER in *Weld-Blundell* v. *Stephens* (8), adopted in this court in a judgment of BANKES, L.J., in *Re Polemis and Furness Withy and Co., Ltd.* (9) ([1921] 3 K.B. at p. 570). Quoting what LORD SUMNER said, BANKES, L.J., says:

> "Proximate cause has acquired a special connotation through its use in reference to contracts of insurance. Direct cause excludes what is indirect, conveys the essential distinction, which causa causans and causa sine qua non cumbrously indicate, . . . I venture to think that direct cause is the best expression."

It will be remembered, though I did not quote words, because I did not think it necessary, that, speaking generally, as BOWEN, L.J., says in *The Argentino* (7), as to all wrongful acts whatever arising out of tort or breach of contract the English law only adopts the principal restitutio in integra.

We have, therefore, to consider what was the damage which flowed out of the trespass and the trespass to goods—in other words, the conversion of the goods. Where you find something which is necessarily incidental to the conversion, there you may add that to the value of the goods converted. TINDAL, C.J., in *Moon* v. *Raphael* (10) (2 Bing. (N.C.) at p. 314) says:

> "This is an action of trover to recover damages for the conversion of goods which were delivered up by the defendants and accepted by the plaintiffs before the trial of the cause."

Then he says:

> "But the plaintiffs seek for more; and though no special damage has been alleged in the declaration and the damage complained of is not necessarily incidental to the wrongful taking of the property, they claim to recover,"

and so on. Is it possible here for the trustee, complaining of the receiver as trespasser, a trespasser at the date of Jan. 9, 1929, to say that he is entitled to the proceeds of what happened in the course of the receiver's wrongful act after it had been committed? What he seeks to recover here is not the direct result of the tort. The receipts of the receiver were not the result of it. They were the product of the energy and work of the receiver himself and they were not necessarily incidental to the conversion.

It must always be remembered in cases where damages are claimed that the plaintiff who claims them ought to take steps to mitigate his loss. In the present case if the trustee had been minded to carry on the business it would have been possible for him to have replaced these goods which he claims were taken improperly from him, such things as the plant and machinery, the motors and vans, the office furniture and so forth. He could have replaced those if they had been improperly withheld from him and, if he had been minded so to do, and it would have been right on his part as trustee to do so, he could have put forward the same energy into the work which ultimately resulted in the profit gained by the receiver in carrying on the business.

Here let me point to a somewhat analogous case. There have been cases where a man is found to be an executor de son tort. The executor de son tort may recoup himself in damages for all money that he has bona fide paid on account of the testator. That statement is to be found made in *Fyson* v. *Chambers* (11) (1842, 9 M. & N. at p. 468).

We must also bear in mind that when you are dealing with a trespass and a conversion of property, when the damages are paid over, that is an end of the trespass. The effect of it is to transfer the property. In *Buckland* v. *Johnson* (12), MAULE, J., said:

> "When the plaintiff made his election to sue in trover for the value at the time of the sale, he was bound by the estimate of the jury. The circumstance of the present defendant's having been a joint converter, or a stranger, makes, I think, no difference. If he were a stranger, the plaintiff, having once recovered in respect of the same goods, cannot recover again the same thing against somebody else. There is an end of the transaction. Having once recovered a judgment, his remedy was altogether gone; his claim was satisfied as against all the world."

In other words, upon the satisfaction of the tort in respect of which the trustee makes his claim, there is an end of the wrong done by the receiver, and thereafter the plant and machinery, the office furniture and the rest of it passes to him, and it is by him that the fruit of his energy has been gained and received. Such an election, of course, may not bar a remedy against some other person, and, as ROMER, L.J., pointed out in the course of the argument, there would have been a claim possible by the trustee against those persons who paid over money to the receiver and there would have been no answer to such a claim. If an illustration of that nature is required, it is to be found in *Smith* v. *Baker* (13).

Here there was no express notice, there was no express indication of any claim that was going to be made beyond the damages for conversion, and it is, to my mind, entirely too late for the trustee to seek to recover the fruits of the energy of the receiver after he has made a final and complete election to treat the receiver as a wrongdoer. Those reasonings, to my mind, support the decision which was given in *Re Riddeough, Ex parte Vaughan* (2), which I think is the right and true statement of the law. In these circumstances, I come to the conclusion that it is not possible to impute the £5,600 4s. 10d. to the receiver as damages for conversion.

There remains the question whether or not he could recover that by way of money had and received to his use. Our attention was called to the old case of *Moses* v. *Macferlan* (14), in which LORD MANSFIELD treats the action of money had and received upon the indebitatus counts as having been derived from equity

A and as being appropriate in any case in which it would be right for the plaintiff to put his hand into the pocket of the defendant and take out from it something which had been received from the defendant using the authority or using the power of the plaintiff to get it into that pocket. That doctrine of *Moses* v. *Macferlan* (14) must now be treated as gone ever since *Sinclair* v. *Brougham* (15) has been decided. By that case it was determined that the action for money had and received does B imply at least the fiction of a promise. I use the words of LORD HALDANE ([1914] A.C. at p. 417), where he says:

> "And it appears to me that as matter of principle the law of England cannot now, consistently with the interpretation that the courts have placed on the statutes which determine the capacity of statutory societies, impute the fiction of such a promise where it would have been ultra vires to give it".

C In other words, you must have the possibility of imputing the fiction of a promise.

In the present case the action of the trustee, finally determining that the receiver was a trespasser, cut away from him the possibility of treating the receiver as an agent and, it seems to me, cut away the possibility of imputing the fiction of a promise to the receiver.

In that case LORD SUMNER also said ([1914] A.C. at p. 456):

D

> "There is now no ground left for suggesting as a recognisable equity the right to recover money in person, merely because it would be the right and fair thing that it should be refunded to the payer."

If the principle of *Moses* v. *Macferlan* (14) has gone, and we now have to consider that the action for money had and received is based at least upon the fiction of E a promise, one comes back to the facts of this case to see whether it is impossible to attach that doctrine to the present facts. The receiver was left in possession of the business. The business was one which he carried on. He carried on all the contracts, being fed and dealt with and supplied out of the totality of the assets of the business, whether in money or in kind. There was no indication of goods being bought separately for one particular contract, as apart from the others, F and the trustee, having elected to treat the receiver as a trespasser, had made a final determination of the matter and there cannot now be an alteration of his position to his own advantage, whereunder he seeks to recover certain sums without allowing sums which ought to be allowed in favour of the receiver. In my judgment, the doctrine of money had and received cannot be applied to the facts of this case.

G Whether, therefore, we consider the one limb or the other limb of the argument which has been presented to us on behalf of the trustee, it seems to me that they both fail; and for these reasons I have come to the conclusion that the order of CLAUSON, J., must be discharged so far as it imposed a liability of £5,600 4s. 10d. upon the receiver.

LAWRENCE, L.J.—On Dec. 23, 1931, the trustee definitely elected to treat the H receiver as a trespasser, and called upon him for an account on that footing. The receiver acquiesced in the position so taken up by the trustee, and it, therefore, becomes unnecessary to consider whether the trustee, in view of his previous attitude, was justified in treating the receiver as a tortfeasor. In these circumstances the receiver does not dispute that he is liable in damages for conversion amounting to a sum of £2,617 8s. 3d., being the actual value of certain plant, machinery, I motors, vans, office furniture, deposits, book debts, and retentions wrongfully taken possession of by him, but he denies that he is under any further liability. CLAUSON, J., has held that beyond this admitted liability the receiver is accountable for an additional sum of £5,600 4s. 10d. by way of special damages on the ground that the trustee was prevented from earning that sum owing to the conversion by the receiver of the plant, machinery, etc. It is against this decision that the receiver appeals, his contention being that no special damages were pleaded and that in any event they are too remote. The trustee seeks to uphold the judgment of the learned judge on the ground, first, that the special damages were rightly awarded; secondly, in the alternative, that the sum awarded can be recovered by the trustee as money had and received to his use; and, thirdly, in the alternative, that the sum awarded can be recovered as damages for wrongful intermeddling with the contracts in respect of which it was received. The determination of the issues thus raised is not free from difficulty. A

Dealing, first, with the question whether the learned judge was right in the circumstances of the present case in awarding any special damages for conversion, B I am of opinion that, if such a claim was intended to be made at the hearing, it ought to have been pleaded and particulars of it given to the receiver. In the absence of any such plea and particulars, and, indeed, of any evidence to support the claim, I do not think that the learned judge was justified in holding that the trustee was prevented by the conversion of the plant and machinery, etc., from earning the profit which the receiver in fact earned by completing twenty out of C the twenty-three contracts current at the commencement of the bankruptcy. As a matter of fact the trustee was not appointed until some months after the receiver had taken possession of the plant, etc., which, moreover, had been abandoned by the bankrupt over a month before that date, the company having been in possession in the meantime. In my judgment, even if the trustee is entitled to claim special damages, the damages which he claims are too remote. There is no evi- D dence to show to what, if any, extent the plant, machinery, etc., were essential to or were in fact used in the carrying out of the twenty contracts in question, or to what, if any, extent they contributed towards the earning of the profits made on those contracts. It is obvious that these profits could not have been earned solely by employing the machinery and plant, etc., in question, and that further materials would have to be bought. Further, the machinery and plant, etc., or some part E of it, might well have been replaced immediately had the trustee been minded to carry out the contracts himself.

Bodley v. *Reynolds* (5) and *France* v. *Gaudet* (6), relied upon by the trustee on this point, are distinguishable from the present case on the facts. In the former case it was held that where special damage is laid and proved there is no reason for measuring the damages merely by the value of the chattels converted. In the F latter case it was held that in the case of trover it is not in general special damages that can be recovered, but a special value attached by special circumstances to the articles converted; that the conversion consists in withholding from another property to the possession of which he is immediately entitled, and that the circumstances which affix the values are then determined. Further it is pointed out in that case that in *Bodley* v. *Reynolds* (5) there must have been evidence of know- G ledge on the part of the defendant that in the nature of things inconvenience beyond the loss of tools must have been occasioned to the plaintiff. In the circumstances of the present case these authorities do not help the trustee, and, in my judgment, he can only recover what he in fact claimed in his points of claim, namely, the value of the plant, machinery, etc. It is plain on the evidence that the trustee was not hindered or prevented from carrying on the business of the bankrupt by H any action on the part of the receiver, nor did the trustee at any time assert any right or show the slightest desire to carry on that business. What really prevented the trustee from asserting his rights was, in the first instance, the fact that he was not appointed at the time when the receiver took possession of the business, and, in the next place, because after his appointment he hesitated to interfere as he was not certain whether he could avoid the assignment which the bankrupt had made I to the company In these circumstances it would, in my judgment, be carrying the doctrine of relation back too far to hold that the trustee was prevented by the action of the receiver from carrying on the business.

I will deal next with the claim for damages against the receiver for wrongful intermeddling with the twenty contracts in question. This claim, in my judgment, is misconceived. The claim is founded on the principle laid down in *Lumley* v. *Gye* (16) and affirmed by the House of Lords in *Quinn* v. *Leathem* (17) that an action lies for procuring a person under contract with the plaintiff to break his contract, the real cause of action in such a case being a wrongful act done intentionally to damage a particular individual and actually damaging him: see per LORD LINDLEY in the latter case ([1901] A.C. at p. 535). The principle thus established has, in my opinion, no application whatever to the facts of the present case. The contracts with which the receiver is said to have intermeddled were contracts which the bankrupt had made but was unable to fulfil. He abandoned them, and first the company, and then the receiver, undertook the fulfilment of his obligations under them, and thus saved the bankrupt and his estate from a heavy claim for damages. So far from the acts of the receiver having been done intentionally to damage the bankrupt, or the trustee, they were done in order to recover for the bank the money which it had advanced and which had no doubt been partly utilised in carrying out the contracts, and the effect of the receiver's acts was to relieve the bankrupt and his estate from liability under those contracts. Moreover, the receiver did not procure the building owners to break their contracts, nor did the building owners, in fact, break their contracts. The bankrupt never became entitled to any moneys thereunder after Jan. 9, 1929, and the building owners, as, in my opinion, they were entitled to do, paid the moneys to the person who had undertaken the obligations of the builder after the latter had abandoned the contracts.

There remains the more difficult question whether the trustee is entitled to receive the profit made by the receiver on the twenty contracts in question as money had and received to the use of the trustee. The true nature of an action for money had and received was considered by the House of Lords in *Sinclair* v. *Brougham* (15) ([1914] A.C. at pp. 454, 455). LORD SUMNER, in his speech, points out that the action was not devised by the Court of Chancery, but was a form of assumpsit already old in LORD MANSFIELD'S time, that it had been described as "liberal" because it was attended by a minimum of formality and the plaintiff waived all torts, trespasses and damages, and that LORD MANSFIELD in *Towers* v. *Barrett* (18) said it was founded on eternal justice.

In the present case the receiver was appointed by Lloyds Bank, who had bona fide advanced a substantial sum on the security of a debenture purporting to cover the whole undertaking which the company had taken over from the bankrupt. Although the receiver was appointed by the bank, he became in law the agent of the company. It is not suggested that the receiver, who is a chartered accountant, acted otherwise than with the utmost good faith. Believing that he had been appointed under a valid debenture he took possession of the whole business which had formerly been carried on by the bankrupt, and was then being carried on by the company. The bankrupt, in the ordinary course of his business as a builder, had entered into twenty-three building contracts which were still current and in the course of being carried out when the receiver took possession. In January, 1929, the bankrupt was unable to carry on his business any longer for lack of funds. Thereupon he assigned his business to the company, who borrowed from the bank the necessary money to carry it on, and for some weeks did in fact carry it on. When the company became unable, owing to lack of funds, to continue the business, the bank, under the powers contained in their debenture, appointed the receiver and found the necessary money to enable him to continue the business and, as part of that business, to carry out the pending contracts, thus saving the bankrupt's estate from a heavy claim for damages. After the trustee had been appointed he allowed the receiver, without any protest, to continue to carry on the business, and all the contracts were in fact completed by him by the end of the year 1929. Twenty of these contracts in the result turned out to be profitable, and the remaining three unprofitable. In April, 1930, the assignment to the company was declared to be fraudulent and void as against the trustee, and in December, 1931, with full knowledge of all the facts, the trustee elected to treat the receiver as a tortfeasor, as stated at the commencement of this judgment. In my opinion, this election involved a reprobation of the acts of the receiver in connection with the business as a whole.

In making the claim for money had and received in respect of the profits received A from the twenty contracts in question, the receiver is, in my judgment, at the same time approbating and reprobating the action of the receiver. These twenty contracts, as well as the three unprofitable contracts, would have come to an abrupt end if the receiver had not carried on the business as a whole and found the necessary time, money and labour, to complete the contracts. No money was due to the bankrupt under any of these contracts at the date of the bankruptcy, and B the bankrupt was under a heavy liability under them. The plant and machinery, stock, etc., of which the receiver took possession, were utilised by him in carrying on the business and completing the contracts.

The trustee has insisted upon treating the receiver as a tortfeasor, for the conversion of the plant, machinery and stock, and has succeeded in obtaining damages from the receiver on that footing. C The trustee has also sought to recover special damages for the conversion of that plant, machinery and stock, and, further, has claimed damages for wrongful interference with the contracts. Having failed to recover anything on these last two heads of claim, the trustee now contends that he is entitled, without having waived all torts, trespasses and damages, to recover the profit which the receiver has made on such part of the business as has resulted in a profit, although D in earning that profit he has used the plant, machinery and stock which the trustee alleges was wrongfully converted. In other words, the trustee is seeking to adopt such acts of the receiver in carrying on the business as suit him, and to repudiate such acts as do not suit him. To hold that the trustee is entitled to adopt this attitude in the circumstances of the present case would, in my opinion, not be doing justice between the parties, and would be misapplying the principle upon E which, according to LORD MANSFIELD, the action for money had and received is founded. After electing to treat the receiver as a tortfeasor, and after insisting upon his accounting on that footing up to the last moment, it is not, in my judgment, open to the trustee to turn round and, whilst insisting upon damages for conversion of the plant and machinery, etc., utilised by the receiver in completing the contracts, at the same time to claim the profits earned by the completion of F those contracts as money had and received to his use. In my opinion, the trustee cannot adopt such an attitude, any more than he could successfully claim to treat the receiver as a tortfeasor on one day and as his agent on the next.

In the circumstances of this case I think that the act of the receiver in carrying on the bankrupt's business ought to be treated as indivisible. The receiver, wrongfully as it turned out, entered into possession of the assets of the whole business G and carried on the business for the benefit of those who, he thought, were entitled to it. It was open to the trustee to elect to waive this tort and make the receiver account for all his transactions in connection with the carrying on of the business, or to treat him as a tortfeasor and sue him for damages on that footing; but, in my opinion, it would be most unjust to allow the trustee, after having elected to treat the receiver as a tortfeasor, having failed to recover all the damages claimed H by him on that footing, whilst retaining such damages as he has in fact recovered, also to seek to recover the profits made by the receiver in respect of certain parts of the business.

The matter does not rest there. Apart altogether from the question whether the effect of the election to treat the receiver as a trespasser prevented the trustee from making the claim for money had and received, that claim in the circumstances of I this case is, in my judgment, not well founded. Either the moneys paid by the building owners to the receiver were moneys which never belonged to the bankrupt, because they were earned entirely by the exertions of the receiver, and were, therefore, properly paid to him for his own use, or else the moneys were due and owing by the building owners to the trustee in bankruptcy and were therefore paid by them to the wrong person and the building owners have not discharged their liability under their contracts. In neither case can it be said that the receiver has received the moneys to the use of the trustee.

I agree, therefore, that the appeal of the receiver ought to be allowed, and that the damages which he has been declared liable to pay ought to be limited to the sum of £2,617 3s. 3d.

ROMER, L.J.—The sale by Simms of his business and assets to William Simms, Ltd., having been declared to be fraudulent and void, the trustee in his bankruptcy had two courses open to him. He could elect to treat Mr. Gillett, the receiver, as having taken possession of the bankrupt's assets, or what remained of them on Feb. 14, 1929, and as having carried on the bankrupt's business as agent of the trustee, or he could elect to treat the receiver as a wrongdoer throughout. Of these two courses he chose the latter, and by letter of Dec. 23, 1931, caused the receiver to be informed of this decision. It is true that in that letter it is said that he elects to treat the receiver as a trespasser. For myself, however, I cannot regard that statement as meaning more than this, that he does not elect to treat the receiver as having been his agent. Whatever remedies, therefore, he possessed against the receiver, if the latter were not to be treated as his agent, still remained open to him, and it becomes necessary to consider what those remedies were.

The receiver's acts, so far as material to the present purpose, were as follows. He had taken possession of and converted to his use certain chattels belonging to the bankrupt consisting of plant and machinery, motor vans, and office furniture, and he had carried on the bankrupt's business of a builder, in the course of which he completed and received payment under certain building contracts that had been entered into by the bankrupt. The receiver has always been willing to account to the trustee for the value or proceeds of sale of the chattels, but contends that the trustee is not entitled to recover anything further in respect of the particular acts that I have specified. The trustee, on the other hand, contends that he is entitled to recover from the receiver as damages for the conversion of the chattels a sum equal to the profits that would have accrued to him from the building contracts but for the receiver's actions, and that the measure of such damages is the sum of £5,600 4s. 10d., that sum representing the excess of what the receiver was paid under the twenty contracts completed by him which resulted in a profit over the cost to him occasioned by the completion.

This contention on the part of the trustee has been upheld by Clauson, J., and from that decision the receiver is appealing to this court. With all respect to the learned judge, I find myself unable to agree with his conclusion. It may be conceded that in an action for the conversion of chattels a plaintiff may in certain cases recover by way of special damages any loss of profit from the use of the chattels that he may have suffered by the conversion; but such special damage must be pleaded. In the present case, it is not alleged in the amended points of claim that the trustee suffered any such special damage. This, in my opinion, by itself, disentitles the trustee from making such a claim; but even if he had alleged in his pleadings that he had been prevented by the receiver from making a profit by the use of the chattels, I should still be unable to agree that he was entitled to the damages awarded him by the learned judge. It is true that in contemplation of law the title of the trustee in bankruptcy relates back to Jan. 9, 1929. He was not appointed in fact until May 27 of that year. If, therefore, the receiver, when he took possession on Feb. 14, had taken no steps to complete the contracts, the building owners would have been entitled to treat them as having been repudiated and would ultimately have proved in the bankruptcy for the damage they had thereby sustained, for there was no one else who would or could in fact have completed the contracts in the absence of the receiver. Even if the trustee is to be presumed by a fiction of law to have been willing and able to do so, there is nothing to suggest that he would have made the same profit as was made by the receiver, for during the interval between Jan. 9 and Feb. 14 the contracts had been performed by William Simms, Ltd., and any materials bought by them that happened to be on the site on Feb. 14 would be utilised by the receiver without having to pay for them. The trustee, on the other hand, would have no such right to use them.

The receiver, moreover, made his profit out of the contracts, and not merely by his use of the chattels. The damages awarded to the trustee by the learned judge have, therefore, in truth, been awarded him, not because of the conversion by the receiver of the chattels, but because the receiver completed the contracts.

The matter may be tested in this way. Supposing that the trustee had himself been completing the contracts and had been deprived by the receiver of the chattels in question, in an action for damages for conversion of the chattels the trustee could not have recovered, in addition to the value of the chattels, anything more than the amount of profits lost to him by being deprived of the use of such chattels during the time necessary to replace them. If the receiver had wrongfully removed a ladder essential for the building operations, the trustee could not cease building and recover as damages for conversion the whole profits that would have accrued to him had he bought another one and completed the contract.

It was, perhaps, for this reason that before us counsel for the trustee claimed in the alternative to be paid the sum of £5,600 4s. 10d. as damages occasioned to him by reason of the interference, or (as it is called in the points of claim) the intermeddling by the receiver with the contract. To such claim there are obvious objections. In the first place, as indicated above, the action of the receiver in completing the contract was to the trustee's advantage, and not to his detriment. The estate of the bankrupt was relieved from a heavy claim for damages on the part of the building owners. In the second place, the receiver committed no wrong to the trustee when he completed the contracts except, of course, by the conversion of the chattels for that purpose. Had he induced the building owners to commit breaches of their contracts with the bankrupt, the matter would have been different, but they committed no such breach. All that happened was that after the bankrupt had broken the contracts, as he did on Jan. 9, 1929, when he ceased to perform them, the building owners as from Feb. 14 permitted the receiver to proceed with and ultimately to complete them. At the time of the receiver's appointment the bankrupt, by reason of his default in carrying out the contracts, had no enforceable rights against the building owners, and the doctrine of relation back would not put the trustee in any better position in this respect. The trustee in truth seeks to approbate and reprobate. He is endeavouring at one and the same time to treat the receiver as a wrongdoer in completing the contracts, and yet in doing so as having kept them alive for his benefit.

In my opinion, the claim of the trustee to the £5,600 4s. 10d. damages cannot be sustained either as damages for conversion of the chattels or as damages for intermeddling with the contracts.

The trustee, however, by way of further alternative, claims to be paid this sum as money had and received by the receiver to his use. The nature of the action for money had and received was clearly explained by the House of Lords in the case of *Sinclair* v. *Brougham* (15) ([1914] A.C. at p. 456). LORD SUMNER, after an examination of the authorities, said:

> "There is now no ground left for suggesting as a recognisable 'equity' the right to recover money in personam merely because it would be the right and fair thing that it should be refunded to the payer."

The action, said LORD HALDANE, was in principle one which rested on a promise to pay either actual or imputed by law; and he subsequently added that the remedy must be taken to have been given only when the law could consistently impute to the defendant at least the fiction of a promise. It is by no means clear in what circumstances the law will impute this fiction. LORD SUMNER said that the action cannot now be extended beyond the principles illustrated in the decided cases, and that it was hard to reduce to one common formula the conditions under which the law would imply a promise to repay money received to the plaintiff's use.

I have no intention of attempting to do what LORD SUMNER found difficult. But it seems reasonably clear that such a promise will not be implied unless it is inequitable or contrary to eternal justice that the payee should retain the money as against the plaintiff in the action. Furthermore, it is obvious that the promise to be implied must be a promise made to the plaintiff or his agent; he could not otherwise sue upon it. Where, therefore, A., who owes a certain sum to B., pays the sum to C. under the mistaken impression that he is thereby discharging himself of his indebtedness to B., a promise by C. to repay A. would be readily and properly implied, as might conceivably a promise given by C. to A. to pay the money to B., though my attention has not been called to any case in which a promise to pay the money to a third person who was in no way a party to the transaction of payment has ever been implied; but I fail to see how the law can imply a promise given by C. to B. to pay him the money, for, in the first place, B. has been in no way affected by A.'s payment to C.—the debt owing by A. to B. still remains undischarged and B. can sue for its recovery. In the second place, B. was no party to the transaction of the payment, and a contract between C. and B. cannot be implied as arising out of the transaction between A. and C. Besides, as I have already pointed out, the law would imply a contract by C. to repay the money to A., and could not reasonably imply another and co-existing one to repay the same money to B. In such a transaction, as I have supposed, C. would probably hand over the money to B. and have done with it, for B. could recover judgment against A. and A. against C.

It was, no doubt, considerations of this kind that induced the receiver to admit his liability to account to the trustee for the book debts collected by him. For the reasons I have given I do not think that an action against him at the suit of the trustee for money had and received would have been maintainable. *Andrews* v. *Hawley* (19), when carefully examined, is no authority to the contrary. In *Re Goldburg, Ex parte Page* (1) Phillimore, J., no doubt, held a receiver, in similar circumstances to the present, accountable to the trustee in bankruptcy for book debts that he had collected, but there was no reference in the arguments, or the judgment, to the action for money had and received. What the learned judge said was that the receiver was accountable for those assets of the bankrupt such as book debts, and that he had either to deliver them up or pay damages for their conversion. With all respect to the learned judge the book debts were not traced to the receiver's hands, nor had he, nor could he, have converted them. They still remained owing by the debtors to the trustee in bankruptcy. In the circumstances I cannot regard this case as an authority for the proposition for which it was cited.

If an action at the suit of the trustee for money had and received to his use would not lie against the receiver in respect of the moneys collected by him from the debtors to the bankrupt a fortiori no such action would lie in respect of the moneys paid to him in respect of the building contracts that were completed by the receiver under which no moneys were payable by the building owners to the bankrupt or his trustee at the date of the receiver's appointment or afterwards. It is, indeed, difficult to see why a promise should be implied by the receiver to hand over to the trustee a profit made by him through the exercise of his own skill and the expenditure of his own money merely because to some unknown extent he took advantage of work already done by the bankrupt, work in respect of which neither the bankrupt nor the trustee could have recovered any payment from the building owners.

For these reasons I am of opinion that the claim of the trustee to be paid the sum of £5,600 4s. 10d. should be rejected.

THE MASTER OF THE ROLLS.—The order of the court will be that the appeal succeeds, replacing instead of the figure of £1,617 3s. 3d. the figure of £1,675 3s. 3d. We allow the receiver to have the costs of this appeal. The costs of the proceedings below must be taxed, and the receiver will be paid three-quarters of the total amount of the taxed costs of the proceedings below, and there will be a set-off of those sums for costs against £1,675 which the receiver has to pay.

Appeal allowed.

Solicitors: *Stafford Clark & Co.*; *Adler & Perowne.*

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

PARTRIDGE JONES AND JOHN PATON, LTD. *v.* JAMES

[House of Lords (Lord Buckmaster, Lord Warrington, Lord Tomlin, Lord Russell, and Lord Wright), February 2, 3, 1933]

[Reported [1933] A.C. 501; 102 L.J.K.B. 760; 148 L.T. 553; 49 T.L.R. 233; 77 Sol. Jo. 100]

Workmen's Compensation—"Arising out of and in the course of employment"—Health of workman contributory cause of accident—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 1 (1).

An accident arises out of employment when the required exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or the condition of the man's health.

A workman who, at the time of his death and for some time before, had been suffering from disease of the coronary arteries, collapsed and died ten minutes after he had stopped working as a dipper in the galvanising department of the respondents' works. On a claim by his widow against his employers for compensation upon the ground that the death was caused by accident arising out of and in the course of his employment, within the meaning of s. 1 of the Workmen's Compensation Act, 1925,

Held: the workman having died, not from the disease alone, but from the disease and the employment taken together, the applicant was entitled to compensation.

Observations of Lord Loreburn, L.C., in *Clover, Clayton & Co.* v. *Hughes* (1), [1910] A.C. 242, applied.

Notes. The Workmen's Compensation Act, 1925, was repealed by the National Insurance (Industrial Injuries) Act, 1946, which prescribes a system of insurance against injuries caused by industrial accidents, but s. 1 (1) of the latter Act provides that the insurance shall be "against personal injury caused . . . by accident arising out of and in the course of" employment, thus adopting the wording of s. 1 (1) of the Act of 1925. See also s. 7 (1).

Followed: *Lochgelly Iron and Coal Co.* v. *Walkenshaw* (1935), 28 B.W.C.C. 230. Considered: *Whittle* v. *Ebbw Vale Steel, Iron and Coal Co.*, [1936] 2 All E.R. 1221; *Ormond* v. *Holmes & Co.*, [1937] 2 All E.R. 795; *Fife Coal Co.* v. *Young*, [1940] 2 All E.R. 85. Referred to: *Walker* v. *Bairds and Dalmellington, Ltd.*, [1935] All E.R. Rep. 153; *Hilton* v. *Billington and Newton, Ltd.*, [1936] 3 All E.R. 292; *Moore* v. *Tredegar Iron and Coal Co.* (1938), 31 B.W.C.C. 359; *Oates* v. *Fitzwilliam's (Earl) Collieries Co.*, [1939] 2 All E.R. 498; *Patrick (James) & Co. (Pty.), Ltd.* v. *Sharpe*, [1954] 3 All E.R. 216.

As to "accidents" within the Workmen's Compensation Acts, see 34 Halsbury's Laws (2nd Edn.) 816 et seq., and for cases see 34 Digest 266 et seq. For National Insurance (Industrial Injuries) Act, 1946, see 16 Halsbury's Statutes (2nd Edn.) 797.

Cases referred to:

(1) *Clover, Clayton & Co.* v. *Hughes*, [1910] A.C. 242; 79 L.J.K.B. 470; 102 L.T. 340; 26 T.L.R. 359; 3 B.W.C.C. 275; sub nom. *Hughes* v. *Clover, Clayton & Co.*, 54 Sol. Jo. 374, H.L.; 34 Digest 273, *2316*.

(2) *Stewart* v. *Wilsons and Clyde Coal Co.* (1902), 5 F. (Ct. of Sess.) 120; 34 Digest 270, *2293, iii*.

Appeal by the employers from an order of the Court of Appeal (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), affirming an award made by His Honour J. Rowland Rowlands under the Workmen's Compensation Act, 1925, in favour of the respondent workman at Pontypridd County Court.

The facts, as stated in the award, were as follows.

At the time of his death, and for some time before, the workman was and had been suffering from disease of the coronary arteries brought on by an attack of syphilis, and his state was such that, although he might die at any time without engaging in any act requiring exertion, every sort of physical labour was dangerous, and likely to lead to heart failure. On the day of his death he was engaged in the galvanising department of the respondents' works, and from the commencement of the morning shift up to 11.30 a.m. or shortly afterwards, he had been engaged in dipping sheets. It then became necessary to clean out the dross, and the workman, assisted by others, proceeded to carry out this operation. This operation was laborious and put more strain upon the man than the work of dipping sheets; but he went through with it till he and the men engaged with him stopped work for a short time in the ordinary course. Immediately after stopping work he stepped down from some staging on which he had been working, and then sat down—close to the point where he stepped off—on a swiller which formed part of the plant.

The county court judge found that he was in distress from heart trouble when he stepped off the staging, and, in fact, he died in about ten minutes from the time when he stopped working. The doctors called on behalf of his widow, when she made a claim for compensation under the Workmen's Compensation Acts, gave it as their opinion that the workman died in consequence of the exertion which he had undergone on that day, particularly the exertion during the operation of drossing, and that he would probably have lived for some years if he had not engaged in his work as a dipper on that day and refrained from such work afterwards. Dr. Robson, who was called for the employers, did not agree with the opinions expressed by the doctors called for the workman, and said that the man died of a diseased heart and might have died at any moment apart from work, but that he would have lived longer if he had not worked on that day, though it might have been only an hour longer. The county court judge said that it was clear that, in the opinion of all the doctors, the physical exertion which the man went through that morning while performing his ordinary work accelerated his death. The county court judge made an award in favour of the workman, and this decision was affirmed by the Court of Appeal.

Edgar T. Dale, *H. H. Roskin*, and *James Macmillan* for the employers.

Edward W. Cave, *K.C.*, and *Godfrey Parsons* for the applicant were not called upon to argue.

LORD BUCKMASTER.—The question in this case is whether the appellants are liable under the Workmen's Compensation Act, 1925, to make compensation to the respondent, who is the widow of a man who was in their service, by reason of the man's death on Oct. 11, 1930, in circumstances which I will shortly relate.

The man was what is known as a dipper in the appellants' service, and on Oct. 11, 1930, he was engaged in the galvanising department. Part of his work consisted in removing the dross, which one of the witnesses said was "a very heavy part of the job." It was immediately after this work that he complained of pains, and shortly afterwards he died. The explanation of his death, as found by the county court judge, was this: that he was

> "suffering from a disease of the coronary arteries as the result of an attack of syphilis, and that the effect of this disease was that his arteries on Oct. 11, 1930, failed to supply the amount of blood necessary for the heart to function when the man was doing his ordinary work in the ordinary way, and that this failure resulted in the condition known as angina pectoris and in failure of the heart."

He further states no personal injury was caused to him, and that the man died because,

> "owing to the disease from which he was suffering, certain organs failed to function so as to enable him to carry on his ordinary work during the day."

Upon that the learned county court judge found, being, as he thought, constrained by authority, that a sum of £600 should be allotted to the widow and her three children, and his finding has been supported by the Court of Appeal.

Now the real case that is made against the judgment appealed from is this, that in order to establish that a man is entitled to the benefit of the section of the Act it is necessary to show that he has suffered an injury as the result of some definite thing that he did in the course of his work. If, in the normal course of his work, owing to the imperfect condition of his arteries, or whatever other internal organ may have been diseased, he breaks down and dies, the appellants' case is that although the work contributed to the death, that is not sufficient unless you can point to a specific injury resulting from a specific act. And that appears to have been the view of the learned county court judge if he had not thought that authority constrained him to hold otherwise. Whatever may have been said about the merit of that argument some twenty years ago, it appears to me that it is impossible for it to be effectively advanced to-day while this House as well as all the other courts are bound by what was done in *Clover, Clayton & Co.* v. *Hughes* (1). In that case a workman who was suffering from a serious aneurism was employed in tightening a nut by a spanner when he suddenly fell down dead from rupture of the aneurism. The county court judge found that death was caused by a strain arising out of the man's ordinary work operating on a condition of the body which was such as to render the strain fatal, and this House, Lord Atkinson and Lord Shaw dissenting, held that it was a case of "personal injury by accident arising out of and in the course of the employment."

There appears to me to be no possible ground of distinction between this case and that, except that, in that case, the work that the man was doing caused his arteries to rupture, and in this case produced the condition described by the county court judge, which caused his heart to fail to function and produced the attack of angina pectoris and so resulted in death. The general principles of this matter are stated in some considerable detail by Lord Loreburn in *Clover, Clayton & Co.* v. *Hughes* (1) ([1910] A.C. at p. 246), and it is well that these words should be remembered, so as to afford the guidance which counsel for the appellants asks this House to give in cases of a similar kind. Lord Loreburn said this:

> "I do not think we should attach any importance to the fact that there was no strain or exertion out of the ordinary. It is found by the county court judge that the strain in fact caused the rupture, meaning, no doubt, that if it had not been for the strain the rupture would not have occurred when it did. If the degree of exertion beyond what is usual had to be considered in these cases, there must be some standard of exertion, varying in every trade. Nor do I think we should attach any importance to the fact that this man's health was as described. If the state of his health had to be considered, there must be some standard of health, varying, I suppose, with men of different ages. An accident arises out of the employment when the required exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or the condition of [the man's] health. . . . In each case the arbitrator ought to consider whether in substance, as far as he can judge on such a matter, the accident came from the disease alone, so that whatever the man had been doing it would probably have come all the same, or whether the employment contributed to it. In other words, did he die from the disease alone or from the disease and employment taken together, looking at it broadly? Looking at it broadly, I say, and free from over-nice conjectures, was it the disease that did it, or did the work he was doing help in any material degree?"

The answer to that question has been found in this case in the clearest terms, and if any possible comment could be made on the conclusions of the county court judge, my feeling would be that they have not been sufficiently emphatic as to the association of the employment and the disease which resulted in death.

Lord Macnaghten, who gave judgment to the same effect as Lord Loreburn, makes a statement which I think also is of considerable consequence. He says this ([1910] A.C. at p. 249):

> "The real question, as it seems to me, is this: Did it arise out of his employment? On this point the evidence before the county court judge was undoubtedly conflicting. But he has held that it did, and I think there was sufficient evidence to support that finding, though I do not say that I should have come to the same conclusion myself. 'The death,' the learned judge says, 'was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal.' The fact that the man's condition predisposed him to such an accident seems to me to be immaterial. The work was ordinary work, but it was too heavy for him."

Lord Collins, who also held the same opinion as Lord Loreburn and Lord Macnaghten, refers to *Stewart* v. *Wilsons and Clyde Coal Co., Ltd.* (2), in which Lord M'Laren said:

> "If a workman, in the reasonable performance of his duties, sustains a physiological injury as the result of the work he is engaged in . . . this is an accidental injury in the sense of the statute."

With that as a guidance to this House it seems to me that, when the county court judge has held that the result of the work was the failure of the blood supply resulting in angina pectoris, and that it was because he was engaged in doing his ordinary work in this diseased condition that this failure arose and that the work and the disease together contributed to his death, it would be impossible to deny that that was not within the actual meaning of the words in the case which I have cited. In my opinion the judgment of the Court of Appeal in this case is right and should be affirmed.

LORD WARRINGTON.—I agree.

LORD TOMLIN.—I concur.

LORD RUSSELL.—I agree.

LORD WRIGHT.—I agree.

Appeal dismissed.

Solicitors: *L. Bingham & Co.*; *Pattinson & Brewer*, for *A. H. Bryant*, Newport.

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

BRITISH RUSSIAN GAZETTE AND TRADE OUTLOOK, LTD. *v.* ASSOCIATED NEWSPAPERS, LTD. TALBOT *v.* SAME

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), July 13, 14, 28, 1933]

[Reported [1933] 2 K.B. 616; 102 L.J.K.B. 775; 149 L.T. 545]

Accord and Satisfaction—Accord without satisfaction—Enforceability of agreement.

Accord and satisfaction is the purchase of a release from an obligation arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged; the satisfaction is the consideration which makes the agreement operative. The consideration on each side may be an executory promise, the two mutual promises making an agreement enforceable in an action for damages. The agreement must be construed in accordance with the intention of the parties as expressed in it, and, if there is doubt, the construction which makes it effective to carry out that intention prevails.

The plaintiff T. and the plaintiff company, which had two directors of whom T. was one, brought against the defendants actions—T. for damages for libel, and the company for damages for slander of title—which were consolidated. T. purported to settle his own claim and that of the company and of its officers for the sum of 1,000 guineas, but in doing so he acted without the authority of the company or of his co-director, who repudiated the settlement. The matter proceeded to trial, and on a counter-claim by the defendants against T. for damages for breach of warranty of authority, it was contended on behalf of T. that accord without satisfaction created no legal obligation, and that, therefore, no enforceable implied warranty existed.

Held: there was an agreement by T. with the defendants to accept promise against promise, which agreement was enforceable in law.

Per GREER, L.J.: It is still the law that a mere accord without satisfaction does not discharge a liability after breach, but it amounts to an agreement which can be enforced by a claim for damages if it is broken by one of the parties when the other has shown his readiness to perform it.

Notes. As to accord and satisfaction, see 8 HALSBURY'S LAWS (3rd Edn.) 206 et seq., and 32 HALSBURY'S LAWS (2nd Edn.) 203. For cases see 12 DIGEST (Repl.) 496 et seq.

Cases referred to:

(1) *Collen* v. *Wright* (1857), 8 E. & B. 647; 27 L.J.Q.B. 215; 30 L.T.O.S. 209; 4 Jur.N.S. 357; 6 W.R. 123; 120 E.R. 241, Ex. Ch.; 1 Digest 665, *2795*.

(2) *Starkey* v. *Bank of England*, [1903] A.C. 114; 72 L.J.Ch. 402; 88 L.T. 244; 51 W.R. 513; 19 T.L.R. 312; 8 Com. Cas, 142; 1 Digest 662, *2777*.

(3) *Firbank's Executors* v. *Humphreys* (1886), 18 Q.B.D. 54; 56 L.J.Q.B. 57; 56 L.T. 36; 35 W.R. 92; 3 T.L.R. 49, C.A.; 1 Digest 658, *2752*.

(4) *Good* v. *Cheesman* (1831), 2 B. & Ad. 328; 9 L.J.O.S.K.B. 234; 109 E.R. 1165; 12 Digest (Repl.) 519, *3898*.

(5) *Cartwright* v. *Cooke* (1832), 3 B. & Ad. 701; 1 L.J.K.B. 261; 110 E.R. 256; 12 Digest (Repl.) 518, *3894*.

(6) *Morris* v. *Baron & Co.*, [1918] A.C. 1; 87 L.J.K.B. 145; 118 L.T. 34; 12 Digest (Repl.) 398, *3086*.

(7) *Goring* v. *Goring* (1602), Yelv. 11; 80 E.R. 8; 12 Digest (Repl.) 518, *3892*.

(8) *Ford* v. *Beech* (1848), 11 Q.B. 852; 17 L.J.Q.B. 114; 11 L.T.O.S. 45; 12 Jur. 310; 116 E.R. 693, Ex. Ch.; 12 Digest (Repl.) 563, *4273*.

(9) *Crowther* v. *Farrer* (1850), 15 Q.B. 677; 20 L.J.Q.B. 298; 15 Jur. 535; 117 E.R. 615; 12 Digest (Repl.) 501, *3758*.

(10) *Henderson* v. *Stobart* (1850), 5 Exch. 99; 19 L.J.Ex. 135; 155 E.R. 48; 12 Digest (Repl.) 501, *3759*.

(11) *Re National Coffee Palace Co., Ex parte Panmure* (1883), 24 Ch.D. 367; 53 L.J.Ch. 57; 50 L.T. 38; 32 W.R. 236, C.A.; 1 Digest 665, *2792*.

(12) *Allen* v. *Harris* (1696), 1 Ld. Raym. 122; 2 Lut. 1537; 91 E.R. 978; 12 Digest (Repl.) 499, *3738*.

(13) *Case* v. *Barber* (1681), T.Jo. 158; T.Raym. 450; 84 E.R. 1195; 12 Digest (Repl.) 498, *3736*.

(14) *Lynn* v. *Bruce* (1794), 2 Hy. Bl. 317; 126 E.R. 571; 12 Digest (Repl.) 499, *3739*.

(15) *Reeves* v. *Hearne* (1836), 1 M. & W. 323; 2 Gale, 4; 5 L.J.Ex. 156; 150 E.R. 457; 12 Digest (Repl.) 503, *3769*.

(16) *Bayley* v. *Homan* (1837), 3 Bing N.C. 915; 3 Hodg. 184; 5 Scott, 94; 6 L.J.C.P. 309; 132 E.R. 663; 12 Digest (Repl.) 499, *3746*.

(17) *Gabriel* v. *Dresser* (1855), 15 C.B. 622; 24 L.J.C.P. 81; 24 L.T.O.S. 272; 3 W.R. 236; 3 C.L.R. 415; 139 E.R. 568; 12 Digest (Repl.) 502, *3768*.

(18) *Elton Cop Dyeing Co., Ltd.* v. *Broadbent & Son, Ltd.* (1919), 89 L.J.K.B. 186; 122 L.T. 142, C.A.; 12 Digest (Repl.) 500, *3756*.

(19) *Peytoe's Case* (1611), 9 Co. Rep. 77 b; 77 E.R. 847; 12 Digest (Repl.) 502, *3761*.

(20) *Bradley* v. *Tonge* (1846), 7 L.T.O.S. 231; 12 Digest (Repl.) 503, *3770*.

(21) *Ruck* v. *Brownrigg* (1850), 2 Ir. Jur. 142; 12 Digest (Repl.) 504, **1816*.

(22) *Flockton* v. *Hall* (1849), 14 Q.B. 380; 19 L.J.Q.B. 1; 14 L.T.O.S. 176; 14 Jur. 571; 117 E.R. 150; affirmed sub nom. *Hall* v. *Flockton* (1851), 16 Q.B. 1039, Ex. Ch.; 12 Digest (Repl.) 499, *3743*.

(23) *Hadley* v. *Baxendale* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 17 Digest (Repl.) 91, *99*.

Cross-appeals in consolidated actions.

The plaintiff, Stafford Cecil Talbot, claimed damages for libel, and the plaintiff company, the British Russian Gazette and Trade Outlook, Ltd., claimed damages for slander of title against the defendants, Associated Newspapers, Ltd., in respect of articles appearing in their newspaper, the "Daily Mail," on June 30 and July 1, 1931.

Up to 1930 the plaintiff Talbot was the proprietor of a monthly newspaper, the "British Russian Gazette and Trade Outlook," of which a Miss Parker was secretary. In February, 1930, the plaintiff company was formed to publish the newspaper, and the plaintiff Talbot transferred all his rights in the newspaper to the plaintiff company for 500 fully paid £1 shares—the total capital. He gave Miss Parker, who had been, and remained, editor, 250 of the shares, and later transferred 225 more shares to her, retaining only twenty-five shares, with an agreement by which he received certain profits or commission from the business of the company.

The "Daily Mail" article of June 30, 1931, was in these terms:

> "Moscow hater of Britain now in London.—Simple 'Scientist' unmasked.—Bukharin, head of the Hate Factory.—Mr. Churchill on Soviet war plans.—Putting it across the B.B.C.
>
> "Bukharin, the inveterate foe of the British Empire, and until recently propagandist-in-chief of the Soviet government, is in England on a visit from Moscow in the guise of a 'simple scientist.' While this concocter of anti-British diatribes was presumably engaged in scientific research in some undisclosed place, Russians were being entertained at a garden party in London.
>
> "Mr. Churchill in Parliament last night, as reported on p. 12, revealed that Russia is importing war metals, such as nickel and aluminiums, at an alarming rate. He showed that Russia is the ominous shadow overhanging the peace of Europe. Not long after Mr. Churchill had spoken on the Moscow menace to Europe's peace there was an extraordinary contrast at the B.B.C. A certain Mr. Stafford C. Talbot was introduced to listeners and occupied nearly twenty minutes, at the best hour of the evening, in delivering in the most glowing

> terms an address about Soviet Russia's industrial plans. The uninformed were led to believe that Russia at present is a land flowing with milk and honey. Not a word about the slavery conditions there; only a mass of statements to Moscow's advantage.
>
> "If Stalin was listening he must have rocked with laughter at the way his supporters succeed in 'putting it over' even the British Broadcasting Corporation. Everybody will ask: How is it arranged?"

The "Daily Mail" article of July 1, 1931, was in these terms:

> "Queer.—The public is becoming more than a little restive at the fatuity with which persons of some authority in this country are allowing themselves to be manipulated by Soviet influence. The Privy Council has just decided to allow that dangerous Bolshevik, Bukharin, who is masquerading as a 'simple scientist,' to visit this country and to remain over here for three months without having to register or to report his presence. The man is a well-known propagandist and enemy of this country.
>
> "Why should the Privy Council thus go out of its way to help Moscow? And why should a semi-public institution such as the British Broadcasting Corporation allow—as it did on Monday night—a lecture to be broadcast throughout the country which was obviously of Soviet propagandist character?"

There followed further matter under two headings:

> "Friend of Soviet.
>
> "Moscow's Favours for Mr. Talbot.
>
> "Mr. Talbot is the proprietor of the 'British Russian Gazette and Trade Outlook,' a monthly journal devoted to the development of Soviet trade. He organised the Association of British Creditors of Russia, for which he was vice-chairman until the general election 1924, when he made an arrangement with the Soviet. He has since visited Russia many times under Soviet auspices, and has been the recipient of much praise for his work on behalf of Soviet interests in this country. As a sign of appreciation the Soviet has given Mr. Talbot permission to open an office at Moscow for his journal, through which it is proposed to disseminate information on Russia to British interests."

The plaintiff company, in their statement of claim, pleaded the following innuendo:

> "The said words meant and were understood to mean that the said Stafford Cecil Talbot was a British subject who was disloyal to his country, and who took part in and aided and abetted the concoction of anti-British diatribes and the propaganda work of the Soviet government under whose control the plaintiff company and the 'British Russian Gazette and Trade Outlook' was. And that the said Talbot was in receipt of financial and other benefits from the government of Russia for those purposes which the said Talbot was engaged in carrying out, and in so doing was deceiving the British Broadcasting Company, and that the plaintiff company and the said 'British Russian Gazette and Trade Outlook' were a mere cloak for such activities of the said Stafford Cecil Talbot, and existed for no other purpose."

A very similar innuendo was pleaded in the statement of claim in the plaintiff Talbot's action, the last words being that Talbot was a man

> "who could not be trusted and with whom no respectable British citizen ought to have anything to do."

The defendants pleaded that the words alleged to be libellous and a slander of title were incapable of any defamatory meaning. They also pleaded justification and fair comment.

After the issue of the writs the plaintiff Talbot was brought into touch with Mr. K. Henderson, the head of the "Daily Mail" legal department, by common friends. On Oct. 6, 1932, a settlement or compromise was discussed at a dinner on the lines of a substantial money payment to be made by the defendants to cover damages and costs, the withdrawal of all legal proceedings, and the giving by the defendants of a letter, not for publication, but for private circulation, stating that they had no intention to impute disloyalty to the plaintiff, Talbot. On Oct. 10, 1932, Mr. K. Henderson and the plaintiff Talbot met at lunch, when Mr. Henderson produced a draft proposal for settlement and a draft letter. Each document was considered, altered by agreement—the alterations being initialed—and finally agreed. The terms of the settlement were as follows:

> I accept the sum of one thousand guineas on account of costs and expenses incurred in full discharge and settlement of my claims against Associated Newspapers and the claims of the "British Russian Gazette and Trade Outlook, Ltd.," and the officers of that company, arising out of the articles published in the "Daily Mail" of June 30, 1931, and July 1, 1931, and I will forthwith instruct my solicitors to serve notice of discontinuance, or to take such other steps, or to agree to such other steps being taken, to end the proceedings now pending. It is understood and agreed that a letter in the form of the draft initialed by me and by Mr. Henderson on behalf of the "Daily Mail," shall be written to me by Mr. Henderson, and that no other reference to this amicable settlement of the dispute shall be published in the "Daily Mail" or in the "British Russian Gazette and Trade Outlook."—S.C.T., K.H.

The draft letter was in these terms:

> Dear Mr. Talbot,—I am glad I have had the opportunity of meeting and discussing with you the articles published in the "Daily Mail" of June 30, 1931, and July 1, 1931. You know the views of the "Daily Mail" in regard to Russia and Soviet propaganda, and those views we maintain. The fact that your name was mentioned in the articles was wholly due to the fact that your broadcast address happened to be made on the same evening as Mr. Churchill spoke on Russia in the House of Commons. Nothing in the "Daily Mail" articles imputed or was intended to impute any act or thought of disloyalty on your part, or that you had in any way abandoned your interest in the claims of British creditors of Russia. This is a personal letter and not for publication; but, of course, there is no objection to your showing it to any friend who is interested in the dispute, which arose apparently out of a misapprehension created by two passages in the "Daily Mail" articles. As that misapprehension has now been removed there is, as we agree, no necessity for the litigation to continue. Yours truly, S.C.T., K.H.

On Oct. 10, 1932, the same day, the solicitors for both plaintiffs wrote to the defendants' solicitors stating that Miss Parker, representing the plaintiff company, was no party to the suggested settlement, "and, therefore, as far as the plaintiff paper is concerned, the action will proceed in the usual way." On Oct. 11 the plaintiffs' solicitors wrote to the defendants' solicitors that it was clear that Mr. Talbot's action was settled, the consideration being the payment to him of 1,000 guineas, and that the plaintiff company's action was not settled. The letter concluded with these words:

> "This action is not being continued for the purpose of getting money. Your clients have published a falsehood against the 'British Russian Gazette.' If your clients apologise for that and pay the costs, they will not be asked for more."

In consequence of these letters there was no payment by the defendants of the 1,000 guineas. On Oct. 20, 1932, the defendants applied to a Master for an order that all further proceedings in the consolidated actions be stayed on the ground that the parties had agreed to compromise the actions. The Master made no order except to give the defendants liberty to amend their defence. They did so, and pleaded the compromise of the actions by both plaintiffs, and they counter-claimed against the plaintiff Talbot, damages for breach of warranty of authority.

The consolidated actions were tried before Avory, J., and a special jury. At the close of the plaintiffs' case, counsel for the defendants submitted that the words complained of were not capable of a defamatory meaning as regards the plaintiff company. Avory, J., said that he was not prepared to say that the words were not capable of some defamatory meaning as regards the plaintiff company, though he had grave doubt about it.

The following questions were left to the jury, whose answers are appended:

Q. 1. Did these publications or either of them expose the plaintiff to hatred, contempt, or ridicule, or had they a tendency to injure him in his profession or trade?—A. Yes.

Q. 2. Were the alleged facts and which of them true or untrue:

(a) Was the plaintiff putting it across the B.B.C.?—A. Untrue—fact.

(b) Were the uninformed led to believe that Russia at present is a land flowing with milk and honey—not a word about slavery conditions there—only a mass of statements to Moscow's advantage?—A. Untrue—fact.

(c) Was the plaintiff a supporter of Stalin in making his broadcast speech?—A. Comment.

(d) Was the lecture of a Soviet propagandist character?—A. Comment.

(e) Was the plaintiff a friend of the Soviet and receiving favours from Moscow?—A. True—fact.

(f) Was the plaintiff Talbot proprietor of a journal devoted to the development of Soviet trade?—A. True—fact.

(g) Did he make an arrangement with the Soviet government after the general election of 1924?—A. True—fact.

(h) Has he visited Russia under Soviet auspices, and been the recipient of praise for his work on behalf of Soviet interests in this country?—A. Untrue—fact.

(i) Did the Soviet government give permission to Talbot to open an office in Moscow as a sign of appreciation?—A. True—fact.

Q. 3. Assuming the facts are correctly stated, are the publications fair comment on a matter of public interest?—A. Unfair.

Q. 4. Did Talbot on Oct. 10, 1932, say that he was making the agreement provisionally, subject to the approval of Miss Parker, and that he could not bind her or the plaintiff company?—A. No.

Q. 5. If Talbot is entitled to succeed in this action, what damages?—A. £1,000.

Q. 6. Are the publications or either of them defamatory of the plaintiff company, and if so, what damages?—A. Yes—£100.

Avory, J., said that, though he held a strong opinion that both plaintiffs, through their solicitors, had been guilty of conduct which was blameworthy, he was not satisfied that this conduct had increased the costs of the litigation. Accordingly, he did not deprive either plaintiff of costs, but he gave the defendants leave to appeal on this question. Accordingly, he gave judgment for the plaintiff Talbot for £1,000 with costs, and for the plaintiff company for £100 with costs. He held that on the construction of the documents of Oct. 10, 1932, the plaintiff Talbot was representing and warranting that he had authority to settle both these actions, and, particularly, that he had authority to settle the claim of the company. It was also clear that there was a breach of that representation and warranty because he had not the authority of the company to settle the action on their behalf. He directed that an inquiry should be held before a taxing master as to the damage sustained by the defendants in consequence of the plaintiff Talbot's breach of warranty of authority—it being essentially a question of costs, and he directed the Master, in assessing the damages, to do so on the principle that the defendants were entitled to be put into the same position as they would have been if the plaintiff Talbot had had the authority which he represented he had. Judgment was entered accordingly.

The defendants appealed against the judgment for the plaintiff company for £100 damages for slander of title. The plaintiff Talbot appealed against the judgment

A for the defendants against him on their counter-claim for damages to be assessed for breach of warranty of authority.

Sir William Jowitt, K.C., and *Valentine Holmes* for the defendants.
Serjeant Sullivan, K.C., and *Robert Fortune* for the plaintiffs.

Cur. adv. vult.

B July 28. The following judgments were read.

SCRUTTON, L.J.—This appeal in an action for libel raises a variety of difficult and apparently unconnected points. Mr. Talbot, a British citizen, was before, during and after the war of 1914–18 engaged in commerce in and with Russia. In the Russian revolution a large sum of money invested by Mr. Talbot in Russian securities was confiscated by the Revolutionary government. He, in company with C other British subjects in the same unfortunate position, formed in 1922 an association to endeavour to recover the money they had lost. A Miss Parker was secretary of the association. Mr. Talbot also started a newspaper, entirely his own property, of which Miss Parker was editor, to further the same objects. At first the association and the newspaper proceeded by vigorously attacking the Soviet government. In 1924 or 1925 Mr. Talbot changed his views as to the best method of obtaining D redress and came to the conclusion that he was more likely to be successful by promoting trade between England and Soviet Russia, and getting on friendly terms with the Soviet government. It is not suggested that either of Mr. Talbot's views was other than an honest attempt to obtain redress from Russia. After 1925 Mr. Talbot followed his new attitude and became on friendly terms with the Soviet representatives; he thereby obtained certain privileges from them in Moscow, E beginning in 1928. The Soviet government took a considerable number of copies of Mr. Talbot's paper for circulation in Russia to government offices. Up to the end of 1929 Mr. Talbot was the proprietor of the paper, and identified with the policy, and Miss Parker was editor at a salary. In February, 1930, a small private company was formed—the British Russian Gazette and Trade Outlook, Ltd. Mr. Talbot transferred all his rights in the paper to the company for fully paid shares. F Its capital was 500 £1 shares on which no money was paid. Of these shares Mr. Talbot presented 250 shares to Miss Parker, who remained editor, and at a later date, before the events next to be mentioned, he transferred to her 225 shares more as a present, leaving himself the owner of 25 shares, with an agreement by which he received certain profits, or commission, from the business.

The paper described itself as published by the company, Talbot and Miss Parker G being directors. They were the only two shareholders. There was no formal appointment of the lady as "managing director," but she did manage the business. There was no change of policy or management following the incorporation of the company. It has never paid a dividend. The paper and Mr. Talbot have been completely identified from 1922 to 1930 and there has been no severance of the identification. In these circumstances, on June 30 and July 1, 1931, the "Daily H Mail," owned by Associated Newspapers, Ltd., published some matter which Mr. Talbot and the company complained of. Mr. Talbot issued a writ for libel; the company issued a writ for a cause of action described in the letter before action and the writ as "slander of title," that is, defamatory matter respecting the goods sold by the company—the paper. The action was tried before a jury and resulted in judgment for Mr. Talbot for £1,000 and costs, subject to a judgment against him I on a counter-claim, and judgment for the company for £100 and costs. The defendants do not appeal against the judgment in favour of Mr. Talbot, but do appeal against the judgment in favour of the company, on the ground that the words complained of are not capable of bearing a meaning defamatory of the company, and that no special damage being alleged, there can be no claim for slander of title. The plaintiff, Talbot, appeals against the judgment against him on the counter-claim to be dealt with hereafter for breach of warranty of authority.

[His Lordship dealt with the defendants' appeal against the company, considered the facts, and concluded:] In my opinion, the libel, not mentioning the company or its paper and no evidence being called of anyone who, reading the libel, believed it to refer to the company and its paper or of any damage actually suffered by the company or the circulation of its paper after the publication of the libel, the judge should have withdrawn the case from the jury. The result of this is that the judgment in favour of the company for £100 and costs must be set aside and judgment entered for the defendants against the company with costs here and below. [His Lordship continued :] The next question is the plaintiff Talbot's appeal as to a judgment against him for breach of warranty of authority to make a settlement of the action, and damages for such breach, based on *Collen* v. *Wright* (1). It arises in this way. While the action was in progress Mr. Talbot, who I think had never realised that since the formation of the company and his gift of shares to Miss Parker he was no longer the master of the situation that he had been from 1922 to February, 1930, was brought into touch by common friends with the head of the "Daily Mail" legal department. First there was a dinner, at which a settlement was discussed on the lines of a substantial money payment by the "Daily Mail" to cover damages and costs, the withdrawal of all legal proceedings, and the giving by the "Daily Mail" of a letter, not for publication, but for private circulation, stating that they had no intention to impute disloyalty to Mr. Talbot. There was then an interval of two or three days, during which Mr. Talbot had ample opportunity to consult his solicitors or his co-director, Miss Parker. He appears not to have consulted either, but to have gone to a lunch at which Mr. Henderson, for the "Daily Mail," produced a draft proposal for settlement and a draft letter. Each document was considered, altered by agreement, with each alteration initialed, and then the whole document was initialed as agreed by each side, or as Mr. Talbot said, "O.K.'d," the court being informed by evidence that "O.K." means "Orl Korrect."

In my view, the document beginning "I accept" is clearly an agreement by which, in consideration of an agreement by the "Daily Mail" to pay 1,000 guineas, and to write the letter there initialed, and agreed upon, Mr. Talbot agrees on behalf of himself and the plaintiff company, and the officers of the company, to accept that sum in full discharge of all their claims in respect of the "Daily Mail" articles, and to take steps to end the proceedings now pending, neither side to publish this amicable settlement of this dispute in their papers. In my opinion, it is an agreement in which the consideration on each side is an agreement by the other side: "In consideration of your agreement I will agree." It is also clear that Mr. Talbot had not the authority of his company, or of his co-director, and co-shareholder, Miss Parker, to make this agreement. Under the doctrine of *Collen* v. *Wright* (1), as extended beyond making contracts to doing acts having a legal effect by *Starkey* v. *Bank of England* (2) and *Firbank's Executors* v. *Humphreys* (3), Mr. Talbot warranted he had the authority he professed to have, and as he had not that authority had broken his warranty, and was liable in damages. The plaintiff alleged that this initialed document was not a concluded agreement, but had been expressly agreed to be only provisional, and subject to the approval of Miss Parker and the company. The jury were accordingly asked question 4: "Did Talbot, on Oct. 10, 1932, say that he was making the agreement provisionally, subject to the approval of Miss Parker, and that he could not bind her or the plaintiff company?" and the jury answered: "No." Miss Parker, unfortunately, took such a mistaken view of the most beneficial course to take as to object to the settlement for 1,000 guineas, unless there was an apology to be published. There is such a thing as dropping the substance in trying to get the shadow as well. Someone, said to be a solicitor's clerk, increased the difficulty by demanding costs as well as an apology, and the plaintiff's advisers, in the letter of Oct. 11, took the view that Mr. Talbot had settled his action for 1,000 guineas, but that the company's action could go on for further damages and costs. There ensued lengthy proceedings on an application to stay the action as settled, which were ultimately referred to the judge at the trial, a lengthy trial, and now a lengthy appeal. This might all have been avoided if Miss Parker, who, from her company proceedings, does not seem to be a very business-like woman, had used a little common sense. The payment of 1,000 guineas by the "Daily Mail" was a sufficient vindication of the company, Mr. Talbot, and herself, without insisting on a published apology, and the exercise of a little common sense would have shown her that, provided she made a satisfactory agreement with Talbot as to the share of the money to go to her and to the company, it was silly to refuse to take the money unless there was added a public apology. However, she was silly, and refused to agree to the settlement.

The result has been a flood of authorities and argument on the subject of accord and satisfaction, a subject one would not expect to make its appearance in an action for libel. Serjeant Sullivan, with great earnestness, almost vehemence, insisted that it was elementary that accord without satisfaction was useless; if there was no satisfaction, that is to say, performance of the accord, the accord by itself was perfectly useless, and devoid of legal consequences. Of course, the point of the counter-claim was that there had been no satisfaction because Mr. Talbot had broken his warranty of authority to promise satisfaction, and there would have been satisfaction if his warranty had been complied with.

Some difficulty in the authorities results from the fact that the early view of the law was that consideration for an accord must be executed, but at a later period the courts took the view that it was sufficient if the consideration was executory. The matter is fully discussed in Professor Holdsworth's work, A History of English Law (1931) at pp. 81 to 84; and the work of the late Sir John Salmond and Professor Winfield on The Law of Contract (1927) at pp. 316–317 and 328–334, which, in my opinion, accurately states the position. Accord and satisfaction is the purchase of a release from an obligation arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative. Formerly it was necessary that the consideration should be executed: "I release you from your obligation in consideration of £50 now paid by you to me." Later it was conceded that the consideration might be executory: "I release you from your obligation in consideration of your promise to pay me £50, and give me a letter of withdrawal." The consideration on each side might be an executory promise, the two mutual promises making an agreement enforceable in law, a contract. Comyns puts it in his Digest, and the passage was approved by Baron Parke in *Good* v. *Cheesman* (4) (2 B. & Ad. at p. 335), and by the Court of King's Bench in *Cartwright* v. *Cooke* (5) (3 B. & Ad. at p. 703):

> "An accord with mutual promises to perform is good, though the thing be not performed at the time of action; for the party has a remedy to compel the performance"

—that is to say, a cross-action on the contract of accord. Lord Atkinson's statement in *Morris* v. *Baron* (6), a case on the Statute of Frauds, having a very remote connection with accord and satisfaction, is to the same effect ([1918] A.C. at p. 35):

> "If, however, it can be shown that what a creditor accepts in satisfaction is merely his debtor's promise and not the performance of that promise, the original cause of action is discharged from the debt when the promise is made."

This was anticipated in 1602 in *Goring* v. *Goring* (7), where an agreement to discharge a debt of £205 by a promise of payment in instalments of £150, though not satisfaction, was held to be a valid agreement, promise against promise. There are numerous cases where promise against promise is held, if not satisfaction, to be a valid subject for a cross-action: see *Ford* v. *Beech* (8) (Parke, B., giving judgment of the Exchequer Chamber), *Crowther* v. *Farrer* (9), and *Henderson* v. *Stobart* (10).

There are also cases where, if the consideration includes a promise by a third party not previously concerned in the obligation, there is an enforceable contract: *Good* v. *Cheesman* (4) and *Cartwright* v. *Cooke* (5). The document is to be construed in accordance with the intention of the parties as expressed in it, and if there is doubt, as PARKE, B., says in one of the cases cited, the construction which makes it effective to carry out that intention prevails. The argument for the plaintiffs on accord and satisfaction was directed to show that, if Talbot had authority, the document would have had no legal result. In my view, there was an agreement to accept promise against promise, and a third party, Miss Parker, was included in the promise. The result in law was an enforceable agreement, at any rate, as in the present case, by way of counter-claim.

The remaining question is the measure and mode of ascertaining the damages. The judge dealt with the matter in this way. He said:

> "I think upon the counter-claim of the defendants they are entitled to an inquiry as to the damages sustained by them in consequence of that breach of the warranty of authority, and I so direct that inquiry to be held by, I think it would be convenient to say, a taxing master, it being essentially a question of costs, and I shall direct that the Master, in assessing the damages, shall do so on the principle that the defendants are entitled to be put into the same position as they would have been if the plaintiff, Talbot, in fact had had the authority which he represented he had,"

and he directed that counsel should submit minutes to him. Unfortunately, he was ill and counsel did not submit minutes to him, but agreed a passage which does not appear in the judge's declared judgment, but is said to be founded on some interlocutory remarks in argument which we have not seen. It is:

> "namely, in the position in which they would be if the parties had carried out the terms of the document of Oct. 10, 1932, and the actions had not been continued thereafter with costs of the counter-claim including the costs of the inquiry as to damages."

It is quite irregular that the latter passage should have been included in the judgment entered whether it is right or wrong. The judge did not say so in the judgment he delivered and it must be struck out of the judgment as entered.

The language used by the judge in his judgment is based upon that used by LORD ESHER in *Firbank's Executors* v. *Humphreys* (3) and in *Re National Coffee Palace Co., Ex parte Panmure* (11). What have the defendants lost, because, owing to the plaintiff Talbot having broken his warranty of authority to make a particular contract; they have lost the benefit they would have derived from that contract? If the agreement was never enforceable, the defendants have lost nothing. I have held it was an enforceable agreement if Talbot had authority to make it. If so, what have the defendants, plaintiffs by counter-claim, lost? If the contract was made with authority, the defendants would have discharged all liability for damages and costs to Talbot, the company, or Miss Parker as an officer of the company by payment of 1,000 guineas and by writing a letter. There being no authority, they have been put to the further expense of costs incurred by and payable to Talbot after the agreement and their own similar costs, less £50 based on the verdict of the jury for £1,000 instead of guineas; they have had to pay their own costs in the company's action after the agreement; they have been landed in an expensive inquiry as to the authority before a Master, a considerable portion of which may be due to an allegation that one director can bind a company which ought not to have been made. On this point a difficult question may arise as to the reasonableness of the defendants' conduct in fighting Talbot's action after the defendants knew that the company repudiated authority. On the one hand, the defendants were wrong in contending that one director could bind the company; on the other hand, they did not know the internal government or shareholding of the plaintiff company, and, if they paid money into court and withdrew other defences, it would be taken out and their counter-claim against Talbot, if successful, could not be regarded as certain to be satisfied by payment.

I think on the whole it was not unreasonable for them to go to trial on the pleadings as they stood. So far as their expenses were not reasonably incurred they would not be entitled to recover them. It was said (i) You could have settled

A with Talbot for 1,000 guineas and ought to have paid it. But that sum was to settle two actions, not Talbot's action, and I see nothing unreasonable in declining to increase the sum payable in the agreement for Talbot's action by striking out the company's action from the settlement. It was also said (ii) You might have avoided the company's action by apologising and paying costs, the latter stipulation never being withdrawn. I see nothing unreasonable in the refusal to apologise B publicly and pay costs. If these directions are right, the question is one of taxation and an apportionment of costs, and an appropriate one for the taxing master with the directions contained in the judge's judgment, as expanded by the views expressed by this court.

The plaintiff Talbot's appeal must, therefore, be dismissed with costs. I have already dealt with the defendant's appeal.

C

GREER, L.J.—I agree with the judgment which has just been read by SCRUTTON, L.J., on all the questions of principle with which he deals except that I would state rather differently the directions to be given to the taxing master relating to the damages to be awarded for breach of the warranty, alleged by the defendants in their counter-claim.

D The plaintiff company, by their statement of claim, allege that they were at all material times the proprietors of a monthly paper entitled the "British Russian Gazette and Trade Outlook," having offices at Walton House, Bedford Street, W.C.2, in the county of London. This statement was put in issue in the defence in the consolidated action. It was never proved by any witness at the trial, but as it was probably not disputed I am prepared to deal with this case on the E assumption that it was admitted at the trial, but this seems to me to be immaterial, because the alleged libel does not mention the company from beginning to end, and no witness was called to say that he read the newspaper and he knew that the plaintiff company was the proprietor of the newspaper, and from that fact on reading the two articles in the "Daily Mail" they meant to him that an attack was being made on the character of the company as being a company which, F according to the innuendo, allowed itself to be used as a mere cloak for the activities of the other plaintiff, Mr. Stafford Cecil Talbot. In the natural and ordinary meaning of the words no reflection whatever is made on the company, and in order to succeed it was necessary that there should be an innuendo that the words meant something derogatory to the character of the company, and was so understood by some person to whom the alleged libel was published. If, for G example, a newspaper stated that "the man who lives at No. 22, X Street is a fraudulent company promoter," this would not of itself constitute a libel unless the recipient of the statement was able to say, "I knew that the plaintiff was a person who resided at 22, X Street, and, therefore, as read by me, the libel meant that that person was a fraudulent company promoter." This may seem to be a very technical way of looking at the case, but it is a technicality which the defendants H are entitled to take advantage of, because there is really no substance in the contention that any reasonable reader would regard the statements in the "Daily Mail" as an attack on the company as distinguished from its director and founder, Mr. S. C. Talbot.

For these reasons I think the learned judge was wrong in not going beyond the doubt that he expressed whether there was any case made by the plaintiff company I for the defendants to meet, and in refusing to hold that there was no such case. I think there was no evidence given at the trial which justified the case of the plaintiff company being left with the jury. I think the defendants' appeal so far as it is concerned with the verdict and judgment in favour of the plaintiff company succeeds.

With regard to their appeal on the question of costs dealt with by the learned judge, I agree with the views of SCRUTTON, L.J., and I may add, if it were a matter for the discretion of this court I would be prepared to exercise it in the same way as the learned judge did by saying that there is no sufficient reason why the plaintiff Talbot should be deprived of his costs incurred after the solicitors' letter of April 11, 1932.

With regard to the cross-appeal of the plaintiff S. C. Talbot against the judgment of the learned judge given on the counter-claim, I agree with Scrutton, L.J., that the defendants have established a case against him for damages for breach of warranty of authority. Assuming that the vigorous argument presented to the court by Serjeant Sullivan on behalf of the plaintiff Talbot is right, though as will be seen presently I think it is wrong, I should still think that the defendants would be entitled to succeed on their claim for damages for breach of warranty of authority. It is not, and cannot be, disputed that an accord followed by satisfaction would have extinguished the causes of action of both plaintiffs if Talbot had had authority from the plaintiff company and its officers to conclude the agreement made in October between Mr. Henderson, on behalf of the defendant company, and purporting to be made by Mr. Talbot on behalf of himself, the plaintiff company, and the officers of the plaintiff company, to pay the 1,000 guineas mentioned in one of the two documents recording the agreement. I think Talbot warranted that he had authority to make an accord and satisfaction, and if it be the law that accord without satisfaction creates no legal obligations, I think it would still be right to say that Talbot warranted that he had authority to make an accord and satisfaction, and is liable for a breach of that warranty. It is clear that even in cases where the contract which the agent warranted he had authority to make would not, if authorised, create any legal obligation by his principals, the agent is none the less liable for damages for breach of warranty of authority: see *Starkey* v. *Bank of England* (2) and *Firbank's Executors* v. *Humphreys* (3). It seems to me reasonably certain that, if Mr. Talbot had had the authority he purported to exercise, not only would the agreement to settle have been made, but the 1,000 guineas would also have been paid. However, as the question of the effect of an accord without satisfaction has been fully argued, I think I ought to state my views upon it.

In my judgment, at the present day the law of this country is that where two people make mutual promises, the promise of each being the consideration for the promise of the other, this amounts to a contract in law for the non-performance of which an action for damages will lie. I think, however, that it is too late to say that the old rule that an accord without satisfaction does not discharge a liability after breach, can be disturbed by a judgment of this court. I think it is still the law that a mere accord without satisfaction does not put an end to an existing liability after breach, but I think it amounts to an agreement which can be enforced by a claim for damages if it is broken by one of the parties when the other has shown his readiness to perform the terms of the agreement. It is clear the rule that an accord without satisfaction afforded no defence in an action for damages after breach arose from the fact that in the early days of the development of the common law, the binding character of executory agreements was not recognised: see the history of this matter in Holdsworth, A History of English Law (1931) at pp. 81 to 84; see also Salmond and Winfield on the Law of Contract (1927) at p. 330.

Many cases were cited by Serjeant Sullivan in support of his proposition that an accord without satisfaction had no effect in law. He began with *Allen* v. *Harris* (12). In that case the defendant pleaded that the plaintiff in consideration that the defendant at the special instance of the plaintiff assumed to pay to the plaintiff 20s., agreed to discharge the defendant of his liability in trover. There was no allegation that the 20s. had been paid. It was held that even though the party who brought the action did not perform his part, he might still maintain his action in trover. This decision has no bearing whatever on the question whether the contract was a contract which the law would recognise, and in the argument for the defendant, Serjeant Girdler said (1 Ld. Raym. at p. 122):

> "It being now settled that the parties may have actions upon mutual promises, this accord may be pleaded, though not executed."

His argument was not accepted, but there is nothing to show that the court disapproved or disputed the proposition that the parties might have action upon the mutual promises made in accord, and in the course of the argument *Case* v. *Barber* (13) was cited. In that case the court appears to have accepted the proposition as applicable to the question under consideration that it had been lately refused to give effect to a plea of accord and satisfaction by an agreement with a third party, because they said there was no consideration, and because of the plea of the Statute of Frauds.

The next case relied on was *Lynn* v. *Bruce* (14). It is clear that the case was one of accord, with only part satisfaction. It was a decision as to the validity of a count in a declaration based on an agreement to accept a composition, no other creditor having been alleged to be party to the agreement; it was held that a breach of the agreement did not give the plaintiff a cause of action. In giving judgment, EYRE, C.J., based the decision on a ground, which, if correct, would make an accord without satisfaction an agreement contrary to public policy and void, but the observations of the learned Chief Justice were not necessary for the purposes of the decision. It was enough to make the count under consideration bad that it was based on a promise to discharge a larger sum by payment of a smaller sum. The decision of the court was undoubtedly right, but I do not think the reasons for the decision stated by the learned Chief Justice can now be supported.

Reeves v. *Hearne* (15) also was not a direct decision on the question whether the accord created an enforceable agreement, but only on the question whether it afforded a defence to an action on the original debt, and it appears from the report that both the original debt and the debt, if any, created by the new agreement were extinguished by the Statute of Limitations: see per LORD ABINGER, C.B. (1 M. & W. at p. 327), and, in any case, PARKE, B., points out that the new agreement was only a satisfaction pro tanto, and the original debt remained for the residue, and not being extinguished, was barred by the statute.

Bayley v. *Homan* (16) was a case in which an accord without satisfaction was held to be bad. I am inclined to think that the facts pleaded in that case would, at the present day, have induced the court to say that the agreement itself was the accord and satisfaction. The case is only an authority for the proposition that a plea in the form in which it was relied upon in that case was a plea of an accord without satisfaction. *Gabriel* v. *Dresser* (17) was another case where a plea relying on a new agreement with regard to an obligation to load timber at Danzig was held to be bad as it only amounted to an allegation of accord without satisfaction.

Elton Cop Dyeing Co., Ltd. v. *Broadbent & Son, Ltd.* (18) does not assist Serjeant Sullivan's argument so far as the decision is concerned. It was there decided that the parties had agreed to accept a new agreement in satisfaction, and the court held that, whether performed or not, the old liability was discharged. Serjeant Sullivan also relied on the observations of LORD ATKINSON in *Morris* v. *Baron & Co.* (6), where his Lordship uses these words ([1918] A.C. at p. 35):

> "There is no doubt that the general principle is that an accord without satisfaction has no legal effect, and that the original cause of action is not discharged as long as the satisfaction agreed upon remains executory. That was decided so long ago as 1611 in *Peytoe's Case* (19) (9 Co. Rep. at p. 79 (b)). If, however, it can be shown that what a creditor accepts in satisfaction is merely his debtor's promise, and not the performance of that promise, the original cause of action is discharged from the date when the promise is made."

There is no doubt that what the learned judge was considering there was the legal effect of an accord without satisfaction on the original cause of action, and I do not think it right to interpret his words as meaning that no legal effect can be attributed to an accord which contains in fact all the elements which constitute a contract in English law.

Some of the cases relied upon are judgments or observations made by so great an authority as PARKE, B., but there are decisions and observations inconsistent with the proposition put forward by Serjeant Sullivan by this learned judge himself, A for example, in *Good* v. *Cheesman* (4), where (2 B. & Ad. at p. 335) he quotes with approval the statement in Comyn's Digest (Accord (B. 4)) that

> "an accord with mutual promises to perform is good, though the thing be not performed at the time of action; for the party has a remedy to compel the performance; but the remedy ought to be such that the party might have taken B it upon the mutual promise at the time of the agreement."

The learned judge goes on:

> "Here each creditor entered into a new agreement with the defendant, the consideration of which, to the creditor, was a forbearance by all the other creditors who were parties, to insist upon their claims. Assumpsit would have lain on either side to enforce performance of this agreement, if it had been C shown that the party suing had, as far as lay in him, fulfilled his own share of the contract."

It is true that these observations related to a case of an agreement to which third persons were parties, but the observations of the learned judge are wide enough to cover a case in which no such third party was concerned.

The decision in *Cartwright* v. *Cooke* (5) carries the matter much farther, for D there it was held that the agreement, whether subsequently acted upon or not, was a binding accord. In the course of the argument the court said (3 B. & Ad. at p. 703):

> "This was a good accord as between the parties to the instrument, and binds the plaintiff. The promise of one was a consideration for that of another. E Each had an immediate remedy upon it against the other; and in this respect it falls within the rule in Comyn's Digest (Accord (B. 4)) that
>
> > 'an accord, with mutual promises to perform, is good, though the thing be not performed at the time of action; for the party has a remedy to compel the performance.' "

The court in this case consisted of Lord Tenterden, C.J., Littledale, J., Parke, F J., and Taunton, J. In *Ford* v. *Beech* (8) the Court of Exchequer Chamber held that an agreement which could not be relied upon as an accord and satisfaction could give rise to a right of action for breach: see also *Bradley* v. *Tonge* (20). In *Crowther* v. *Farrer* (9) the action was upon an agreement which was construed as an accord and satisfaction, but in the course of his judgment Campbell, C.J., said (15 Q.B. at p. 680): G

> "The question is not what would form a good plea in bar to the further maintenance of these actions, but whether this is a good consideration for the defendant's agreement,"

and Patteson, J., said:

> "Even if it was no more than an agreement on the part of the plaintiffs to H refrain from going on, I think that was a sufficient consideration to support the promise of the defendant":

see also *Ruck* v. *Brownrigg* (21) and *Flockton* v. *Hall* (22).

It will be seen that we have not been referred to any case in which it was necessary to decide that an action will not lie on an agreement which is a mere accord, and has not been performed. On the question whether such an agreement I can be a binding contract opinions of judges have varied. I, therefore, feel that we are now entitled to decide the question on principle, and I think at the present stage of the development of the law we ought to decide that an agreement for good consideration, whether it be an agreement to settle an existing claim or any other kind of agreement, is enforceable at law by action if it be an agreement for valuable consideration, and such valuable consideration may consist of the promise of the other party. The old decisions that an accord without satisfaction is no answer to an action on the original action or tort until it has been performed seem to me to

A be decisions on a question of interpretation. Unless it appears to be intended that the contract itself is to extinguish the liability, this liability can only be extinguished by performance, and if the plaintiff refuses performance of the executory agreement, the only remedy the defendant has is to sue him for damages. In the old days this would have had to be done by cross-action, but now it may be by counter-claim.

B I think the learned judge's judgment as delivered was right.

With regard to the question relating to the damages, which the judge referred to be assessed by a taxing master, and with regard to the directions to be given to him, I have come to the following conclusions. In his oral judgment the learned trial judge directed that the Master should assess the damages on the principle that the defendants are entitled to be put in the same position as they would have been C in if the plaintiff Talbot in fact had had the authority which he represented he had. This direction is undoubtedly right, and indeed has not been questioned. I agree that the parties were not entitled to add to this direction the additional words that were inserted in the formal judgment. I have no doubt that the learned judge thought that the damages would consist of items of costs incurred after the date of the breach of warranty of authority. But it does not necessarily follow that the D defendants will be entitled to all the costs incurred by them between the date of the breach and the final judgment in the action. It will be necessary for the tribunal assessing the damages to have regard to the rules laid down in *Hadley* v. *Baxendale* (23), which limit the damages recoverable to those which may fairly and reasonably be considered as naturally arising from the breach of contract, or which must be supposed to have been contemplated by the parties to the contract. E As regards the action by the company, as the defendants by our judgment have been given their taxed costs against the company they will be entitled to the difference between their party and party costs and reasonable solicitor and client costs. If they are unable to obtain repayment of any costs they may have paid to the company, or payment of their taxed costs from the company, these should be added to the difference between solicitor and client costs and party and party costs, F so that the defendants will then recover as damages the whole of their solicitor and client costs referable to the action so far as it is concerned with the claim of the plaintiff company from the date of the unauthorised contract, together with the costs, if any, they have already paid to the company and are unable to recover from the company. But with regard to the costs of the action so far as it concerns the claim by the plaintiff Talbot, the tribunal will have to ask and answer the G question whether, having regard to the fact that the defendants could have escaped the payment of those costs by accepting the offer made by Mr. Talbot's solicitor to accept £1,050 in settlement of his claim and costs, it was reasonable for them to continue to defend the action so far as the claim by Talbot was concerned. It is not for me to say what answer should be given to this question. Though a taxing master is, perhaps, not an ideal tribunal to determine a question of this sort, I do H not think we ought to disturb that part of the judgment which refers the assessment of damages to the taxing master. Guided by a sufficient direction, I think a taxing master will be able to decide the questions involved, and, as in any event questions will arise as to whether items of costs were properly incurred, the taxing master will on the whole be not an unsuitable tribunal to assess the damages on the counter-claim. I would add to the learned judge's judgment a direction that I in assessing the damages the Master should have regard to the rules laid down in *Hadley* v. *Baxendale* (23), but, inasmuch as my brothers think that the direction should be as stated in SCRUTTON, L.J.'s judgment, the Master will be directed by that rather than by what I have said with regard to the direction.

SLESSER, L.J.—I have read the judgments of SCRUTTON and GREER, L.JJ., in these appeals. I agree with them and find it necessary only to deal with the minor question of the directions to be given to the taxing master. In this matter raised on the appeal in the counter-claim I agree with SCRUTTON, L.J., that it was not unreasonable for the defendants to go to trial on the pleadings, and, once the plaintiff company had repudiated the authority of Talbot to make the purported agreement, I see no reason why the defendants should have accepted the offer made by Mr. Talbot to settle a part only of the liability of the consolidated action, or to settle the whole action with added terms if they did not wish so to do. I am anxious to avoid any possibility of confusion in the directions which the court are giving to the taxing master, and, therefore, I content myself by saying that I exactly concur with the directions expressed by SCRUTTON, L.J., in his judgment.

Appeal of defendants against the judgment for the plaintiff company allowed. Appeal of the plaintiff Talbot against the judgment for the defendants on the counter-claim dismissed.

Solicitors: *Bowkers*; *Lewis & Lewis.*

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

Re GILLOTT'S SETTLEMENT. CHATTOCK *v.* REID

[CHANCERY DIVISION (Maugham, J.), May 17, 1933]

[Reported [1934] Ch. 97; 102 L.J.Ch. 332; 149 L.T. 419; 77 Sol. Jo. 447]

Settlement—Forfeiture—Determination of husband's protected life interest—Covenant for value by husband to pay one-half of any money in the nature of income to a third person within three days of receipt.

By a settlement made in 1892 on the marriage of E.L.G. with her first husband, stock was settled upon trust to pay the income thereof to E.L.G. during her life, and if the husband should survive her and should not have assigned, charged or encumbered or attempted or affected to assign, charge or encumber the annual produce of the trust premises or have done or suffered anything whereby the same if belonging absolutely to him would have become vested in or payable to some other person, the trustees were to pay the same to the husband until one of these events should happen, and if E.L.G. should survive her then intended husband, she was empowered to appoint the annual produce of the trust premises to any husband who might survive her on the like terms and terminable in the like events, and subject to the same restrictions as were thereinbefore declared in favour of the then intended husband.

The first husband of E.L.G. died in 1904, and in 1906 she married the defendant J.M.C. In 1908 a memorandum of agreement was entered into between J.M.C., of the first part, E.L.G., of the second part, and S., of the third part. After reciting the settlements and a loan from S., by cl. 11 thereof it was provided that as long as any money should remain owing thereunder, J.M.C. and E.L.G. would "within three days after receipt of any money in the nature of income pay one equal half part" thereof to the account of a depositee, who was to apply the same in paying certain debts. By a minute of agreement executed in 1927 J.M.C. and E.L.G. entered into a further similar covenant. E.L.G. by her will, made in 1929, appointed, in terms similar to those in the settlement of 1892, a life interest in the trust funds in favour of her husband, J.M.C.

Held: J.M.C., the husband, had forfeited his interest because (i) cl. 11 of the agreement of 1908, being a covenant for value received, amounted to an equitable assignment which made him a trustee for the depositee and the beneficiaries under the agreement of one-half of the income received by him.

Re Lind, Industrials Finance Syndicate, Ltd. v. *Lind* (1), [1915] 2 Ch. 345, followed.

Palmer v. *Carey* (2), [1926] A.C. 703, considered.

(ii) according to the natural meaning of the language of the agreements the husband was bound to pay over part of the income which he received, and, therefore, a forfeiture had occurred.

(iii) even though the parties did not intend to incur a forfeiture, the court could not construe the agreements as not effecting a forfeiture.

Re Spearman (3) (1900), 82 L.T.Rep. 302, considered.

Notes. Applied: *Re Haynes' Will Trusts, Pitt* v. *Haynes*, [1948] 2 All E.R. 423.

As to the termination of a husband's protected life interest, see 29 HALSBURY'S LAWS (2nd Edn.) 598, para. 870, and for cases on the subject see 40 DIGEST 558–560, *990–1003*.

Cases referred to:

(1) *Re Lind, Industrials Finance Syndicate, Ltd.* v. *Lind*, [1915] 2 Ch. 345; 84 L.J.Ch. 884; 113 L.T. 956; 59 Sol. Jo. 651; [1915] H.B.R. 204, C.A.; 8 Digest (Repl.) 561, *138*.

(2) *Palmer* v. *Carey*, [1926] A.C. 703; 95 L.J.P.C. 146; 135 L.T. 237; [1926] B. & C.R. 51, P.C.; 8 Digest (Repl.) 581, *290*.

(3) *Re Spearman, Spearman* v. *Lowndes* (1900), 82 L.T. 302; 44 Sol. Jo. 377, C.A.; 40 Digest 559, *994*.

(4) *Oldham* v. *Oldham* (1867), L.R. 3 Eq. 404; 36 L.J.Ch. 205; 15 W.R. 300; 40 Digest 560, *1000*.

(5) *Samuel* v. *Samuel* (1879), 12 Ch.D. 152; 47 L.J.Ch. 716; 41 L.T. 462; 26 W.R. 750; 24 Digest 730, *7584*.

(6) *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523; 58 L.J.Q.B. 75; 60 L.T. 162; 37 W.R. 513; 4 T.L.R. 726, H.L.; 5 Digest 697, *6128*.

(7) *Metcalfe* v. *The Archbishop of York* (1836), 1 My. & Cr. 547; 6 L.J.Ch. 65, L.C.; 35 Digest 524, *2535*.

(8) *Holroyd* v. *Marshall* (1862), 10 H.L.Cas. 191; 33 L.J.Ch. 193; 7 L.T. 172; 9 Jur.N.S. 213; 11 W.R. 171; 11 E.R. 999, H.L.; 40 Digest 180, *1500*.

Originating Summons to determine whether, on the true construction of the settlements, appointment and agreement hereinafter referred to, a husband had by the agreement forfeited his protected life interest under the settlements and appointment.

By a settlement dated Aug. 15, 1892, made on the marriage of Ethel Leonora Gillott with a Mr. Reid, a sum of £10,416 2¾ per cent. Consolidated Stock was settled upon trust to pay the annual produce to the wife during her life for her separate use without power of anticipation and after her death, if the husband should survive the said Ethel Leonora Gillott, and should not be outlawed or have been or become bankrupt and should not have assigned, charged, or incumbered, or attempted or affected to assign, charge, or incumber the annual produce of the trust premises or any part thereof or have done or suffered anything whereby the same or any part thereof would through his act or default or by operation or process of law or otherwise, if belonging absolutely to him, have become vested in or payable to some other person or persons, the said trustees or trustee should pay the same annual produce to the said husband until one of those events should happen. Subject to that life interest the trust premises were settled upon trust for the issue of the intended marriage. The settlement further contained a provision that if the said wife should survive her then intended husband, it should be lawful for her if sole by any deed or deeds or if covert or sole by will or codicil to appoint that the whole or any part of the annual produce of the said trust premises thereby settled should be paid after her death to any husband whom she might marry after the death of the then intended husband and who might survive her on the like terms and terminable in the like events and subject in all respects to the same restrictions and conditions as were thereunder applicable to the trusts thereinbefore declared in favour of the then intended husband in case he survived the said wife.

By a second settlement, dated Jan. 2, 1895, further sums were brought into settlement to be held upon the trusts of the settlement of 1892. By a third settlement certain additional investments were settled. In this case, however, the power of the wife to appoint a life interest in favour of any after-taken husband was without restriction.

In 1904 Mr. Reid, the first husband, died, and in 1906 Ethel Leonora Gillott then Mrs. Reid (hereinafter called the wife) married the defendant, the Rev. James Marjoribanks Campbell (hereinafter called the husband).

Between the year 1908 and the year 1932, when the wife died, some fifteen documents in favour of creditors of the husband and the wife were executed. Two only of these, an agreement of 1908 and a minute of agreement of 1927, were considered by the court. The memorandum of agreement of Nov. 18, 1908, was made between the husband, of the first part; the wife, of the second part; and a lady called Sarah Male, who was described as "the lender," of the third part. It recited an indebtedness to the National Bank of Scotland, and to the British Linen Bank, Ltd., and to a number of creditors whose names were set out in a schedule to the deed, and it recited that the husband had no capital moneys or other property except some household furniture and effects, and a stipend derived from his benefice in the county of Dumfries. It also recited that the wife was possessed of no capital moneys or other property except some household furniture and effects and an income of about £1,400 per annum during her life payable under the three indentures of settlement mentioned above, subject to restraint against anticipation. The agreement then went on to recite the power of the wife by deed or codicil to appoint a protected life interest to the husband if he should survive her and should not have done or suffered one of the acts above referred to. It then recited that the husband and wife were desirous of borrowing a sum of £3,016 in order to enable them to pay their debts to the amount of such loan, and that the lender, largely out of friendship for the wife, had agreed to lend this sum of £3,016, and it had been fully explained to her that neither the husband nor the wife could give her any proper security for the repayment of that sum and the interest thereon. Upon that the operative part of the agreement was entered into. There was a covenant by the husband and the wife to repay the sums borrowed, with interest at 10 per cent., and a number of other provisions, including a provision that the sum of £3,016 was to be applied by the husband and the wife in paying to such of the persons mentioned in the First Schedule thereto as the husband and wife should decide, the whole or such part of their scheduled debts as they should think proper. These debts exceeded £4,800, and it was apparent that the sum then advanced was insufficient to discharge them in full. After certain provisions as to policies, which are not material, the agreement provided by cl. 10 that the wife in exercise of her power would forthwith by will appoint the protected life interest to the husband and would not, so long as any principal money remained owing under the foregoing covenant, revoke or vary any such appointment. The result of this was that the wife would have an income of £1,400, subject to her restraint on anticipation, and on her death, leaving the husband surviving her, he would have a protected life interest in the £1,400 per annum. Then cl. 11 provided as follows:

> "As long as any money shall remain owing under these presents each of them the husband and the wife shall within three days after the receipt of any money in the nature of income pay one equal half part of such money into an account to be opened in the name of Sydney Mitchell, of 112, Colmore Row, Birmingham."

Clause 12 provided that Sydney Mitchell, thereinafter called "the depositee," should hold all moneys paid into the said account, subject to the following directions: (a) Until the scheduled debts were fully paid the depositee was to pay the moneys, or so much thereof, as should be sufficient to pay in full the then unpaid balance of the scheduled debts to the husband and the wife jointly, and the husband and wife should forthwith apply the same in or towards payment of such unpaid balance and not otherwise, and should within seven days after the receipt of such moneys account in writing for the same to the depositee; (b) after the scheduled debts were fully paid, the depositee was at his discretion either to deposit the said moneys with a banker at interest, or invest the same in the purchase of any of the securities mentioned in the Second Schedule up to the amount of such securities, and it was provided that the securities and the income should stand charged with the payment of all moneys due to the lender under the deed; (c) when all principal and interest and other moneys due under those presents should have been fully paid and satisfied the depositee was to hand over and transfer all moneys and securities in his hands to the husband and the wife, or to the survivor, or as they should direct. Then there was a provision that the directions contained in the foregoing sub-clauses might be revoked or varied at any time by writing under the hands of the husband and the wife or the survivor of them.

The second document considered by the court was a minute of agreement executed in the year 1927, and made between the husband, of the first part; the wife, of the second part; Sarah Male, who had lent the money under the agreement of 1908, of the third part; Donald Somerled Macdonald, writer to the signet, described as "the depositee" (who took the place of Sydney Mitchell, the depositee under the agreement of 1908 and certain other documents), of the fourth part; and a number of other people who were among them advancing a further sum of £2,000. This minute of agreement referred to certain agreements detailed in Sched. A, whereby the husband and wife were indebted to certain parties in certain sums of money, and it recited the agreement of the parties to modify the principal documents as therein mentioned. Mr. Macdonald was to act as depositee. The parties ratified and approved a number of receipts and payments made by Sydney Mitchell and by his executors as depositee, and discharged him from further liability. Then there followed this clause:

> "So long as any money now owing by the husband and wife as aforesaid shall remain owing, the husband and wife shall within three days after the receipt of any money in the nature of income pay the whole of such income into an account to be opened in the name of the said Donald Somerled Macdonald as such depositee at the Dumfries Branch of the British Linen Bank, or at such other bank as shall be determined by the parties third to eighth hereto, and no personal responsibility shall be upon the depositee to enforce this clause."

The depositee was to hold all moneys so paid into the said account in trust to pay interest on the various debts, to pay monthly sums to the husband and wife, and to pay the ultimate surplus as to three equal fifth parts to Miss Male, and as to the remainder to the other parties thereto rateably and proportionately to the respective sums owing to them until all such sums owing and the interest thereon were wholly paid off. By a later clause the principal documents were declared to be modified and altered, but only so far as was necessary to give effect to those presents and the law of England was to apply.

By her will dated Sept. 3, 1929, the wife, after reciting that she had power to appoint in favour of any husband she might marry the income of the funds settled by the three settlements, did appoint, in terms substantially similar to the terms of the settlement of 1892, a life interest in favour of the husband. There were some very slight differences between the language of the deed of appointment and the language of the power, but his Lordship held, in answer to the first question raised by the summons, that those were immaterial.

The wife died in 1932. At her death substantial sums were still owing under the various agreements. The trustees of the three settlements took out this summons to have it determined whether on the true construction of the settlements and of the appointment made by the wife in favour of the husband under the powers conferred on her by the settlements and by virtue of the agreements set out above, the interest so appointed to him failed to take effect. There were four children of the wife's first marriage, and one child of her second marriage, all of whom were defendants to the summons.

R. H. Hodge for the plaintiffs, the trustees of the settlements.

W. E. Vernon for certain defendant beneficiaries.

R. F. Roxburgh, K.C., and *J. H. Boraston* for the defendant Mrs. Dashwood, a child of the wife's second marriage.—A forfeiture has occurred. First, the agreements create an express charge. Secondly, the agreements effect an equitable assignment for valuable consideration of a fund which the court can identify. [They referred to: *Re Lind, Industrials Finance Syndicate, Ltd.* v. *Lind* (1), *Oldham* v. *Oldham* (4), *Re Spearman* (3), and *Palmer* v. *Carey* (2).]

H. S. G. Buckmaster for certain infant defendant beneficiaries under the settlements adopted the arguments of R. F. Roxburgh, K.C.

J. Neville Gray for mortgagees.

F. R. Evershed, K.C., and *Andrewes-Uthwatt* for the husband.—The husband did not intend to assign his right to the income of the trust fund (*Samuel* v. *Samuel* (5)), and no such assignment was in fact effected by the agreements. If there was an assignment it did not result in any forfeiture, as the intention of the parties was clear (*Tailby* v. *The Official Receiver* (6)). The agreements operated in contract only (*Palmer* v. *Carey* (2)).

MAUGHAM, J.—As this case has been fully argued on both sides I think further consideration would be unlikely to lead me to a conclusion different from that at which I have arrived, and accordingly I will not take time to put my judgment into writing.

The question to be decided is as to whether the Rev. James Marjoribanks Campbell, the husband named in certain settlements, to which I shall have to refer in a minute, has in popular language done or suffered something which has resulted in a forfeiture of the life interest which he was given after the life of his wife Ethel Leonora Campbell. [His Lordship here stated the facts and the effect of the documents set out above and continued:] I would summarise the agreement of 1908 by saying that subject to the discharge of the sums due to the bank and certain other provisions, the intention of the deed was that half of the income whether of the husband or of the wife, should, within three days from its being received by either of them, be paid over to the depositee to be held subject to the directions which I have shortly stated. The main question that arises with regard to that deed is whether the provision in cl. 11 does not amount in the circumstances to an equitable assignment of one-half of the income payable to the wife or the husband under the settlements, the effect of which I have stated. It has been suggested that, inasmuch as the clause refers to a payment of one equal half part of any money received in the nature of income, there is no definite description of the property or the moneys which have to be handed over, and accordingly on that ground, a pure ground of construction of the language used in the clause, there is not sufficient to establish any sort of assignment. I do not take that view. I think having regard to the elaborate nature of the recitals and the specific statements as to the property of both the husband and the wife, and in particular the statement that the income of the wife is £1,400 a year under the three settlements, it is reasonably clear that cl. 11 means that immediately the husband or the wife receives the income of those settlements—and possibly any other income, but at any rate the income of those settlements—they have bound themselves by covenant to pay over one equal half part of that income to an account to be opened in the

A name of the depositee. That is a sort of preliminary point which I dispose of at this stage.

Now, can it be said that notwithstanding the execution of those agreements the interest on the investments standing upon the trusts of the settlements could be paid to the husband after the death of the wife on the ground that he had not become bankrupt and had not assigned, charged, encumbered, or attempted, or B affected to assign, charge or encumber the annual produce of the trust premises or any part thereof, and can it also be affirmed that he had not at that date done or suffered anything whereby the same or any part thereof would through his act have become vested in or payable to some other person or persons after the property had belonged absolutely to him? Two points are taken by counsel on behalf of the husband. He first of all says: assume that such a covenant as that contained C in cl. 11 of the agreement of Nov. 18, 1908, amounts to an equitable assignment, it is necessary to consider what is the subject-matter so assigned. He contends that there is no assignment, at any rate in terms, of the income arising under the two settlements in question. With regard to that point, so far as it rests upon the phrase used in cl. 11, "any money in the nature of income," I have already held that I do not so find. Then, however, he goes on to contend that the covenant D relates to property which has already become the absolute interest of the husband inasmuch as the covenant relates only to money which has to be paid over into the name of Sydney Mitchell within three days after the money has been received by the husband. I think it is true that under cl. 11, and it is also true under the third clause of the minute of agreement of the year 1927, that the covenant relates to moneys which have been paid to the husband, and does not operate until they E have reached his hands. The suggestion then is that the property has become his absolute interest, and accordingly cl. 11, and the equivalent clause in the subsequent agreement, operate only as matters of contract and that it is impossible to say that the property in question has become in law or in equity the property of the third persons.

A number of cases have been cited to me, but I do not think I need go beyond F a citation of two or three of them. The first one to which I should like to refer is *Re Lind, Industrials Finance Syndicate, Ltd.* v. *Lind* (1), a decision of the Court of Appeal where SWINFEN EADY, L.J., delivered an elaborate reserved judgment in which most of the previous authorities were reviewed. Accordingly, I think it is unnecessary for me to deal with those previous authorities. The question there related to the assignment by one Hugh Lind in favour of the Norwich Union Life G Insurance Society of a spes successionis to arise on his mother's death, as next-of-kin to his mother, who was alive at the date of the assignment. Subsequently to the assignment, he was adjudicated a bankrupt, and two years later he received his discharge. His mother then died and the share fell into possession. It will be observed that the neat point arose whether the assignment of something non-existent by Hugh Lind, primarily only to have effect by virtue of a covenant or H agreement operative when the property came into existence, was one which rested only in contract, so that his discharge in bankruptcy put an end to his obligation to perform the contract, or whether the assignment operated as from the moment of the death of his mother to transfer what was previously only a spes successionis, so that notwithstanding his bankruptcy was discharged, the Norwich Union were entitled to the property. That question involved a somewhat elaborate considera- I tion of the doctrines of equity with regard to equitable assignments and the well-known cases of *Metcalfe* v. *The Archbishop of York* (7), *Holroyd* v. *Marshall* (8), *Tailby* v. *The Official Receiver* (6), and a number of other cases were most elaborately discussed. The conclusion to which SWINFEN EADY, L.J., arrived is to be found at [1915] 2 Ch. at p. 360. He says:

> "It is clear from these authorities that an assignment for value of future property actually binds the property itself directly it is acquired—automatically on the happening of the event, and without any further act on the part of the

> assignor—and does not merely rest in, and amount to, a right in contract, giving rise to an action." A

Now come these words:

> "The assignor, having received the consideration, becomes in equity, on the happening of the event, trustee for the assignee of the property devolving upon or acquired by him, and which he had previously sold and been paid for." B

PHILLIMORE, L.J., and BANKES, L.J., agreed.

Now I accept that as being a true and accurate statement of the law, and I think it binds me to hold that such a covenant as I find in cl. 11 of the agreement of Nov. 18, 1908, being a covenant for value, had this effect, that the husband after the death of the wife, upon receipt of any income paid to him by the trustees of the settlements, became a trustee of one-half part of such income for the persons C intended to derive benefit under the agreement. The event had happened, the money had been handed to him, and he in substance, the assignor, having received the consideration, namely, the loans in question, became in equity on receipt of the money, a trustee for the depositee and the persons who were cestuis que trustent under the directions as to how the depositee was to apply the fund. It makes no difference that the obligation to pay over the one-half of the money was D an obligation to do it within three days after the receipt of the money. I think the position would be exactly the same if the word "forthwith" had been used. I think that on the day on which the husband received a cheque for a particular sum as part of the income in question he had not got free dominion over it. I think he was a trustee of it, and would be restrained by the court from such an application or disposition of that money as would put it out of his power to hand E over one-half of such money to the depositee before the expiration of the three days. Accordingly, I do not accept the view that before the so-called equitable assignment attaches, the property must necessarily have become, during the three days, the absolute interest of the husband. I think that is contrary to the decision in *Re Lind* (1), and it is contrary in my opinion to the doctrines which the Court of Equity has been accustomed to act upon ever since *Metcalfe* v. *The Archbishop* F *of York* (7), namely, for nearly a hundred years.

Counsel for the husband relied on a decision of the Court of Appeal, which I should, of course, follow, *Palmer* v. *Carey* (2). I confess at first sight it looked as if some ground was to be found in that decision in support of his view that there was nothing like an equitable assignment from the form of cl. 11. As reported in the Law Reports, I venture to think the case is not wholly intelligible, in so far G as it does not very clearly show what the point was which the Privy Council had to decide. But a reference to 34 C.L.R. 380, where the case in the High Court of Australia is reported, clears up the slight obscurity as to the facts which I think exists in the report in the Law Reports. What had happened was that the lender, who was one Carey, had undoubtedly entered into an agreement of April 30, 1917, with one Johnstone, the effect of which is stated in [1926] A.C. at p. 705. H Pursuant to that agreement large sums were advanced by Carey to Johnstone, and the advances so made exceeded £10,000. Johnstone, being in pecuniary difficulties, on May 31 entered into an agreement in writing by which, in consideration of the release of the sum of £18,990, Johnstone assigned to Carey all the stock-in-trade and fittings of his premises, together with the goods then in bond, and in consideration of the sale and delivery of that stock-in-trade and fixtures by a subsequent I agreement of June 7, 1921, Carey released Johnstone from all liability under the agreement of April 30, 1917, and also all claims by him for share of profits of the business to date pursuant to that agreement. Three weeks afterwards Johnstone sequestrated the estate, and Palmer, the appellant in the Privy Council case, was appointed as official assignee. On the motion of the official assignee an order was made in Australia declaring void as against the official assignee the sale, handing over, delivery and transfer by Johnstone to Carey of the lease, fixtures, stock-in-trade and book debts and other assets of Johnstone of or in connection with his business. It was then necessary to determine whether Carey was entitled to any security, lien or charge under cl. 3 of the agreement of April 30, 1917, and if so for what amount. There was, however, at the date of the bankruptcy no sum standing to the credit of Carey in the account which was provided for in the agreement of April 30, 1917; on the contrary that account was very largely in debit, and the question was whether Carey could claim, notwithstanding the subsequent transaction of June 7, 1921, that he had an equitable charge over the goods, the subject-matter of the later agreement, or over their proceeds of sale in the hands of the assignee in bankruptcy. With that explanation I think it becomes easy to understand what the Privy Council had to decide and decided, but I do not think that the case throws any doubt upon the correctness of the decision of the Court of Appeal in *Re Lind* (1) or on any other of the authorities which have been cited before me. In my opinion, therefore, subject only to one further point with which I have to deal, the husband having received due consideration for entering into the agreement, became in equity a trustee for the persons intended to be benefited by the agreement in question as soon as any income became payable and was paid to him.

The point that I still have to determine seems to me to be this. There is some ground for the view that, ordinarily speaking at any rate, a document ought not to operate as an equitable assignment unless the parties mean it to be such. It is said with truth, that in this case it is clear that the husband and the wife and their advisers were doing their best to avoid there being any equitable assignment or any other document which would have the effect of causing a forfeiture of the interest of the husband. The interest of the wife, of course, could not be forfeited because she was restrained from anticipation, but the husband's interest was in jeopardy if any event should happen which, but for the form of the clause, would result in the income after his wife's death being payable to anybody other than himself. I should be quite willing to say that, if the matter was really one of ambiguity, it would be open to the court to construe cl. 11, and the similar clause in the later document, as one which was not intended to have any effect other than a contractual effect, and I should be willing, in the event I have mentioned, to place reliance upon the intention of the parties being to avoid a forfeiture. I should not be justified in the present state of the law in coming to that conclusion in the present case. I think that the language is consistent only with the view that when the husband receives the income he becomes a trustee of the income and is bound to hand over the whole of it under the later agreement to the depositee, and I am unable to say that on the true construction of the language that result does not follow. I cannot believe that the parties intended to leave it simply to the good faith of the husband to hand over the income or not as he thought fit. If that had been the true view and the true intention of the parties, the whole of cl. 11, and of the equivalent clause in the later agreement, should have been omitted and the parties should have relied simply upon a verbal assurance or perhaps informal statement of the intention of the husband contained in the document. I have the obligation here, in a solemn statement in several carefully drawn up documents, that so long as any money remains owing to the persons in question, each of them, the husband and the wife, shall within three days after the receipt of any money in the nature of income, pay a proportion or the whole, as the case may be, into the name of the depositee. Accordingly, supposing that were not done, I think the parties could have obtained an injunction. I think they could have enforced the payment of it but for the fact that the clause is so worded that a forfeiture, according to the view I have now taken, had been incurred.

On the whole, therefore, I must come to the conclusion that the interest of the husband has been forfeited by the events which have happened. However, I would add this, in deference to the ingenious argument on behalf of the husband, that if that argument were to succeed, it seems to me that there is not a single one of these clauses which could not be evaded by some such device as was taken in the present case. With regard to the question of the true intention of the parties, there are a number of cases, including *Re Spearman* (3) in the Court of Appeal, which go to show that the court is strictly limited in its power of construing such documents as I have before me as not affecting a forfeiture when, according to the natural meaning of the words, a forfeiture must result. On the whole, therefore, I must decide this question of the summons in the sense that the husband has forfeited the interest so appointed to him by the wife in the three settled funds.

Declaration accordingly.

Solicitors: *Bird & Bird*, for *Sydney Mitchell, Chattock, & Hatton*, Birmingham; *Vizard, Oldham, Crowder, & Cash*, for *Oldham & Marsh*, Melton Mowbray; *Lawrence, Graham & Co.*

[*Reported by* MISS B. A. BICKNELL, *Barrister-at-Law.*]

GRAIN UNION CO., S/A ANTWERP *v.* A/S HANS LARSEN, AALBORG

[KING'S BENCH DIVISION (Branson, J.), July 3, 1933]

[Reported 150 L.T. 78; 49 T.L.R. 540; 38 Com. Cas. 260; 18 Asp.M.L.C. 449]

Sale of Goods—Appropriation to the contract—Appropriation in conformity with contract, but containing inaccurate statement.

A contract for the sale of goods to be shipped from a foreign port provided that notice of appropriation, setting out inter alia the name of the vessel in which the goods were shipped, should be given by the seller to the buyer within a specified time, and that "a valid notice of appropriation when once given shall not be withdrawn." The goods were shipped per *S.S. Triton*, but owing to an error by a clerk employed by the sellers a notice of appropriation was given by the seller's agent to the buyer in which it was stated that the goods had been shipped per *S.S. Iris*. The buyers refused to accept delivery.

Held: the appropriation of the *Iris* was in conformity with the contract, and so, although containing an inaccurate statement, was valid, and, therefore, it was irrevocable, and the buyers were entitled to refuse delivery of goods.

Notes. As to appropriation, see 29 HALSBURY'S LAWS (2nd Edn.) 75 et seq., and for cases see 39 DIGEST 488 et seq.

Special Case stated by arbitrator.

By a contract dated Sept. 23, 1932, the Grain Union Co., S/A Antwerp, the sellers, sold to A/S Hans Larsen, Aalborg, the buyers, a parcel of 500 tons of maize to be shipped from named ports during November to Aalborg. The contract provided that notice of appropriation, with ship's name, date of bills of lading, and approximate quantity loaded, should be mailed within three days or telegraphed within seven days from the date of the bills of lading. It further provided that a valid notice of appropriation, when once given, should not be withdrawn, and that all notices should be deemed to be under reserve for errors or delays in telegraphic transmission. On Nov. 9, 1932, the shippers at Braila telegraphed to the sellers as follows:

> "Per *S.S. Triton* bills of lading from Braila to Aalborg one bill of lading 510 tons . . . loading finished to-day, vessel goes to Constanza to complete."

That telegram was received by the sellers on Nov. 10, and on the same day they wrote to the brokers:

> "Following advice received from our sellers, we beg to notify you under usual reserves and subject to rectification, that the steamer *Triton*, or its more correct name, bill of lading 9.11.32, has loaded about 510 tons maize in total execution of the above-mentioned contract and confirm to you our telegram of this date."

The telegram there referred to read as follows:

> "Appropriate usual reserves total fulfilment contract Larsen, Sept. 23, 510 tons maize November shipment . . . per *S.S. Iris* B/L Nov. 9. . . ."

The maize had in fact been shipped in the *Triton*, but the name *Iris* was inserted in the telegram through the error of a clerk in the sellers' office. On receipt of the telegram the brokers wired to the buyers that the maize had been shipped per *S.S. Iris*. On discovering the mistake, the sellers at once advised the brokers, who forwarded to the buyers the letter of appropriation of Nov. 10 above set out, and stated that the correct name of the ship was *Triton*. The buyers refused the appropriation on the ground that the *Iris* had already been appropriated. A ship named *Iris* had in fact been loaded at Braila in November, but she left that port some days before the *Triton*. The question for the court was whether the buyers were entitled to refuse the appropriation of the *Triton* on the ground that an irrevocable appropriation of the *Iris* had already been made.

Willink for the sellers.

Dickinson, K.C., and *McNair* for the buyers.

BRANSON, J.—This is an appeal by way of Case Stated from an award made by the Appeal Committee of the London Corn Trade Association, dismissing an appeal by the Grain Union Co., S/A Antwerp, against an award in favour of A/S Hans Larsen, Aalborg. The dispute arose out of a contract made on the London Corn Trade Association form No. 52 and dated Sept. 23, 1932. Under that contract the Grain Union Co. sold to Hans Larsen, through brokers, Krusoe & Co., of Copenhagen, certain maize, to be shipped from a port or ports on the Danube, or Bulgarian ports, or Roumanian ports on the Black Sea, and so forth, bills of lading to be dated when the goods were actually on board, the quantity to be about 500 tons, and the price to be 3 florins and 85 cents Dutch currency per 100 kilos shipped.

The contract was subject to certain conditions and rules, the material one of which is No. 1, which deals with notice of appropriation. Under it the notice of appropriation, with the ship's name, date of bills of lading and approximate quantity loaded, is to be mailed within three days or telegraphed within seven days from the date of the bills of lading by the shipper of the grain tendered under the contract direct to the buyer. That was to be passed on by the buyer and by each subsequent seller within one business day from receipt. Notices of appropriation received after the three or seven days, as the case might be, were to be passed on by telegram if the seller and buyer did not reside in the same country. All notices under this clause given by telegram were to be confirmed by letter. Then it provides that on demand the buyer is to give to the seller a receipt for the notice of appropriation. The clause goes on to provide as follows: "A valid notice of appropriation when once given shall not be withdrawn." Then later it says: "A notice or tender to the broker or agent shall be deemed a notice or tender under this contract." Finally it says: "All notices under this clause shall be deemed to be under reserve for errors or delay in telegraphic transmission."

That being the material clause of the contract, I turn to the facts of the case. On Nov. 10, 1932, the sellers received a telegram from Braila, saying:

> "Per *S.S. Triton* bills of lading from Braila to Aalborg one bill of lading 510 tons, one bill of lading 609 tons, Nov. 9,: loading finished to-day, vessel goes to Constanza to complete."

Upon receipt of that telegram, the sellers wrote a letter to the brokers in which they said that, under the usual reserves and subject to rectification,

> "the steamer *Triton*, or its more correct name, bill of lading 9.11.32, has loaded about 510 tons maize in total execution of the above-mentioned contract and confirm to you our telegram of this date."

The telegram of that date, owing to a mistake of a shipping clerk, instead of using the word "Triton" as the name of the ship, used the word "Iris." The telegram was in the following words:

> "Appropriate usual reserves total fulfilment contract Larsen, Sept. 23, 510 tons maize November shipment. Appropriate also part fulfilment of contract Aalborg Foderstofimport, Sept. 28, 609 tons maize November shipment. Both per steamer *Iris* bill of lading Nov. 9."

Upon receipt of that telegram, the brokers took it as an authority or direction to forward the information to the buyers, and on Nov. 11 they telegraphed to them:

> "Contract 23/9 under usual reserves 510 tons maize steamer *Iris* bill of lading 9/11 telegraph modus of payment."

That telegram they confirmed by a letter of the same day, also addressed to the buyers. The letter of Nov. 10, addressed by the sellers to the brokers, was not delivered until Nov. 14. By that time the sellers had discovered that they had made the mistake of naming the *Iris* in their telegram instead of the *Triton*. Communications were then made over the telephone, in which the sellers tried to put themselves right with the brokers, and the brokers tried to put the sellers right with the buyers. The buyers, however, determined to reject the cargo, relying upon the clause in the contract that: "A valid notice of appropriation when once given shall not be withdrawn." The parties subsequently agreed that the buyers should accept the grain which came by the *Triton* at a lower price than the contract price, and that they should arbitrate about the difference between that price and the contract price. Hence these proceedings arose.

The Appeal Committee have found the facts. Their finding that the brokers were the sellers' agents is much relied upon by the buyers. The view taken by the Appeal Committee was that by their telegram of Nov. 10 the sellers authorised the brokers as their agents to give notice of appropriation to the buyers, and that that notice, which was given by telegram passing from the brokers to the buyers on Nov. 11 and confirmed by letter from the brokers to the buyers of Nov. 11, constituted a valid appropriation which cannot be withdrawn.

Unless it can be shown that that was not a valid notice of appropriation, it seems to me that the Appeal Committee were perfectly right. It is suggested that it was not a valid notice of appropriation because to be a valid notice there must in fact have been an appropriation and the notice must represent what that appropriation in fact was. Counsel for the sellers says that appropriation takes place in the mind of the individual who has to appropriate, and that a notice of it, in order to be valid, must correctly reproduce the effect upon the mind of him who has appropriated. I do not think this contract means that at all. It seems to me that a notice which contains all the essentials—the ship's name, the date of the bill of lading, and the approximate quantity of the goods on board—if all those three elements are in conformity with the contract, is a valid notice of appropriation, subject only to this, that the appropriation clause in the contract contains a provision that all notices under the clause are to be deemed to be made under reserve of errors or delays in telegraphic transmission. If it could be shown here that the name "Iris" had got into the notice by reason of any error in telegraphic transmission, I should have been prepared to hold that the notice was not a valid notice, but it is found as a fact, and there is no contest about the matter, that the mistake in the telegram, which resulted in the name "Iris" being telegraphed instead of "Triton," was not a mistake of telegraphic transmission—i.e., not a mistake made by those who had to do with the transmission of the message handed in. The message was transmitted as it was received by the telegraph office. The mistake was a mistake of the clerk who drafted the message. Such a mistake is not provided for, and the burden of such a mistake must fall upon the shoulders of the maker of it, or his principal, if the maker is an employee.

In the circumstances, therefore, I think it is plain that the decision of the Appeal Committee was right, and this appeal must be dismissed.

Solicitors: *Richards, Butler, Stokes, & Woodham Smith*; *Thomas Cooper & Co.*

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

G. MONRO AND R. S. COBLEY *v.* BAILEY (INSPECTOR OF TAXES)

[HOUSE OF LORDS (Lord Buckmaster, Lord Tomlin, Lord Russell of Killowen and Lord Wright), February 24, 1933]

[Reported 102 L.J.K.B. 471; 148 L.T. 505; 17 Tax Cas. 607]

Income Tax—Occupation of land—Nurseries or gardens—Sixty acres of farm of 204 acres used for growing of bulbs—Occupation as nursery or garden for the sale of produce—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Rules applicable to Sched. B*, *r.* 8.

The taxpayers occupied 204 acres of farmland. In the year ending April 5, 1930, they used sixty acres for the purpose of growing bulbs, fifty acres for potatoes and the rest for general farm crops. During that year, sales by the taxpayers of blooms produced £8,332, of bulbs £5,415, and of general farm crops £1,623. The whole area consisted of open fields and was worked as one farm by ordinary farming methods. The area used for growing bulbs was limited to sixty acres so as to permit a rotation of crops. The blooms of bulbs were only picked if no harm would thereby be caused to the bulbs, and the bulbs were grown for the sale of the bulbs rather than for the sale of their blooms. The taxpayers were assessed to income tax under the Income Tax Act, 1918, Rules applicable to Sched. B, r. 8. On appeal, the commissioners found that the land was mainly devoted to the growth of bulbs, that it was used partly as a nursery, and partly as a garden for the growth and sale of bulbs, and that the farming operations were ancillary to the bulb business, and they confirmed the assessment.

Held: the decision of the commissioners could not be disturbed because the question whether the land was occupied by the taxpayers as nurseries or gardens for the sale of produce within r. 8 was one of fact to be decided by the commissioners, and there was evidence on which they might properly answer that question in the affirmative.

Notes. The Income Tax Act, 1918, Rules applicable to Sched. B, r. 8, was repealed by the Finance Act, 1941, s. 52 (7) and Sched. V. Market gardening is charged to tax under Case I of Sched. D by the Income Tax Act, 1952, s. 124 (1). "Market garden land" means land occupied as a nursery or garden for the sale of the produce (other than land used for the growth of hops) and "market gardening" is to be construed accordingly: see ibid. s. 526 (1).

Considered: *Dennis* v. *Hick* (1935), 19 Tax Cas. 219; *Bomford* v. *Osborne*, [1941] 2 All E.R. 426. Distinguished: *David Lowe & Sons, Ltd.* v. *I.R. Comrs.* (1941), 24 Tax Cas. 105. Referred to: *Inspector of Taxes* v. *Barter*, *Inspector of Taxes* v. *Williamson*, [1944] 2 All E.R. 154.

For the Income Tax Act, 1952, s. 124 (1) and s. 526 (1), see 31 HALSBURY'S STATUTES (2nd Edn.) 121, 489.

Appeal by the taxpayers from the decision of the Court of Appeal (LORD HANWORTH, M.R., SLESSER and ROMER, L.JJ.), reported 148 L.T. 50, on a Case Stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the General Purposes of the Income Tax Acts for the Spalding Division of the county of Lincoln, for the opinion of the King's Bench Division of the High Court of Justice. The Case Stated was as follows:

> "At a meeting of the Commissioners for the General Purposes for the Spalding Division of the County of Lincoln for hearing and determining appeals against income tax, held at Number 11, Market Place, Spalding, on Dec. 12, 1930, Messrs. G. Monro and R. S. Cobley (hereinafter called 'the appellants') appealed against an assessment to income tax of £636 14s. 0d. made on them for the year ended April 5, 1930, under r. 8 of Sched. B of the Income Tax Act, 1918, on the profits derived from the occupation of about 204 acres of land situate at Spalding Marsh in the county of Lincoln.
>
> "The following facts were proved and admitted:
>
> "(a) The appellants were occupiers of 204·55 acres of farmland consisting of the following four farms:
>
> "(1) Sharman's Farm: 86·6 acres.
> "(2) Saxton's Farm: 72·2 acres.
> "(3) Farmland rented from Mr. Barker: 29·25 acres.
> "(4) Farmland rented from Mr. Cotton: 16·5 acres.
> "Total 204·55 acres.
>
> "Upon Saxton's farm an area of one acre was covered by thirteen glasshouses.
>
> "(b) For the year in question, the land was occupied for the purposes of growing the following crops:

Potatoes	about 50 acres
Wheat, oats, beans, mangolds and general farm crops	about 94·55 acres
Bulbs	about 60 acres
Total	204·55 acres

> "(c) With regard to the thirteen glasshouses covering one acre upon Saxton's farm, separate accounts were kept and the appellants expressed their willingness to pay income tax upon profits earned therein.
>
> "(d) The figures in the accounts for the year in question showed: Sales of blooms, £8,332; sales of bulbs, £5,415; sales of general farm crops, £1,623; labour charges, £5,454.
>
> "(e) The whole acreage consisted of open fields and was worked as one farm by farm labourers using ordinary methods of husbandry, horses, ploughs, tractors and other agricultural implements.
>
> "(f) The crops on the land were changed each year according to the usual agricultural principle of rotation of crops, and the land was not heavily manured.
>
> "(g) The cultivation of the flower bulbs was in all respects similar to that of potatoes, being ploughed into the ground and ploughed out of the ground and being cleaned by an Eglington potato riddle. The method of preparation of the soil for the growth of both crops was identical.
>
> "(h) No nursery work was done on the land. The blooms of the bulbs were picked only if weather conditions permitted, and if no harm would thereby result to the bulb. The blooms of many of the varieties were never picked for this reason. The bulbs were grown for the sale of the bulb rather than for the sale of the flower, and the appellants were bulb growers rather than flower growers. The bulbs were sold by the ton.
>
> "(i) The billheads of the appellants described the business as the 'Spalding Bulb Farms.'

"(k) The whole acreage was worked as one entire holding, but the cost of the labour employed on the bulbs amounted to £27 per acre, a sum far in excess of the price of ordinary farming, which averaged in the locality £8 per acre.

"(l) The quantity of land under bulbs for the year in question was sixty acres, and the residue of the holding was under ordinary farming cropping customary in the district.

"(m) The receipts from the land used for ordinary agricultural cropping were £11 per acre.

"The appellants contended:

"(i) That the lands were not occupied as a nursery or a garden for the sale of produce.

"(ii) That the lands in question were occupied wholly or mainly for the purpose of husbandry.

"(iii) That the growing of flower bulbs in open fields, sixty acres in extent, using the methods of ordinary farming, was husbandry.

"(iv) That 140 acres of the said lands which were used for growing general farm crops were occupied for purposes of husbandry.

"(v) That 204·5 acres of farmland, worked by farm labourers, using ploughs, tractors and horses did not constitute a garden.

"(vi) That the profits of occupation of the lands in question were improperly assessed under r. 8 of the Rules applicable to Sched. B.

"(vii) That the profits of occupation of the said lands should be assessed upon the annual value according to the general Rules of Sched. B.

"The Inspector of Taxes contended:

"(i) That the land in question was occupied as a nursery or garden for the sale of the produce.

"(ii) That the primary purpose for which the land as a whole was occupied was the growth of bulbs.

"(iii) That the growth of other crops on portions of the land not used for bulbs in any year was only ancillary to the occupation of the whole of the land for the production of bulbs.

"(iv) That the existing assessment under r. 8 of the Rules applicable to Sched. B was correct, and should be confirmed.

"The Commissioners found, as a fact, that the land in the occupation of the appellants was mainly devoted to the growth of bulbs, that it was used in part as a nursery, and in part as a garden for the growth and sale of bulbs, and that the farming operations carried on by the appellants were ancillary to the bulb business, and decided that the assessment should be confirmed."

The Court of Appeal held, reversing the decision of FINLAY, J., that having regard to the fact that an additional £19 worth of labour per acre was put on this land, and the large sale of blooms, and that the whole acreage was worked as one farm, the commissioners, familiar with the system of farming, of husbandry, and of gardening, were qualified to take into account and form an estimate of those facts, and their finding could not be disturbed, there being sufficient evidence for such a finding. The appellants now appealed to the House of Lords.

A. M. Latter, K.C., and *L. C. Graham-Dixon* for the appellants.

The Solicitor-General (*Sir Boyd Merriman, K.C.*) and *R. P. Hills* for the respondent.

LORD BUCKMASTER.—The question for your Lordships' consideration is whether certain lands in the occupation of the appellants are occupied by them as nurseries or gardens for the sale of the produce in accordance with the provisions of r. 8, Sched. B, in the Income Tax Act, 1918, or whether they are entitled to be taxed under the first paragraph of the Schedule, which simply taxes them in respect of the occupation for every 20s. of the assessable value. The commissioners have held that the lands in question are occupied as nurseries or gardens for the sale of produce, and consequently the profits that arise from that occupation have to be estimated in accordance with the provisions applicable to Sched. D and are subject to tax accordingly.

Now the facts of the case are these: The appellants have a holding of about 204 acres in Lincolnshire, sixty acres of which are annually devoted to the growth of bulbs, which bulbs are obviously intended to be used when sold for the purpose of producing flowers and not for the purpose of consumption. They use sixty acres for that purpose alone, because it is necessary, for change of soil and other reasons, that they should use no more. The commissioners have, however, found that the main purpose for which the whole of the 204 acres are concerned is the growth of bulbs. The flowers which these bulbs produce are sold to a substantial extent, but none the less it is stated that they never cut at times when their cutting would do injury to the bulbs themselves and that the real purpose of the business is the cultivation and the growth of bulbs. The methods of agriculture which are described are those which are in common use for the ordinary purposes of husbandry. The land is worked by ploughs, horses, tractors, and other agricultural implements. None the less, on the facts the commissioners have held that this land is occupied as a garden for the sale of the produce—these bulbs. The question, and the only question, before this House is whether it is possible to say that there was not material on which that conclusion could be reached. FINLAY, J., thought that there was no material that could justify it. The Court of Appeal have overruled his judgment, and the present appeal is from that decision. It is plain that in all such cases the distinction is a matter of degree; no general principle can be made to govern them, and I agree with the judgment of ROMER, L.J., which I think has put the whole matter in a nutshell. He said (148 L.T. at p. 53):

> "The question whether the land in the occupation of the respondents was or was not occupied by them as a garden seems to me to be a question of fact for the commissioners to decide, and I am not prepared to hold that there was no evidence on which the commissioners might properly answer that question as they did, in the affirmative."

The other point raised in the appeal was a question whether the sale of the produce ought not to be on or absolutely close to the land that was being used. I can find nothing which leads me so to associate the condition of sale in the Act of Parliament, and on that point I think it is also clear that the appeal must fail.

For both these reasons, therefore, I think the judgment appealed from is correct.

LORD TOMLIN.—I agree, and have nothing to add.

LORD RUSSELL.—I agree.

LORD WRIGHT.—I agree.

Appeal dismissed.

Solicitors: *Ellis & Fairbairn*; *Solicitor of Inland Revenue.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

WYATT *v.* KREGLINGER AND FERNAU

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), February 7, 1933]

[Reported [1933] 1 K.B. 793; 102 L.J.K.B. 325; 148 L.T. 521; 49 T.L.R. 264]

Contract—Illegality—Public policy—Restraint of trade—Unreasonable scope—Agreement to forgo benefit on entry into specified trade.

By letters written by employers to an employee the employers stated that on the employee's retirement they would pay him a "pension" or "remuneration" of or at the rate of £200 a year provided that he did not enter the wool trade "and do nothing at any time to our detriment (fair business competition excepted)."

Held: assuming that the terms of the letters constituted an enforceable contract and were not mere nudum pactum, no distinction was to be drawn between a case where a man expressly covenanted to exclude himself from a trade without limitation of time or space, as, e.g., on the occasion of the sale of a business, and a case where he agreed that he should be deprived of a benefit if he entered the trade; and, therefore, the contract was void as being in restraint of trade and so against public policy.

Notes. Distinguished: *Re Prudential Assurance Co.'s Trust Deed*, *Horne* v. *Prudential Assurance Co.*, post, p. 839.

As to contracts in restraint of trade, see 32 HALSBURY'S LAWS (2nd Edn.) 397 et seq., 43 DIGEST 19 et seq.

Cases referred to:

(1) *Attwood* v. *Lamont*, [1920] 3 K.B. 571; 90 L.J.K.B. 121; 124 L.T. 108; 36 T.L.R. 895; 65 Sol. Jo. 25; 43 Digest 20, *131*.

(2) *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co., Ltd.*, [1894] A.C. 535; 63 L.J.Ch. 908; 71 L.T. 489; 10 T.L.R. 636; 11 R. 1; 43 Digest 22, *139*.

(3) *Leather Cloth Co.* v. *Lorsont* (1869), L.R. 9 Eq. 345; 39 L.J.Ch. 86; 21 L.T. 661; 34 J.P. 328; 18 W.R. 572; 43 Digest 23, *147*.

(4) *Bishop* v. *Kitchin* (1868), 38 L.J.Q.B. 20; 43 Digest 62, *644*.

(5) *Evans & Co.* v. *Heathcote*, [1918] 1 K.B. 418; 87 L.J.K.B. 593; 118 L.T. 556; 34 T.L.R. 247, C.A.; 43 Digest 91, *954*.

(6) *Flight* v. *Reed* (1863), 1 H. & C. 703; 32 L.J.Ex. 265; 8 L.T. 638; 9 Jur.N.S. 1016; 12 W.R. 53; 158 E.R. 1067; 12 Digest (Repl.) 246, *1882*.

(7) *Mogul S.S. Co.* v. *McGregor Gow & Co.*, [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.Q. 101; 40 W.R. 337; 8 T.L.R. 182; 7 Asp.M.L.C. 120; 43 Digest 10, *51*.

Appeal from an order of MACNAGHTEN, J.

The plaintiff, Henry Wyatt, had been in the employment of the defendants, Krenglinger and Fernau, a Belgian firm with a branch office in London, from 1914 to 1923, and in the employment of their predecessors in London from 1876 to 1914. In 1923 he was manager of their import and export department at a salary of £400 per annum and commission at 2½ per cent., but for several years he had not been engaged in their wool department. On June 25, 1923, the defendants wrote to him as follows:

> "Upon your retirement on July 31 next we have decided to grant you a pension of £200 per annum, payable by monthly instalments. You are at liberty to undertake any other employment, or enter into any business on your own account, except in the wool trade, and the only other stipulation we attach to the continuance of this pension is that you do nothing at any time to our detriment (fair business competition excepted). . . ."

The reply of the plaintiff was lost, and its contents were unknown. On June 26, 1923, the defendants wrote to the plaintiff:

> "Your letter to hand. I was unaware of the arrangement regarding three months' notice, consequently you will receive full salary until Sept. 30, and from that date remuneration at the rate of £200 per annum in accordance with the terms and conditions of our letter of yesterday. Your salary, as hitherto, will be paid free of income tax. . . ."

The plaintiff received full salary to Sept. 30, 1923, and from that date a payment of £200 a year payable by instalments of £16 13s. 4d. a month. On April 1, 1932, the defendants wrote to the plaintiff:

> "In going through the London figures, my partners and myself were greatly surprised at finding that an allowance of £200 was being paid to you at the London office whereas very drastic steps have been taken of late to reduce the overhead expenses in London which have become unbearable in proportion to the present-day values of the wool and produce. After due consideration of your past services and of the present situation, we come reluctantly to the conclusion that this allowance should be discontinued as from June 30 next. . . ."

The defendants ceased the payments in accordance with this letter.

The plaintiff claimed damages for breach of an agreement contained in the letters of June 25 and 26, 1923, to pay him £200 a year, and, alternatively, by amended pleading, a declaration that the defendants were liable to make this payment to him for his life. The defendants pleaded that there was no contract between the plaintiff and the defendants, and (by amendment) that, if there was a contract, it was (a) terminable by reasonable notice; and (b) void as being in restraint of trade.

MACNAGHTEN, J., held that the promise to pay the £200 a year was a gratuitous promise which gave rise to no legal obligation on the part of the defendants, and he, therefore, gave judgment for the defendants. The plaintiff appealed.

Macaskie, K.C., and *St. John Field* for the plaintiff.

Comyns Carr, K.C., and *R. Fortune* for the defendants were not called upon.

SCRUTTON, L.J.—The first point to be considered is the construction of four letters, two of which we have not got, and when that point has been decided, a question of general importance as to principle arises.

Messrs. Kreglinger and Fernau, the defendants, a very old-established firm, in the sense that it has carried on business under various names and with various amalgamations for about 125 years, took into its service in 1900 the plaintiff, a gentleman who had been serving for some twenty years previously with another firm which was amalgamated. In 1923 the defendant firm, which had a London branch, found itself compelled to cut down its expenses. It had the right under its contract with the plaintiff to terminate his engagement on three months' notice, and it was under no obligation whatever to give him any pension; there was no contributory pension scheme, so this employee had not been contributing anything or having anything deducted from his wages in relation to pension, and the firm could, if they had wished, simply have given him three months' notice and dismissed him, and he would have had no legal claim for any pension at all. But the firm did not desire to take that attitude, and they wrote certain letters to the plaintiff to which he wrote certain answers. He now says: "You then contracted to pay me as a matter of law a pension, and have no power to withdraw that pension," for, after paying the pension for some nine years, pecuniary circumstances again becoming difficult, the firm withdrew the pension, and alleged that there was no obligation on them to continue paying it.

While the court is agreed as to the result of this appeal, it may be that they are not agreed as to all the grounds which have been argued, and I say at once that I take the same view as did the learned judge below. I am of opinion that these

A letters are not the letters of contract. I think that my brothers do not agree with that view. They consider that there was a contract—an agreement I should say; but the whole court takes the view that, if there was an agreement, it was an agreement which the court cannot enforce, at the instance of either party to it, on the ground that it is contrary to public policy as an agreement in restraint of trade.

B First, as to the construction of the letters, I think the court is placed in a great difficulty when it has to get a promise and an acceptance giving legal results out of four letters and it has only got two of them. It has not the letters written by the plaintiff. The letters it has got are these. On June 25, 1923, the defendants wrote:

> C "Dear Mr. Wyatt.—Upon your retirement on July 31 next we have decided to grant you a pension of £200 per annum payable by monthly instalments."

They were under no obligation whatever to pay him a pension, and the whole transaction seems to have begun with a voluntary, gratuitous offer. There is no question of agreement. The words are: "We have decided." I start, therefore, with a letter which appears to begin, not as a contract, but as an intimation of an D intention. The letter continues:

> "You are at liberty to undertake any other employment or enter into any business on your own account."

That does not look like a contract. The defendants are merely stating what is the present position—that, if the agreement is terminated, the plaintiff is at liberty to undertake any other employment or enter into any business on his own account. E For the moment I leave out the next words: "except in the wool trade." The letter then continues:

> "and the only other stipulation we attach to the continuance of this pension is that you do nothing at any time to our detriment (fair business competition excepted)."

F The view I take of that clause is that it is meaningless, too vague to form any part of a legal obligation.

We have not got the answer to that letter, but I infer from the next letter from the employers that it was not an acceptance of the first letter. I think it is quite clear that in the first letter of the plaintiff, he said: "You cannot terminate my agreement. I am entitled to three months' notice," because the second letter of G the defendants, written the following day, June 26, is in these terms:

> "I was unaware of the arrangement regarding three months' notice, consequently you will receive full salary until Sept. 30 and from that date remuneration at the rate of £200 per annum [the word "pension" is changed to "remuneration"] in accordance with the terms and conditions of our letter of yesterday."

H There is nothing in the rest of the letter of any importance. Again, we have not got the answer to that letter. So that we have to find a contract from certain letters when all the letters on one side are absent. On July 2 the defendants wrote:

> "Dear Mr. Wyatt.—I am in receipt of your letter of the 28th ult. for which I thank you. [So that there was something which the employer thought he ought I to thank the employee for.] Kindly note you will retain the secretaryship of the Tres Puentes Co., Ltd., until this company is liquidated."

The words on which special reliance is placed as showing there was a contract importing legal obligations are the words in the first letter:

> "You are at liberty to undertake any other employment or enter into any business on your own account except in the wool trade."

The learned judge below has expressed exactly the view I take of these words, reading them in a letter which, in my view, starts by being a letter of a gratuitous

offer imposing no legal obligation. The learned judge describes the opinion he had A
formed as to the meaning of the first paragraph by saying that

> "it was a voluntary, gratuitous payment offered by the defendants which they were at liberty to give or to withhold at any time at their discretion. I think the words:
>
> > 'You are at liberty to undertake any other employment or enter into any business on your own account except in the wool trade' B
>
> are merely an intimation that they did not desire Mr. Wyatt to enter into the wool trade, and that if he did enter into the wool trade he must not expect them to continue the payment."

That expresses exactly a view I take of these words, coming as they do in the framework of which the opening words are an intimation of gratuitous payment. It has C
to be borne in mind that not every formal proposal and acceptance constitute a legal contract. "Will you come to dinner on Tuesday?" "I have pleasure in accepting your kind invitation"—proposal and acceptance: here is no legal contract, because the parties never intended it to be a legal contract. I once had the pleasure as a judge of the King's Bench Division of hearing an animated dispute whether a particular gentleman was entitled to a prize under the terms of a golf D
competition held at the Devonshire Club at Eastbourne, and I decided (and no appeal was made against my decision) that nobody concerned with that competition had ever intended there should be any legal results following from the conditions posted and the acceptance by the competitor of those conditions. I take the same view of these letters.

Suppose that it is a contract. I take the view that—assuming it to be a contract E
in the most favourable terms for the plaintiff, which is that it is not an undertaking by the plaintiff: "I will not enter into the wool trade," but that it is a contract by the defendants: "I will pay you a sum if you do not enter into the wool trade"—it is a contract in restraint of trade, and this is a point which the court must take because it is a matter of public policy, and the court does not enforce arrangements which are contrary to public policy. Counsel for the plaintiff F
agrees that if it were a contract not to enter into the wool trade for all time and all space it would be unenforceable, because it would be a restraint of trade, injurious to the public and contrary to the principle laid down as to such contracts between employer and employee as distinguished from contracts between a person selling a business and a person buying that business—the principle stated at length and justified by quotations from the authorities in the judgment of YOUNGER, L.J., G
in *Attwood* v. *Lamont* (1), with which ATKIN, L.J., concurred. Now this contract, if it be a contract, stated in the most favourable form for the plaintiff, is: "If you will not enter into the wool trade for the rest of your life in any part of the country or world we will pay you so much a year." That appears to me to be as much a restraint of trade, which is unenforceable, as the contract made by an employee: "I will not trade in the wool trade for the rest of my life in any part of the world," H
in which case, the country is being deprived of the services of a man of sixty in the wool trade—of a man who is quite competent to enter into business because he is given leave to enter into any other kind of business than the wool trade. The country is being deprived of his services without any legitimate justification. That this contract, if it be a contract, is unenforceable as being in restraint of trade, follows from the principle stated in *Attwood* v. *Lamont* (1).

For these reasons, dealing with the matter firstly as a question of construction, I
and secondly, as a question of law, without any consideration of whether the employers ought or ought not to have continued the pension, I come to the conclusion that the learned judge arrived at the right result, and that consequently this appeal must be dismissed.

GREER, L.J.—This case, when it was before the learned judge who tried it, involved a question as to the true construction of certain documents that passed between the parties at the end of June and the beginning of July, 1923, and then a further question, if the true construction of these documents was that there was a contract between the parties, whether that contract was one which could be enforced at law or whether it was a contract which was void as being in restraint of trade. I am inclined to take the view that the learned judge was wrong in the construction he put upon the documents, but we have not thought it necessary to call upon counsel for the defendants to support the view which commended itself to the learned judge and, therefore, I do not feel that I am entitled to give any final decision on the question of the construction of the documents. I am, however, inclined to take the view that the document which settled the rights of the parties is a letter of June 25 from the defendants to the plaintiff, and that when they said they required two stipulations from the plaintiff they were thereby asking him to give them a legal promise in consideration of the pension which they were offering.

We have not heard counsel for the defendants on that question, and I do not express any final opinion upon it; but, assuming it is right that the obligation created was a contractual obligation, I take the same view as that expressed in the judgment of SCRUTTON, L.J., that the contract was one which would be in restraint of trade and would not be binding—that is to say, the promise which is in question on the part of Mr. Wyatt was a promise not to engage in the wool trade and not to do anything at any time to the detriment of his employers throughout the whole of his natural life at any place and at any time, and that, assuming he bound himself, he bound himself to something which was void in law, and, inasmuch as the consideration was void, the contract would go altogether because you cannot have a contract in consideration of a void promise, the promise being a nullity. On those grounds I agree that this appeal should be dismissed.

SLESSER, L.J.—I agree that this appeal should be dismissed. I assume for the purpose of my judgment that the plaintiff has proved to the satisfaction of the court that on June 25 and 26, 1923, a subsisting agreement between him and the defendants was entered into which was intended to bind both parties. I assume that for the purpose of what I have to say, because we have not heard counsel for the defendants on the matter, and it may be that he might have been able to throw a light upon the case which would have led one to a contrary opinion. But, assuming that there was a contract here, one has to consider what is the nature of the alleged contractual relation between the parties. As I read it, it is this, the defendants would pay £200 (described in the letter of June 25 as a "pension" and in the letter of June 26 as a "remuneration"), on certain stipulations. The material one is this: "You [that is, the plaintiff] are to be at liberty to undertake any other employment or enter into any business on your own account, except in the wool trade." I think the effect of that is not that the plaintiff undertakes that he will not enter the wool trade; but that it is made a condition of the receipt of the money that, if he does at any time enter into the wool trade, he is to forfeit any rights he might otherwise have under the agreement.

It has been argued for the plaintiff that a distinction must be drawn between a case where he has expressly covenanted to exclude himself without limitation of time and space from a trade and a case where he has agreed that a right which he would otherwise have would be defeated by his so entering into that trade. I cannot in principle find any distinction between the two. The public policy which has to be considered, the interest of the community, seems to be affected quite as much by a direct agreement on his behalf, an agreement which might support an injunction in restraint or a claim for damages, as in a case where he says he will give up a benefit which he would otherwise receive if he does enter into the particular trade. In such matters it is well to go back to principle and the principle is nowhere better stated, I think, than by LORD MACNAGHTEN in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co., Ltd.* (2), where he says ([1894] A.C. at p. 565):

> "All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void." A

It seems to me that to say to a man he should be deprived of a benefit if he fails to restrain himself from a particular trade, when such restraint would be a general restraint, is just as much contrary to public policy and deprives the public of his services equally as if he made an express covenant. B

There is a passage in the judgment of YOUNGER, L.J., in *Attwood* v. *Lamont* (1) ([1920] 3 K.B. at p. 583), where he cites with approval a passage from the judgment of JAMES, V.-C., in *Leather Cloth Co.* v. *Lorsont* (3) (L.R. 9 Eq. at p. 354), where the learned Vice-Chancellor said:

> "Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labour, skill, or talent, by any contract that he enters into." C

That language, which is approved by YOUNGER, L.J., and which I think is right, extends to any contract which has of necessity the effect of depriving a man of the liberty to serve the State by his labour or his skill. It may well be that there are cases quite irrespective of that consideration where the restraint is so partial D that it is not in the interests of the community that it should not be enforced, but in this case, to my mind, it is quite clear that this is a restraint unlimited in time and space. It is not a restraint in consideration of the sale of a goodwill, such a case, for example, as LORD MACNAGHTEN envisages in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co., Ltd.* (2) ([1894] A.C. at p. 567), where he said:

> "What has the public to hope in the way of future service from a man who sells his business meaning to trade no more?" E

In the present case there is a contract contemplated in the agreement itself that the plaintiff will continue to carry on in business because there is an express provision that he is to be at liberty to undertake any other employment or enter into any other business on his own account, but he must simply do nothing to the F detriment of the defendants, "fair business competition excepted." So this is a case where there is a general restraint imposed upon a person who otherwise, the agreement contemplates, might continue to serve the community in the wool business.

Finally, I would say a word about one authority which has been cited which is not very easy to understand, *Bishop* v. *Kitchin* (4). There, in the very short report G of the decision of the court, it appears to have been said, on an argument that an agreement was in restraint of trade, that the agreement having been executed and the plaintiff having submitted to the restraint, he was clearly entitled to recover the consideration due in respect of it. I cannot think that that report adequately accounts for the decision of the court. If the agreement were void it is very difficult to see how a party could found upon it, and I would associate myself with H what was said by SCRUTTON, L.J., in *Evans & Co.* v. *Heathcote* (5) ([1918] 1 K.B. at p. 437): "It remains to consider the case of *Bishop* v. *Kitchin* (4) in 1868," and then my Lord sets out the facts of that case. He continued:

> "The case, as far as I can discover, has never been followed or doubted, but is cited in recent textbooks without comment. If there were some account stated it would stand on the same footing as *Flight* v. *Reed* (6), the case under I the usury laws; but in the absence of such an element I do not understand, with respect to the eminent judges who decided the case, how you can sue on a contract which is, in the language of LORD HALSBURY in *Mogul Steamship Co.* v. *McGregor Gow & Co.* (7) ([1892] A.C. at p. 39),
>
> 'void . . . in restraint of trade: and contracts so tainted the law will not lend its aid to enforce.' "

Respectfully I associate myself with the criticism of *Bishop* v. *Kitchin* (4) there stated by SCRUTTON, L.J., and I do not think that that case, without more explanation than appears in the report, can be regarded any longer as an adequate authority.

Appeal dismissed.

Solicitors: *H. S. Wright & Webb; Cochrane & Cripwell.*

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

Re UNION OF LONDON AND SMITH'S BANK, LTD.'S CONVEYANCE. MILES *v.* EASTER

[CHANCERY DIVISION (Bennett, J.), July 5, 6, 7, 8, 11, 12, 29, 1932]

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), February 7, 9, 10, 13, March 17, 1933]

[Reported [1933] Ch. 611; 102 L.J.Ch. 241; 149 L.T. 82, Ch.D. and C.A.]

Sale of Land—Restrictive covenant—Annexation of benefit—Assignment of benefit—Conditions for validity.

The S. Co., on June 24, 1907, bought some land near Shoreham from L. and mortgaged it to the U. Bank. By a deed dated Oct. 23, 1908, the S. Co. and the bank sold part of this land (the part so sold being coloured pink on the plan of the deed of 1908, and the land retained being coloured thereon green) to B.'s executors. This deed contained certain restrictive covenants by the vendors expressed to be made with the "purchasers their heirs and assigns or other the owner or owners for the time being of the land coloured pink or any part or parts thereof." The deed also contained covenants (the subject-matter of the present action) by B.'s executors "for themselves their heirs and assigns . . . with the vendors, their successors and assigns" not to do anything on the land so conveyed which might be a nuisance to the vendors and not to erect any hotel or public house on the hereditaments thereby conveyed. The plaintiff became the owner in fee of part of the land so sold and coloured pink, his title being derived through B.'s executors. After October, 1908, the defendant E. bought from the S. Co. part of the land retained and coloured green: later, by deeds dated Oct. 19, 1920, and Oct. 15, 1921, the S. Co. assigned the benefit of these restrictive covenants to the defendant E. By various sales by E. part of the land bought by him was conveyed to some fifteen persons. By a conveyance dated May 10, 1909, B.'s executors had sold part of the land conveyed to them, including the land eventually purchased by the plaintiff, to P.B. By a conveyance dated May 11, 1909, P.B. conveyed part of this land, including the land eventually purchased by the plaintiff, to L.P. L.P. gave P.B. covenants similar in terms to those by B.'s executors contained in the deed of Oct. 23, 1908. P.B. later sold the rest of the land conveyed to him by B.'s executors, a substantial part of which eventually came into the ownership of the defendants. By a deed dated April 10, 1931, P.B., who by then no longer retained any of the land which had been conveyed to him by B.'s executors, assigned, so far as he could, the benefit of the restrictive covenants to the defendants for £40. The plaintiff had notice of all the restrictive covenants when his land was conveyed to him.

Held: the defendants could not enforce the restrictive covenants because

(i) where a restrictive covenant has been taken by a vendor on the sale of part of his land, but no building scheme has been created, a purchaser from the original covenantee of land retained by him when he executed the conveyance containing the covenant will be entitled to the benefit of the covenant, even if such benefit has not been expressly assigned to him, if that conveyance shows that the covenant runs with (i.e., was intended to enure for the benefit of) that particular land.

(ii) if the purchaser acquires from the original covenantee only part of the land which the conveyance shows the covenant was intended to benefit, the purchaser, to entitle himself to the benefit of the covenant without an express assignment thereof, must also show that such benefit runs with (i.e., was intended to enure to) each portion of that land: *Renals* v. *Cowlishaw* (1) (1878), 9 Ch.D. 125, affirmed; (1879), 11 Ch.D. 866, applied.

(iii) in all other cases the purchaser would not acquire the benefit unless that benefit was expressly assigned to him.

(iv) an express assignee of the benefit of a restrictive covenant which did not run with the land retained by the covenantor can enforce the covenant only if, at the time the covenant was taken, the covenantee retained ascertainable land capable of enjoying, as against the land of the covenantor, the benefit of the restrictive covenant: *Formby* v. *Barker* (2), [1903] 2 Ch. 539, *Renals* v. *Cowlishaw* (1) (1879), 11 Ch.D. 866, and *L.C.C.* v. *Allen* (3), [1914] 3 K.B. 642, applied.

(v) a restrictive covenant cannot be enforced by the covenantee against an assign of the covenantor after the covenantee has parted with the whole of the land benefited by the covenant: *Chambers* v. *Randall* (4), [1923] 1 Ch. 149, approved and applied; *Ives* v. *Brown* (5), [1919] 2 Ch. 314, and *Lord Northbourne* v. *Johnston & Son* (6), [1922] 2 Ch. 309, explained and distinguished.

(vi) the express inclusion, in the deed of Oct. 23, 1908, of "other the owner or owners for the time being of the land coloured pink" in the covenants by the vendors, when contrasted with the omission of any similar mention in the covenants by the purchasers (B.'s executors), of the owners of the land coloured green, showed that it was not intended to annex the benefit of the covenant by B.'s executors to the land coloured green, and, therefore, the benefit of that covenant did not run with the green land.

(vii) E. was not entitled to the benefit of the restrictive covenant contained in the deed of Oct. 23, 1908, as an express assignee since it had not been shown that his land was intended to be benefited by that covenant.

(viii) at the date of the assignment by P.B. to the defendants of the benefit of the covenant contained in the conveyance of May 11, 1909, P.B. had disposed of the whole of the land for the benefit of which this covenant had been taken, and so was then unable to give the defendants any right to enforce this covenant.

Notes. The dictum of BENNETT, J., to the effect that where a person is suing as an assign of the benefit of a restrictive covenant there must necessarily be something in the deed containing the covenant to define the land for the benefit of which the covenant was entered into, was dissented from by UPJOHN, J., in *Newton Abbot Co-operative Society, Ltd.* v. *Williamson & Treadgold, Ltd.*, [1952] 1 All E.R. 279, at pp. 286–288.

Considered: *Drake* v. *Gray*, [1936] 1 All E.R. 363; *Newton Abbot Co-operative Society, Ltd.* v. *Williamson & Treadgold, Ltd.*, [1952] 1 All E.R. 279; *Re Pinewood Estate, Farnborough*, [1957] 2 All E.R. 517. Referred to: *Re Rutherford's Conveyance, Goadby* v. *Bartlett*, [1938] 1 All E.R. 495.

As to retention of land capable of being benefited by a restrictive covenant, annexation of such a covenant to land retained, and assignment where covenant not annexed, respectively, see 14 HALSBURY'S LAWS (3rd Edn.) 563, 564, and 565, respectively; and as to the burden and benefit of such a covenant, see 29 HALSbury's Laws (2nd Edn.) 442–444, and 444–447, respectively. For cases on the subject see 40 Digest 310–328, *2648–2768*.

Cases referred to:

(1) *Renals* v. *Cowlishaw* (1878), 9 Ch.D. 125; 38 L.T. 503; affirmed (1879), 11 Ch.D. 866; 48 L.J.Ch. 830; 41 L.T. 116; 28 W.R. 9, C.A.; 40 Digest 316, *2686*.

(2) *Formby* v. *Barker*, [1903] 2 Ch. 539; 72 L.J.Ch. 716; 89 L.T. 249; 51 W.R. 646; 47 Sol. Jo. 690, C.A.; 40 Digest 306, *2626*.

(3) *London County Council* v. *Allen*, [1914] 3 K.B. 642; 83 L.J.K.B. 1695; 111 L.T. 610; 78 J.P. 449; 12 L.G.R. 1003, C.A.; 40 Digest 302, *2602*.

(4) *Chambers* v. *Randall*, [1923] 1 Ch. 149; 92 L.J.Ch. 227; 128 L.T. 507; 39 T.L.R. 6; 67 Sol. Jo. 61; 40 Digest 303, *2605*.

(5) *Ives* v. *Brown*, [1919] 2 Ch. 314; 88 L.J.Ch. 373; 122 L.T. 267; 40 Digest 322, *2728*.

(6) *Lord Northbourne* v. *Johnston & Son*, [1922] 2 Ch. 309; 92 L.J.Ch. 12; 128 L.T. 496; 40 Digest 321, *2722*.

(7) *Re Sunnyfield*, [1932] 1 Ch. 79; 101 L.J.Ch. 55; 146 L.T. 206; Digest Supp.

(8) *Brigg* v. *Thornton*, [1904] 1 Ch. 386; 73 L.J.Ch. 301; 90 L.T. 327; 52 W.R. 276, C.A.; 40 Digest 311, *2657*.

(9) *Rogers* v. *Hosegood*, [1900] 2 Ch. 388; 69 L.J.Ch. 59; 81 L.T. 55; 48 W.R. 202; 16 T.L.R. 20, Ch.D.; on appeal, [1900] 2 Ch. 388; 69 L.J.Ch. 652; 83 L.T. 186; 48 W.R. 659; 16 T.L.R. 489; 44 Sol. Jo. 607, C.A.; 40 Digest 312, *2664*.

(10) *Dyson* v. *Forster*, *Dyson* v. *Seed*, *Quinn*, *Morgan and others*, [1909] A.C. 98; 78 L.J.K.B. 246; 99 L.T. 942; 25 T.L.R. 166; 53 Sol. Jo. 149, H.L.; 34 Digest 686, *799*.

(11) *Elliston* v. *Reacher*, [1908] 2 Ch. 665; 78 L.J.Ch. 87; 99 L.T. 701, C.A.; 40 Digest 309, *2646*.

(12) *Western* v. *Macdermot* (1866), L.R. 1 Eq. 499; 35 L.J.Ch. 190; 12 Jur.N.S. 366; affirmed (1866), 2 Ch. App. 72; 36 L.J.Ch. 76; 15 L.T. 641; 31 J.P. 73; 15 W.R. 265, L.C.; 40 Digest 328, *2769*.

(13) *Everett* v. *Remington*, [1892] 3 Ch. 148; 61 L.J.Ch. 574; 67 L.T. 80; 40 Digest 316, *2688*.

(14) *Lawrence* v. *Cassel*, [1930] 2 K.B. 83; 99 L.J.K.B. 525; 143 L.T. 291; 74 Sol. Jo. 421, C.A.; Digest Supp.

(15) *Tulk* v. *Moxhay* (1848), 2 Ph. 774; 1 H. & Tw. 105; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 13 Jur. 89; 41 E.R. 1143, L.C.; 40 Digest 313, *2667*.

Appeal by the defendants against the decision of BENNETT, J. (post), that they were not entitled to enforce against the plaintiff certain restrictive covenants contained in conveyances of land including the plaintiff's land dated Oct. 23, 1908, and May 11, 1909. The action was commenced by the plaintiff for a declaration that the covenants could not be enforced against him by the defendants. The facts, which are summarised in the headnote, are set out in full in the judgment of BENNETT, J.

As stated, the plaintiff took out the summons to determine whether the defendant Easter could enforce the restrictive covenant in respect of the land owned by the plaintiff.

Cleveland-Stevens, K.C., and *Raymond Jennings* for the plaintiff.—The covenantors intended to bind their trust estate, not themselves. [They referred to *Re Sunnyfield* (7), *London County Council* v. *Allen* (3), *Renals* v. *Cowlishaw* (1), *Brigg* v. *Thornton* (8), *Rogers* v. *Hosegood* (9), *Dyson* v. *Forster*, *Dyson* v. *Seed*, *Quinn*, *Morgan and others* (10), *Elliston* v. *Reacher* (11), *Ives* v. *Brown* (5), *Formby* v. *Barker* (2), *Chambers* v. *Randall* (4), and *Western* v. *Macdermot* (12).]

Topham, K.C., and *F. Baden Fuller*, for the defendants, referred to *Everett* v. *Remington* (13), *Lord Northbourne* v. *Johnston & Son* (6), *Ives* v. *Brown* (5), *Chambers* v. *Randall* (4), *Rogers* v. *Hosegood* (9), and *Lawrence* v. *Cassel* (14).

July 29. **BENNETT, J.**—The first question raised by this summons is whether certain covenants contained in a conveyance dated Oct. 23, 1908, being the first of the conveyances mentioned in the title, are capable of being enforced by the defendants, or either of them, against the plaintiff. The covenants are covenants restricting the user of the land thereby conveyed. The plaintiff is now the owner in fee of a part of the land thereby conveyed. At the time the plaintiff acquired the land he now owns, he had notice of the restrictive covenants. It has been conceded on the defendants' behalf that the burden of these restrictive covenants runs with the land he now owns.

The second question raised by the summons raises similar points regarding restrictive covenants imposed upon the same land by a conveyance of May 11, 1909, being the second of the conveyances mentioned in the title. Apart from the question of costs, these are the only two questions to be decided on the summons, which has been amended by deleting all reference to the Law of Property Act, 1925, raising the questions as questions of construction affecting the plaintiff and the defendants only, the question of construction arising out of the language of the two conveyances and of their effect, in the events which have happened, the parties being agreed as to the facts.

The history of the matter begins in the month of June, 1907. On June 24, 1907, a limited company called the Shoreham and Lancing Land Co. (which I shall refer to as "the Shoreham Co.") acquired by purchase from Mr. Carr Lloyd a considerable area of land in the vicinity of Shoreham and Lancing. The land so acquired was mortgaged by the Shoreham Co. In the year 1908 that company agreed to sell a part of the land they had purchased from Mr. Carr Lloyd to a Mrs. Blaker. She died before any conveyance had been made to her of the land she had agreed to purchase. The executors of her will were Nathaniel George Blaker, Herbert Harry Blaker, and Cecil Somers Clarke.

The conveyance of Oct. 23, 1908, being the first of the conveyances mentioned in the title, was made for the purpose of carrying out the agreement of purchase made between the Shoreham Co. and Mrs. Blaker. The parties to the deed were the Union of London and Smith's Bank, Ltd., the first mortgagees, referred to in the deed as "the said bank" of the first part; the Shoreham Co., referred to in the deed as "the vendors" of the second part; Lord Lucas, a second mortgagee, of the third part; George Cecil Buller, who was an incumbrancer upon the land conveyed, of the fourth part; and Mrs. Blaker's executors, referred to in the deed as "the purchasers" of the fifth part. It appears from the recitals in this deed, and the fact is, that the land thereby conveyed was a part only of the land of the Shoreham Co. The lands conveyed by this deed had an area of 515 acres, 2 roods, 3 perches, and were delineated and described on the plan annexed thereto and thereon coloured pink, violet, brown, and red. In addition to the land distinguished on this plan by those colours, there was other land which was owned and retained by the Shoreham Co., and was distinguished on the plan by the colour green.

The plaintiff is the owner in fee of a portion of the land coloured pink on this plan. All of his holding is on the north side of the railway line shown on the plan. He derives his title from Mrs. Blaker's executors. After Oct. 23, 1908, the defendant Mr. Easter became the owner in fee of the greater part of the land distinguished by the green colour on the plan. He derived his title thereto from the Shoreham Co. He is still the owner of a substantial part of it, but he has sold several parts of this land, and, according to the evidence, there are at the present time some fourteen or fifteen persons, in addition to Mr. Easter, who are the owners in fee of parcels of land distinguished by the colour green on the plan annexed to the conveyance of Oct. 23, 1908.

It was admitted at the hearing by counsel on behalf of the defendants that all the plaintiff's land is more than 460 yards away from the land coloured green on the plan. It is clear that if it be intended to annex to a parcel of land the benefit of a covenant restricting the user of another parcel of land the deed entered into to give effect to this intention must define the parcel of land to which the benefit of the covenant is to be annexed: see *Renals* v. *Cowlishaw* (1). In my judgment, the deed ought also to make it plain that it is intended to annex the benefit of the covenant to the defined parcel.

The law relating to covenants restricting the user of land entered into by persons who do not stand towards one another in the relationship of landlord and tenant, is of modern origin. It is, I think, still in course of development. The annexation to one parcel of land of the benefit of a covenant restricting the user of another parcel creates a relationship between the two parcels analogous to that of dominant and servient tenement, and if the parties intended to do this they ought, in my judgment, to have done it in such a manner and by the use of such language as to leave no room for doubt as to whether or not it had been done.

I now proceed to consider the meaning and effect of the covenants contained in the conveyance of Oct. 23, 1908. The deed contains a declaration in these terms:

> "The expression 'The vendors' as hereinbefore used shall where the context admits include besides the Shoreham and Lancing Land Co., Ltd., their successors and assigns, and the expression 'the purchasers' as hereinbefore used shall where the context admits include besides the said Nathaniel George Blaker, Herbert Harry Blaker, and Cecil Somers Clarke, their heirs, executors, administrators, and assigns."

The deed contains certain covenants entered into by the vendors, as well as covenants entered into by the purchasers. The first of the vendors' covenants, so far as material, is as follows:

> "The vendors for themselves and their successors in title and assigns do hereby (with the consent of the bank, Lord Lucas and George Cecil Buller as such mortgagees or incumbrances as aforesaid) covenant with the purchasers their heirs and assigns or other the person or persons who shall for the time being be the owner or owners of the lands hereby conveyed or any part or parts thereof (all of whom are included under the expression 'the owner of the land coloured pink' as hereinafter used)"

to do certain things upon the land.

It is, I think, clear that, although the vendors are made to covenant for themselves and their successors in title and assigns, the only persons against whom this covenant could have been enforced were the Shoreham Co., because in the first place the covenant is an affirmative covenant, that is to say, a covenant to do certain things, and, in the second place, there is nothing to indicate an intention to burden the owner for the time being of any particular land with the obligation of performing the covenant. It also is, I think, clear that by making the vendors covenant not merely with the purchasers, but also with their heirs or assigns or other the person or persons who shall for the time being be the owners of the land thereby conveyed or any part or parts thereof, the draftsman was minded to make the benefit of the covenant run with the land. It is not necessary to consider or to determine whether he was successful.

The next covenant by the vendors throws further light on the draftsman's intention. It is in these terms:

> "The vendors for themselves their successors and assigns as owners of the land coloured green on the plan hereto do hereby (with the consent of the said bank, Lord Lucas and George Cecil Buller as such mortgagees or incumbrances as aforesaid) further covenant with the purchasers their heirs and assigns or other the owners or owner for the time being of the land coloured pink or any part or parts thereof not to do or permit or suffer to be done anything upon the said land coloured green on the said plan hereto or any part thereof which would interrupt or interfere with the natural course of the stream or watercourse running from the south-west corner of the said land coloured pink into the west portion of the said land coloured green and to keep the said stream or watercourse at the western end of the said land coloured green clear of all weeds and other obstructions and not to throw or permit or suffer to be thrown therein

> any spoil rubbish or refuse whatsoever and not to throw or permit or suffer to be thrown into the said stream or watercourse on the said land coloured green (while the said stream or watercourse at the south-west side of the said land coloured pink shall flow into the said land coloured green) any spoil rubbish or refuse whatsoever which may contaminate the quality of the water therein and not to do or so far as possible permit to be done anything upon the said land coloured green which may be or which may grow to be a nuisance or damage to the owner of the said land coloured pink or any part thereof and not to erect or permit to be erected on the said land coloured green any factory."

The phrase "the vendors for themselves their successors and assigns as owners of the land coloured green" indicates, in my judgment, the intention to throw the burden of the negative and restrictive covenant which follows upon and to annex it to the green land, whilst the fact that the covenant is given to

> "the purchasers their heirs and assigns or other the owners or owner for the time being of the land coloured pink or any part of parts thereof,"

is, in my judgment, a clear indication of the intention to annex the benefit of the covenant to each and every part of the pink land. Therefore, the draftsman has shown that when he desires to annex the benefit and burden respectively of restrictive covenants to different parcels of land, he knows the appropriate language to use in order to do so.

I now come to the covenant which gives rise to the first question on the summons, and it is in the following terms:

> "The purchasers so as to bind their trust estate but not their own personal or private estates for themselves their heirs and assigns do hereby covenant with the vendors their successors and assigns and also as a separate covenant with the said bank their successors and assigns (but not so as to make the purchasers or any person claiming under them personally liable after parting with the land in respect of which any breach of this covenant shall subsequently be committed) not to do anything on any of the lands hereby conveyed which may be or may grow to be a nuisance or damage to the vendors or to the said bank and not to erect or authorise to be erected on the hereditaments hereby conveyed any factory within 460 yards of the said land coloured green and not to erect any hotel public-house beer-house or beer-shop on the hereditaments hereby conveyed and not authorise more than one grocer's licence for the sale of wine beer or spirits to be applied for or used within 460 yards of the said land coloured green."

In view of the fact that no part of the plaintiff's holding is within 460 yards of the land coloured green, the only covenants with which I am concerned are, first, the covenant not to erect any hotel, public-house, beer-house or beer-shop on the hereditaments thereby conveyed, and, secondly, not to do anything on any of the lands thereby conveyed which might be or might grow to be a nuisance or damage to the vendors or to the bank.

The first contention on behalf of the defendants was that the benefit of these covenants was annexed to the land coloured green on the plan, so as to run therewith without express assignment. In my judgment this contention cannot prevail. One must have regard to the language employed in the deed, and there is a striking contrast between the language employed in the preceding covenant given by the vendors and the language employed in the purchasers' covenant now under consideration. In the case of the covenant given to the purchasers by the vendors, it was given to them, their heirs and assigns or other the owner or owners for the time being of the land coloured pink or any part or parts thereof—words which seem to me to show exactly the intention of annexing the benefit of the covenant to every part of the land so coloured. The covenant now under consideration is given to the vendors, their successors and assigns and also as a separate covenant to the bank, their successors and assigns. It is not given to the owner or owners for the time being of the land coloured green or any part thereof. It would not be right to conclude that the omission of any reference to the green land was accidental or due to careless drafting, and yet a reference to it is, in my judgment, necessary if the defendants' construction is to prevail. I cannot imply a reference to it, and therefore there is, in my judgment, no basis for the defendants' contention, and on a proper construction of the covenant no annexation of the benefit of it to any defined land of the vendors.

This conclusion makes it necessary for me to determine whether the purchasers' covenant can be enforced by an express assignee of the benefit thereof against an assignee of a part of the lands to which the burden of such covenants was annexed.

It was common ground between the parties that on the same day as that upon which the Shoreham Co. acquired from Mr. Carr Lloyd the lands comprised in the conveyance of Oct. 23, 1908, they also acquired from Mr. Carr Lloyd other lands in the vicinity of Shoreham and Lancing; but there was no evidence before me as to where such other lands were situate or as to the area thereof. There was no evidence before me as to the purposes for which the Shoreham Co. acquired these lands from Mr. Carr Lloyd, whether for the purpose of re-sale or for development as a building estate. There was no evidence of the existence of any building scheme in pursuance of which the Shoreham Co. intended to develop the land they had acquired from Mr. Carr Lloyd or any part thereof; and I am really left to guess at the reasons, if any, which led to the introduction in the conveyance of Oct. 23, 1908, of the purchasers' covenant.

It appears from the recitals to an indenture of Jan. 19, 1912, made between the Shoreham Co. of the first part, Richard Bragg of the second part, and the Seaside Land Co. of the third part, that between June 24, 1907, and Jan. 19, 1912, the Shoreham Co. had from time to time sold portions of the land they had acquired from Mr. Carr Lloyd contemporaneously with the land comprised in the conveyance of Oct. 23, 1908, and that the Shoreham Co. were then in voluntary liquidation, Richard Bragg being their liquidator. In these circumstances, by the indenture of Jan. 19, 1912, the Shoreham Co. conveyed to the Seaside Land Co. all the unsold portions of the land the Shoreham Co. had bought from Mr. Carr Lloyd on June 14, 1907.

By an indenture dated Oct. 19, 1920, made between the Shoreham Co. of the first part, Alexander-Smith, who was then their liquidator, of the second part, and Seaside Land Co. of the third part, the defendant Stephen Easter of the fourth part, and the defendant Alice Charlotte Jane Easter, wife of the said Stephen Easter, of the fifth part, after reciting five indentures of June 24, 1907, whereby certain hereditaments (which were referred to as the Shoreham Estate) had been assured to the Shoreham Co. in fee simple, and reciting that the Shoreham Co. had sold certain hereditaments in land, part of the Shoreham Estate, and on completion of the said sale had assured the said lands and hereditaments to the respective purchasers thereof, subject to certain covenants restrictive of building upon and user of the said lands and hereditaments or otherwise contained in the assurances of the said respective purchasers thereof, and reciting a special resolution of the voluntary liquidation of the Shoreham Co., and reciting the indenture of Jan. 19, 1912, between the Shoreham Co., Bragg, and the Seaside Co., whereby the lands and hereditaments thereby described, part of the then unsold portions of the Shoreham Estate, had been assured to the use of the Seaside Co. in fee simple, and reciting that the Seaside Co. from time to time sold divers further lands and hereditaments, part of the Shoreham Estate, and on completion of the said several sales had assured the said lands and hereditaments to the respective purchasers thereof, subject to certain covenants restrictive of building upon or of user of the same lands and hereditaments contained in the assurances of the said respective purchasers thereof, and reciting that certain portions of the Shoreham Estate had not been sold by the Seaside Co., and that the Seaside Co. was still in possession thereof, it was witnessed that in consideration of the sum of one guinea to Smith as liquidator of the Shoreham Co. and of one guinea to the Seaside Co. paid by the defendant Stephen Easter, the Shoreham Co. and the Seaside Co. respectively, according to their respective estates and interest as beneficial owner and if and so far as they respectively lawfully could or might, thereby respectively granted unto the defendant Stephen Easter the benefit in common with the Seaside Co. and other persons, if any, entitled thereto, the covenants restrictive of building upon and user of the several parts already sold of the Shoreham Estate contained in the respective assurances to the respective purchasers thereof, to hold the same unto the said Stephen Easter, his heirs and assigns.

By an indenture dated Oct. 15, 1921. made between the Shoreham Co. of the first part, its liquidator of the second part, the Seaside Co. of the third part, a company called the South Coast Construction Co. of the fourth part, the defendant Stephen Easter of the fifth part, Mrs. Easter of the sixth part, and Mrs. Dorothy Vera Hamilton of the seventh part, an assignment was made by the Shoreham Co., the Seaside Co., and the Construction Co., to the defendant Stephen Easter, of all the benefit of the covenants restrictive of building upon or user of the several parts already sold of the Shoreham Estate lying to the west of the entrance to Shoreham Harbour contained in the respective assurances to the respective purchasers thereof with certain exceptions which are not material.

Upon the footing that the benefit of the purchasers' covenants contained in the conveyance of Oct. 23, 1908, was not annexed to the land coloured green thereon so as to run therewith without express assignment, the defendant Stephen Easter claims to be entitled to enforce those covenants against the plaintiff by virtue of the express assignment contained in those deeds.

In my judgment, in order that an express assignee of a covenant restricting the user of land may be able to enforce that covenant against the owner of the land burdened with the covenant, he must be able to satisfy the court of two things. The first is that it was a covenant entered into for the benefit or protection of land owned by the covenantee at the date of the covenant. Otherwise it is a covenant in gross and unenforceable, except as between the parties to the covenant: see *Formby* v. *Barker* (2). Secondly the assignee must be able to satisfy the court that the deed containing the covenant defines or contains something to define the property for the benefit of which the covenant was entered into: see JAMES, L.J., in *Renals* v. *Cowlishaw* (1).

I will assume in favour of the defendants that the purchasers' covenants were entered into for the benefit or protection of land owned by the Shoreham Co. on Oct. 23, 1908. I can find nothing in the deed to define the property for the benefit of which the covenants were entered into.

In my judgment, therefore, the answer to the first question is that the defendants cannot, nor can either of them, enforce against the plaintiff the purchasers' covenant contained in the conveyance of Oct. 23, 1908.

I now turn to the second question raised by the summons, which asks:

> "That it may be declared that the restrictive covenant contained in the abovementioned conveyance of May 11, 1909, whereby the said William Phillips—the purchaser—covenanted not to do anything on any of the land thereby conveyed which might be or grow to be a nuisance or damage to the said Arthur Pullen Burry—the vendor—or to the neighbourhood, and not to erect or authorise to be erected on any of the said land any factory, hotel, public-house, beer-house, or beer-shop and not to authorise any grocer's licence for the sale of wine, beer, or spirits, to be applied for or used in respect of or on any part of the said land is not enforceable by the defendants, or either of them, or by any other person against the plaintiff or his successors in title, owner or owners of the freehold property hereinbefore described."

By an indenture of May 10, 1909, Mrs. Blaker's executors conveyed part of the land which had been conveyed to them on Oct. 23, 1908, to a Mr. Pullen Burry. Mr. Pullen Burry proceeded at once to divide up into parcels what he had purchased from Mrs. Blaker's executors and to convey those parcels to a number of different purchasers, and on May 11, 1909, he conveyed one of those parcels to Mr. Phillips.

The parcel conveyed to Phillips included the land now owned by the plaintiff. Phillips entered into a restrictive covenant with Mr. Pullen Burry, and the plaintiff at the time of his purchase had notice of this restrictive covenant. The covenant is in these terms:

> "The purchaser for himself, his heirs and assigns owner or owners for the time being of the hereditaments hereby conveyed but not so as to make the purchaser or any person claiming under him personally liable after he or they shall have parted with the said hereditaments hereby covenants with the vendor his heirs and assigns not to do anything on any of the land hereby conveyed which may be or grow to be a nuisance or damage to the vendor or to the neighbourhood and not to erect or authorise to be erected on any of the said land any factory hotel public-house beer-house or beer-shop and not to authorise any grocer's licence for the sale of wine beer or spirits to be applied for or used in respect of or on any part of the said land."

On April 10, 1931, Mr. Arthur Pullen Burry entered into a deed with the defendants whereby, in consideration of the sum of £40 paid to Mr. Pullen Burry by the defendants, Mr. Pullen Burry as beneficial owner, if and so far as he lawfully could or might, thereby granted the benefit in common with other persons, if any, entitled thereto of the covenants restrictive of building upon or user of parts of the premises originally conveyed to Mr. Pullen Burry which had been sold contained in the respective assurances of the respective purchasers thereof except the covenants intended to be thereby released. At the date of this deed Mr. Pullen Burry had sold all the land conveyed to him by Mrs. Blaker's executors on May 10, 1909, and the defendants were the owners in fee of a considerable part of the lands comprised in that conveyance.

The defendants argued, first, that the benefit of the covenants entered into by Phillips as purchaser with Pullen Burry as vendor in the conveyance of May 11, 1909, was annexed to some land of Pullen Burry's acquired by him from Mrs. Blaker's executors and retained by him at the time of the conveyance to Phillips, and that the defendants, as owners of the land or part thereof, to which the benefit of Phillips' covenants was annexed, could enforce them against the plaintiff.

In my judgment, this argument fails, for the reason (a) that the conveyance makes no attempt to annex the benefit of the covenant to any land retained by Pullen Burry, and (b) contains no definition of any land to which the benefit of the covenant was annexed.

The second argument was based on the express assignment of the benefit of the covenants contained in the deed of April 10, 1931. But this argument also fails, in my judgment, because of the absence in the conveyance of May 11, 1909, of any definition of the land for the benefit of which the covenant was given. On those grounds, therefore, the plaintiff is entitled to the two declarations for which he asks on the originating summons.

The other questions which were raised at the hearing of the summons do not arise for consideration and I express no opinion at all about them.

The defendants appealed.

A. F. Topham, K.C., and *F. Baden Fuller* for the defendants.

Cleveland Stevens, K.C., and *Raymond Jennings* for the plaintiff.

Cur. adv. vult.

March 17. **ROMER, L.J.**, read the following judgment of the court.

This is an appeal by the defendants from an order made by BENNETT, J., on July 29, 1932, whereby it was declared that certain restrictive covenants affecting lands of the plaintiff at Shoreham and Lancing in the county of Sussex, and contained in two indentures dated respectively Oct. 23, 1908, and May 11, 1909, were not enforceable by the defendants or either of them against the plaintiff.

The relevant facts, as to which there is no dispute, are fully stated in the judgment of the learned judge and need not be repeated here. The questions arising on the appeal depend on the application to those facts of the law relating to the restrictive covenants affecting land. That the plaintiff is bound by the covenants in question is not disputed in view of the fact that he purchased his lands with notice of them. What is in dispute is the question whether the defendants are entitled to the benefit of such covenants. The defendants are not the original covenantees, and it therefore became necessary to ascertain what person other than the original covenantee is entitled to the benefit of a restrictive covenant affecting land. This question was put to himself by Hall, V.-C., in *Renals* v. *Cowlishaw* (1), and the answer was given in a judgment so well known that it is unnecessary to refer to it at length. It is a judgment that has received the approval both of this court and of the House of Lords and has always been regarded as a correct statement of the law upon the subject. Stated shortly, it laid down this: that, apart from what are usually referred to as building scheme cases (and this is not a case of that sort), a purchaser from the original covenantee of land retained by him when he executed the conveyance containing the covenant will be entitled to the benefit of the covenant if the conveyance shows that the covenant was intended to enure for the benefit of that particular land. It follows that if what is being acquired by the purchaser was only part of the land shown by the conveyance as being intended to be benefited, it must also be shown that the benefit was intended to enure to each portion of that land. In such cases the benefit of the restrictive covenant will pass to the purchaser without being mentioned. It runs with the land. In all other cases the purchaser will not acquire the benefit of the covenant unless that benefit be expressly assigned to him—or, to use the words of the Vice-Chancellor (9 Ch.D. at p. 130), "it must appear that the benefit of the covenant was part of the subject-matter of the purchase."

In *Renals* v. *Cowlishaw* (1) the covenant was entered into with the covenantee, his heirs, and assigns, and it appears to have been argued that the use of the word "assigns" showed an intention that the benefit of the covenant should run with the land. However, to use the language of Farwell, J., in *Rogers* v. *Hosegood* (9) ([1900] 2 Ch. at p. 396):

> "there was nothing to show what assigns were intended by the words of the covenant; there was no necessary implication that each assign of each parcel of the vendor's land, whether acquired before or after the date of the deed, was to have the benefit of the covenant; the inference, indeed, was to the contrary, and the courts accordingly held that the covenant did not run, but must be expressly assigned in order to pass. Contrast this with the case of the ordinary covenants for title: these undoubtedly run with the land, and each purchaser of each portion of the land gets the benefit of the covenants so far as they relate to the land purchased by him. In both these cases the covenants are entered into with the heirs and assigns, but in the first case the word 'assign,' on the true construction of the deed, means 'assign of the covenant,' in the latter 'assign of the land,' to which is annexed the benefit of the covenant by virtue of the evidence of intention so to contract which is found in the deed and the surrounding circumstances."

In *Rogers* v. *Hosegood* (9) itself the benefit of the covenant was held to run with the land of the covenantees, for the covenant had been entered into with them their heirs and assigns with the express intent that the covenant would enure to the benefit of the covenantees, their heirs, and assigns, and other claiming under them to all or any of their lands adjoining or near to the premises then being conveyed to the covenantor. In *Renals* v. *Cowlishaw* (1) the benefit of the covenant had never been expressly assigned by the covenantee. In neither of these cases, therefore, did it become necessary for the court to enquire into the circumstances in which an express assignee of the benefit of a covenant that does not run with the land is entitled to enforce it. In the present case, however, it is necessary

A to do so, inasmuch as the defendants claim to be the express assignees of the benefit of the restrictive covenants contained in the deeds of Oct. 23, 1908, and May 11, 1909.

It may be conceded that the benefit of a covenant entered into with the covenantee or his assigns is assignable. The use of the word "assigns" indicates this. But it by no means follows that the assignee of a restrictive covenant affecting land B of the covenantor is entitled to enforce it against an assign of that land. For the burden of the covenant did not run with the land at law, and is only enforceable against a purchaser with notice by reason of the equitable doctrine that is usually referred to as the rule in *Tulk* v. *Moxhay* (15). It was open, therefore, to the courts of equity to prescribe the particular class of assignees of the covenant to whom it should concede the benefit of the rule. This it has done, and in doing so C has included within the class persons to whom the benefit of the covenant could not have been assigned at law. For at law the benefit could not be assigned in pieces. It would have to be assigned as a whole or not at all. And yet in equity the right to enforce the covenant can in certain circumstances be assigned by the covenantee from time to time to one person after another. Who then are the assignees of the covenant that are entitled to enforce it? The answer to this question D is to be found in several authorities which it now becomes necessary to consider. In *Formby* v. *Barker* (2) a vendor, on the occasion of the sale of the whole of his land, exacted from the purchaser a restrictive covenant as to its user. The vendor having died, his executor sought to enforce the covenant against an assignee of the purchaser. Inasmuch as there was no land retained by the vendor on the occasion of the sale, the covenant was merely personal to the vendor, and was E accordingly held to be unenforceable by the vendor's executor as his assignee against the assignee of the purchaser. ROMER, L.J., said ([1903] 2 Ch. at p. 554):

> "If restrictive covenants are entered into with a covenantee, not in respect of or concerning any ascertainable property belonging to him, or in which he is interested, then the covenant must be regarded, so far as he is concerned, as F a personal covenant—that is, as one obtained by him for some personal purpose or object. It appears to me that it is not legally permissible for him to assign the benefit of such a covenant to any person or persons he may choose so as to place the assign or assigns in his position."

To a like effect was the decision in *London County Council* v. *Allen* (3). In that case the covenantees had never had any interest at all in the land in respect of G which the owner had entered into a restrictive covenant. It was held that the covenantees were not entitled to enforce the covenant against an assignee of the covenantor. BUCKLEY, L.J., said ([1914] 3 K.B. at p. 660):

> "that the doctrine in *Tulk* v. *Moxhay* (15) does not extend to the case in which the covenantee has no land capable of enjoying, as against the land of the H covenantor, the benefit of the restrictive covenant."

SCRUTTON, L.J., said ([1914] 3 K.B. at p. 672):

> "If the covenant does not run with the land in law, its benefit can only be asserted against an assign of the land burdened, if the covenant was made for the benefit of certain land, all or some of which remains in the possession of I the covenantee or his assign, suing to enforce the covenant."

It is plain, however, from these and other cases, and notably from *Renals* v. *Cowlishaw* (1), that, if the restrictive covenant be taken, not merely for some personal purpose or object of the vendor, but for the benefit of some other land of his in the sense that it would enable him to dispose of that land to greater advantage, the covenant, though not annexed to such land so as to run with any part of it, may be enforced against an assignee of the covenantor taking with notice, both by the covenantee and by persons to whom the benefit of such covenant has been assigned, subject, however, to certain conditions. In the first place the "other land" must be land that is capable of being benefited by the covenant—otherwise it would be impossible to infer that the object of the covenant was to enable the vendor to dispose of his land to greater advantage. In the next place this land must be "ascertainable" or "certain" to use the words of Romer, L.J., and Scrutton, L.J., respectively. For, although the court will readily infer the intention to benefit the other land of the vendor where the existence and situation of such land are indicated in the conveyance or have been otherwise shown with reasonable certainty, it is impossible to do so from vague references in the conveyance or in other documents laid before the court as to the existence of other lands of the vendor, the extent and situation of which are undefined. In the third place the covenant cannot be enforced by the covenantee against an assign of the purchaser after the covenantee has parted with the whole of his land.

This last point was decided, and, in our opinion, rightly decided, by Sargant, J., in *Chambers* v. *Randall* (4). As pointed out by that learned judge, the covenant having been entered into to enable the covenantee to dispose of his property to advantage, that result will in fact have been obtained when all that property has been disposed of. There is, therefore, no longer any reason why the court should extend to him the benefit of the equitable doctrine of *Tulk* v. *Moxhay* (15). That is only done when it is sought to enforce the covenant in connection with the enjoyment of land that the covenant was intended to protect. But it was also held by Sargant, J., in the same case, and in our opinion rightly held, that although on a sale of the whole or part of the property intended to be protected by the covenant the right to enforce the covenant may be expressly assigned to the purchaser, such an assignment will be ineffective if made at a later date when the covenantee has parted with the whole of his land. The covenantee must indeed be at liberty to include in any sale of the retained property the right to enforce the covenants. He might not otherwise be able to dispose of such property to the best advantage, and the intention with which he obtained the covenant would be defeated. But if he has been able to sell any particular part of his property without assigning to the purchaser the benefit of the covenant, there seems no reason why he should at a later date and as an independent transaction be at liberty to confer upon the purchaser such benefit. To hold that he could do so, would be to treat the covenant as having been obtained, not only for the purpose of enabling the covenantee to dispose of his land to the best advantage, but also for the purpose of enabling him to dispose of the benefit of the covenant to the best advantage. Where, at the date of the assignment of the benefit of the covenant, the covenantee has disposed of the whole of his land, there is an additional reason why the assignee should be unable to enforce it. For at the date of the assignment the covenant had ceased to be enforceable at the instance of the covenantee himself, and he cannot confer any greater rights upon the assignee than he possessed himself. In opposition to this view we were very properly pressed by counsel with two earlier decisions of Sargant, J. The earlier of these is the case of *Ives* v. *Brown* (5). In that case the survivor of two joint covenantees was the owner of other land held by herself as trustee for herself for life with remainder to her testamentary appointees. By her will she appointed the lands to the plaintiff, Ives, for life, but not in such a way as to pass to him the benefit of the restrictive covenant which accordingly devolved upon her death upon her two executors, of whom the plaintiff, Ives, was one. In an action brought by Ives alone to enforce the covenant against an assignee of the covenantor, it was objected that he was not entitled to maintain the action. The learned judge thereupon gave leave to the plaintiff to amend by adding as a co-plaintiff the other executor, and eventually granted an injunction to restrain a breach of the covenant. After holding that the testamentary appointment did not amount to an assignment of the benefit of the restrictive covenant, he added:

> "and it was, therefore, necessary, in my judgment, that her legal personal representatives should be joined in the action."

The learned judge does not, however, appear to have addressed his mind to the question whether the legal personal representatives of a covenantee can enforce a restrictive covenant unless they are possessed of land that the covenant was intended to protect, and that question does not appear to have been argued. But it may well have been that the executors still had the legal estate of the land vested in them, and if that were so, then they could not be said to have had no interest in the land. The second case was *Lord Northbourne* v. *Johnston & Son* (6). But the assignment of the benefit of the covenant in that case was made by a representative of the covenantees who, at the time of the assignment, held such benefit as a bare trustee for the plaintiff to whom had been conveyed at an earlier date the land for the protection of which the covenant had originally been obtained. It is true that after the conveyance the covenantees were not possessed of any of that land, but they continued to hold the benefit of the covenant as trustees for the plaintiff, and the right to enforce it was treated accordingly as being kept alive for his benefit. In neither of these two cases did the learned judge intend to decide, nor did he in fact decide, that a covenantee who has parted with all the land for the protection of which the covenant was imposed can thereafter confer upon an assignee of the covenant the right to enforce it. Indeed, in *Chambers* v. *Randall* (4), as already stated, it was definitely decided by the learned judge that he could not.

Such being the law, it only remains to apply it to the facts of the present case; and the first question that has to be considered is whether or no an intention is shown in the deed of Oct. 23, 1908, that the restrictive covenants should enure for the benefit of any particular land of the covenantees. As to this it is contended on behalf of the defendants that an intention is shown in the deed to attach the benefit to the land coloured green upon the plan annexed to it. It is conceded by them that if they are wrong in this contention there is no other land of the vendors for the benefit of which the covenants can be said to enure. For the purpose of considering this question there is one outstanding fact to be borne in mind, a fact that naturally had considerable effect upon the mind of BENNETT, J. It is this: In the indenture are contained certain restrictive covenants on the part of the vendors as to the user of the land coloured green, and those covenants are expressed to be made with the

> "purchasers their heirs and assigns or other the owner or owners for the time being of the land coloured pink or any part or parts thereof."

These are apt words to ensure that the benefit of the covenant should run with the pink land and every part of it, and one cannot doubt that in framing them the author had *Renals* v. *Cowlishaw* (1) and *Rogers* v. *Hosegood* (9) in mind. To use the words of BENNETT, J.,

> "the draftsman has shown that when he desires to annex the benefit and burden respectively of restrictive covenants to different parcels of land he knows the appropriate language to use in order to do so."

No such language is, however, used in relation to the restrictive covenants entered into by the purchaser. If the omission were due to design it would be conclusive of the matter. It would, however, be possible to attribute the omission to carelessness, if one could find elsewhere in the deed a strong indication of intention to make the benefit of the purchasers' covenant enure to the green land. The defendants contend that this strong indication is afforded by the fact that the restrictive covenants entered into by the vendors in relation to the green land and those entered into by the purchasers in relation to the pink land are more or less reciprocal covenants, and that just as the vendors' covenants were entered into for the benefit of the pink lands, so too were the purchasers' covenants entered into for the benefit of the green lands. But an examination of the two sets of covenants renders this argument untenable. For though the vendors covenant not to do anything upon the green land that may be a nuisance or damage to the owner of the land coloured pink or any part thereof, the corresponding covenant on the part of the purchasers is not to do anything on the land coloured pink that might be a nuisance or damage to the vendor or to the bank (who were the mortgagees), no mention is made of the green land or of any other land of the vendors or the bank. It is hardly permissible to regard this further omission as being unintentional. There must be some limit to the carelessness to be attributed to the draftsman.

However, the defendants also rely on the fact that the purchasers covenant not to erect any factory upon the lands coloured pink within 460 yards of the land coloured green, and not to authorise more than one grocer's licence for the sale of wine, beer, or spirits to be applied for or used within the same distance. This circumstance does no doubt give some ground for the suggestion that these two restrictions were intended for the benefit of the green land as distinct from any other lands of the vendors, and that, therefore, the restrictions as a whole should be so regarded. But these two references to the green land do no more than define the part of the pink land that was to be subject to the two restrictions in question, and such restrictions may quite conceivably have been intended also to protect the land coloured yellow on the plan, land that, as is shown by the conveyance itself, was also land of the vendors, and land of which part, at any rate, was, as appears from the plan, capable of being benefited by such restrictions. In these circumstances it is impossible, having regard to the remarkable difference between the wording of the covenants by the vendors and purchasers respectively, to avoid drawing the inference that it was not intended to annex the benefit of the purchasers' covenant to the land coloured green. That is the inference that BENNETT, J., drew, and in our opinion he was right in so doing. The benefit of such covenant did not, therefore, run with the green land.

The next question is whether the defendant Easter is entitled to enforce the covenant as express assignee of the benefit of it. In our opinion he is not. To start with, it is impossible to ascertain with any certainty what lands retained by the covenantees when the conveyance of Oct. 23, 1908, was executed were intended to be protected by the covenant so that the covenantees might thereafter dispose of them to greater advantage. That conveyance shows that the vendors were possessed of other land in the vicinity, reference being made in the deed to "foreshore belonging to the vendors west of the harbour entrance" without further defining it, and to land coloured yellow on the plan attached to the deed in terms that clearly indicate their ownership of such land. But our attention is also called to certain transactions, between the covenantees and a company called the Service Land Co., Ltd., in the month of January, 1912, that show that in October, 1908, the covenantees were possessed of still other lands at Lancing and Shoreham of considerable, though, so far as the court is concerned, of undefined extent. Referring to these other lands, BENNETT, J., said:

> "There was no evidence before me as to where such other lands were situate or as to the area thereof. There was no evidence before me as to the purposes for which the Shoreham Co. acquired these lands, whether for the purpose of re-sale or for development as a building estate. . . . I am really left to guess at the reasons, if any, which led to the introduction in the conveyance of Oct. 23, 1908, of the purchasers' covenant."

In these circumstances the learned judge declined to draw the conclusion that the covenant was inserted in the conveyance for the protection of all the other lands of the Shoreham Co. so as to enable them to dispose of such lands to the best advantage. And he was justified in so doing. It is impossible to ascertain whether all or some, and if so, which part, of such lands were capable of being protected by the reservation of the covenant. When, therefore, by indenture of Oct. 19, 1920, and Oct. 15, 1921, the Shoreham Co. and the Seaside Co. (to whom the Shoreham Co. had previously sold the whole of their still unsold lands) purported to assign to the defendant Easter the benefit of the restrictive covenant, there can be no sure ground for thinking that any of such still unsold lands were lands for the protection of which the covenant had been obtained. It is plain that at that time all the lands coloured green had been disposed of. The defendants have accordingly failed to show that there is now vested in them or either of them the right to enforce the restrictive covenant contained in the deed of Oct. 23, 1908. It is not necessary in these circumstances to consider the question whether, in any case, the right to enforce the restrictive covenant against the assigns of the covenantors had not come to an end when the Shoreham Co. conveyed to the Seaside Co. the whole of their lands still remaining unsold without assigning at the same time the benefit of the covenant. It is only necessary to say that it appears to us more than doubtful whether in the contract for sale that preceded that conveyance the benefit of the covenant was included.

It only remains to consider the question whether the restrictive covenant contained in the deed of May 11, 1909, is enforceable against the plaintiff by the defendants. This question can be dealt with quite shortly. There is no indication whatsoever to be found in the conveyance that the benefit of the restrictive covenant by Phillips was annexed to any other defined land belonging to Burry so as to pass with it to subsequent purchasers from him of such land. The right to enforce the covenant would not, therefore, pass to any such purchaser unless the covenant was obtained by Burry for the purpose of enabling him to dispose of the remainder of his land to the greatest advantage and unless the benefit of the covenant were expressly assigned by Burry to such purchaser before Burry had disposed of the whole of his land. Inasmuch as at the date of the assignment by Burry to the defendants of the benefit of the covenant, Burry had disposed of the whole of his land, the defendants could not in any case acquire from him any right to enforce the covenant, and it is unnecessary to consider whether such covenant was or was not imposed for the benefit of any and what other land retained by Burry on the occasion of the sale to Phillips.

The result is that we agree with Bennett, J.'s decisions upon both questions raised by the originating summons. The appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitors: *Surtees & Co.*; *Palmer, Bull & Co.*, for *F. W. A. Cushman & Son*, Brighton.

[*Reported by* J. H. G. Buller, Esq., *and* Geoffrey P. Langworthy, Esq., *Barristers-at-Law.*]

Re W.D.J. (*deceased*)

[COURT OF APPEAL (Lord Hanworth, M.R., and Romer, L.J.), November 22, 1933]

[Reported [1934] Ch. 174; 103 L.J.Ch. 221; 150 L.T. 226]

Person of Unsound Mind—Court percentage—Discretionary trust—Charge on accumulations and sums applied for benefit of patient after statutory period of accumulation—Effect of death of patient—Lunacy Act, 1890 (53 *&* 54 *Vict., c.* 5), *s.* 116 (1) (*d*)—*Rules in Lunacy*, 1892, *r.* 127.

By his will, dated Sept. 17, 1897, a testator, who died in 1900, left his estate to trustees to pay or apply the whole of the income, or such part of it as the trustees deemed proper, for the maintenance of his son who became a patient under the Lunacy Act, 1890, and to accumulate any surplus. The trustees paid for the benefit of the son such sums as they thought proper and accumulated the surplus income. The statutory period for accumulation terminated in 1921, but, in error, the trustees continued to accumulate the surplus until 1925 when a receiver was appointed and the trustees were ordered to pay to the Paymaster-General the amount of the accumulations between 1921 and 1925. From 1925 to 1933 the trustees applied part of the income for the benefit of the patient, paying the surplus to the receiver. The patient died in 1933.

Held: (i) under r. 127 of the Lunacy Rules, 1892, court percentage was payable in respect of both the accumulations paid to the Paymaster-General and the sums applied for the benefit of the patient between 1925 and 1933, since after 1921 both these sums belonged absolutely to the patient.

(ii) all power in lunacy over the patient's estate ceased on his death in 1933, but his death did not terminate the right to levy the percentage or to increase a levy made while he was alive.

Notes. For rules relating to the court percentage in lunacy, see Management of Patients' Estate Rules, 1934, r. 148 et seq., as amended by Management of Patients' Estates (Percentage and Fees) Rules, 1953, S.I. 1953, 336.

As to effect of the death of the patient and court percentage, see 21 HALSBURY'S LAWS (2nd Edn.) 358 et seq., and for cases see 33 DIGEST 227 et seq. For Lunacy Act, 1890, see 17 HALSBURY'S STATUTES (2nd Edn.) 1052, and for Management of Patients' Estate Rules, 1934, S.R. & O. No. 269, see 17 HALSBURY'S STATUTORY INSTRUMENTS.

Case referred to:

(1) *Re Smith, Public Trustee* v. *Aspinall*, [1928] Ch. 915; 97 L.J.Ch. 441; 140 L.T. 369; 43 Digest 593, *429*.

Appeal from master in lunacy.

George Henry Jackson by his will dated Sept. 17, 1897, devised and bequeathed all his real and personal estate to the trustees of his will, and directed that they should

> "pay or apply the entire income of my residuary estate or such part thereof as my said trustees or trustee shall from time to time deem proper to or for the maintenance, clothing, comfort and benefit"

of his son and only child (being the patient W.D.J.), with express power to the trustees to pay or apply for this purpose less than the entire annual income. On the cesser of this discretionary trust during the lifetime of the patient there was a similar discretionary trust for the benefit of the patient, his wife and children. The testator then directed the trustees during the life of the patient to accumulate all such portion of the income of his residuary trust estate as should not be paid or applied under the discretionary trusts by investing the same and the resulting income thereof as therein mentioned, all such accumulations to be added to the capital of the residuary trust estate. The testator directed that on the death of

A the patient the trustees should hold the residuary trust estate upon certain trusts. The testator died on Dec. 31, 1900, and the patient as his son and only child was his heir at law and sole next-of-kin.

The trustees paid what they thought proper of the income of the trust residuary estate to the son, and accumulated the surplus income. The statutory limit of time for the accumulations to be made expired on Dec. 31, 1921, but the trustees B then acting continued to accumulate and invest the surplus income until July 8, 1925, having overlooked the fact that the statutory period had expired.

The master in lunacy, on July 8, 1925, appointed a receiver in the matter of the patient under s. 116 (1) (d) of the Lunacy Act, 1890, authorising him in the name and on behalf of the patient to receive and give a discharge for all dividends, interest and income, and all arrears thereof respectively to which the patient was C or might become entitled and allowed as from the date of the order the net income of the patient for his maintenance. The order further directed that lodgments were to be made and the funds to be dealt with as directed in the lodgment payment schedule thereto. By the lodgment schedule the surviving trustee was directed to lodge with the Paymaster-General £438 London, Midland and Scottish Railway 4 per cent. debenture stock, £1,375 Local Loans 3 per cent. stock, and £400 cash, D being the accumulations of surplus income from Dec. 31, 1921, to the date of the order. The directions given in that order were complied with. The trustees, after the order so made by the master in lunacy, continued to pay out of the income of the residuary trust estate all expenses necessary for the patient's maintenance and personal comfort, and then paid the balance of such income to the receiver.

The receiver and his successor both died in 1932, and on Jan. 19, 1933, an E application was made to the master in lunacy for the appointment of a third receiver. Upon that application it was alleged insufficient lunacy percentage had been paid, and the application was adjourned. The patient died on Feb. 2, 1933, a bachelor intestate, and letters of administration to his estate were granted to F. B. Jackson and S. Craven on May 23, 1933.

From July 8, 1925, to June 23, 1932, lunacy percentage was levied upon all sums F received by the receiver for the time being from the trustees. On the application of the administrators of the estate of the deceased patient an order was made on April 11, 1933, directing that the amount of lunacy percentage to be certified should be raised and carried over to percentage account under the Lunacy Act, 1890, and amending Acts. On July 17, 1933, the amount to be so carried over was certified by the master in lunacy to be £279, made up as follows: £232 being G 3 per cent. on income applied by the trustees from the date of the order of July 8, 1925, to the date of the death of the second receiver; £38 10s. being 3 per cent. on the investments and cash transferred into court pursuant to the order of July 8, 1925, such investments and cash representing the surplus income of the residuary trust estate of the testator; £9 being 3 per cent. on income actually paid to the receiver in respect of the period from June 23, 1932, to Nov. 21, 1932. Against H that certificate the patient's administrators appealed except in respect of the sum of £9. The appeal was adjourned into court to be argued, and was heard on Nov. 22, 1933.

W. A. Peck for the appellants.
Stafford Crossman for the Crown.

I **LORD HANWORTH, M.R.**—This case appeared to raise an important point, and on that ground it was thought right to adjourn it into court to be argued. That point was whether, where a patient whose estate has been taken charge of by the appointment of a receiver under s. 116 of the Lunacy Act, 1890, is in receipt of an income as a beneficiary under a discretionary trust, that income can be treated as an income dealt with or made available for him under an order within the meaning of r. 127 of the Lunacy Rules, 1892. It is not easy to say that a sum which can be applied or withheld by trustees at their discretion is income dealt with or made available under an order in lunacy, for on such an order being made the trustees might refuse to exercise their discretion and apply it for the benefit of the patient. But that point does not really arise in the present case, and although we might be tempted to express our opinion on the point, it does not appear that the facts justify our doing so, and it would be mere obiter dictum.

The patient was the son of a testator who made his will in September, 1897, and made provision in it for his son. The testator died on Dec. 31, 1900, and left him surviving his only child, the patient, who was his heir-at-law and sole next-of-kin. Under the discretionary trust contained in the will the trustees applied for the benefit of the patient so much of the income of the testator's residuary estate as they thought proper and invested and accumulated the balance. The statutory limit of the period for accumulation expired on Dec. 31, 1921, and thereafter there could be no proper accumulation, but as a matter of fact the trustees continued to accumulate so much of the income as was not applied for the benefit of the patient. Nearly four years afterwards an application was made to the court, and on July 8, 1925, a receiver was appointed. Under the terms of the order the receiver was authorised to receive and give a discharge for all dividends, interest, and income, and all arrears thereof, to which the patient might become entitled. The trustees did not pay over the whole income of the residuary estate to the receiver under the discretionary trust, but applied sums out of the income from time to time to the patient's advantage.

It is now suggested that these sums fell within r. 127 of the Lunacy Rules, 1892, and that the lunacy percentage is payable in respect of them. That might or might not be so in regard to money applied by the trustees under their discretion in the ordinary case of a discretionary trust, and the form of the order of July 8, 1925, would not assist the determination of the point, as it only gives the receiver power to receive and give a discharge for sums to which the patient may have been entitled. But in the present case, if and so far as the income available for the exercise of the discretionary trust is not used by the trustees for the patient's benefit, it is undisposed of under the trusts declared of the testator's residuary estate, and, therefore, belonged and passed to the patient as being the testator's sole next-of-kin. Therefore, in this case, whether the money was paid over to the advantage of the patient by the trustees or whether it was money which in the events which have happened fell to be the absolute income of the patient as the testator's sole next-of-kin, it cannot be denied that the money, though subject to the discretion of the trustees, when at their discretion it was not used for the benefit of the patient, belonged absolutely to the patient, and, therefore, it is plain that it was part of the income of the patient and consequently fell within r. 127.

It may be unsatisfactory that we are only able to decide this case on its own particular facts, but it would be unfortunate if we went beyond them in giving judgment, for any decision we gave that did not arise on the facts could be criticised as wholly unnecessary—as to the distribution of the income or its liability to the lunacy percentage. This case, however, does enable us to say that we are clearly of opinion that a point of this sort is not concluded by the death of the patient. In the present case the patient died in February, 1933, and all power in lunacy over his estate then ceased; but one of the matters remaining to be adjusted was the liability of the patient's income to lunacy percentage under r. 127, and his estate which is now being administered by the administrators is liable to pay whatever is the right sum to be paid in respect of this liability, which was not yet reduced into money value at the death of the patient, but can be so reduced even though the patient is dead. It is the duty of the administrators to deal with any liability of the estate, and the liability to a lunacy percentage was not, therefore, brought to an end by the patient's death. For these reasons the appeal must fail.

ROMER, L.J.—It is, in my opinion, clear that, as from the expiration of twenty-one years from the death of the testator, the whole of the net income of his residuary estate received by his trustees was income to which the patient was entitled, because after 1921 he could at any moment have insisted on the whole income being handed to him, and the receiver after his appointment could have done the same. That, I think, is the effect of the authorities I had to consider in *Re Smith, Public Trustee* v. *Aspinall* (1), and the effect also of my decision in that case. Unfortunately, though, the point which Sir Henry Theobald in his book on lunacy says is a point which has not been decided by any judge must still remain undecided.

I have nothing to add to what the Master of the Rolls has said on the rest of the case, except in regard to the argument that lunacy percentage did not become leviable on the arrears of unapplied income between 1921 and 1925 that was transferred to the receiver under the order. His contention is that it had ceased to be income and became capital by reason of the investment by the trustees. I cannot take that view. It was surplus income belonging to the patient which the trustees invested. If the patient had received it and invested it, it might have been said that he had capitalised it, but, as the investment was made by the trustees on their own initiative, what was income remained income, and, therefore, income dealt with and made available under r. 127 so as to be liable to the lunacy percentage.

Appeal dismissed.

Solicitors: *Sandilands & Co.*; *Treasury Solicitor.*

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

CORRY *v.* ROBINSON (INSPECTOR OF TAXES)

[Court of Appeal (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), December 1, 4, 1933]

[Reported [1934] 1 K.B. 240; 103 L.J.K.B. 228; 150 L.T. 250; 50 T.L.R. 125; 78 Sol. Jo. 12; 18 Tax Cas. 411]

Income Tax—Civil servant—Office of profit within the United Kingdom—Admiralty employee serving abroad—Liability to tax of pay and allowances—Benefit of occupation of official residence—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5), *Rules applicable to Sched. E*, *r.* 6, *r.* 18 (2).

The taxpayer, an established civil servant, was appointed by the Admiralty to a post as deputy cashier at the naval base at Singapore as from Aug. 1, 1928, until Sept. 30, 1931. The taxpayer's official pay was payable to and received by him in the colony of the Straits Settlement during his residence there, i.e., until he left for the United Kingdom on July 25, 1931, and during that period he had no residence in the United Kingdom. In Singapore he was provided, for part of his time there, with an official dwelling-house (which, however, he was precluded from letting wholly or in part), and when he was not so provided with a house he was paid an allowance for house rent. The taxpayer was also paid a "colonial allowance" which was designed to meet the extra expenditure likely to be incurred by an official living abroad. The taxpayer was assessed to income tax under Sched. E for the three years of his service in Singapore in the full amount of his pay and allowances, and also in respect of a sum representing the annual value of his occupation of an official house.

Held: (i) the taxpayer was correctly assessed under Sched. E in respect of his pay and allowances because, having regard to r. 18 (2) of the Rules applicable to Sched. E, his office was an office of profit within the United Kingdom within the meaning of r. 6 of those rules.

(ii) the occupation of an official house was not part of the perquisites of the taxpayer's office within r. 1 of the Rules applicable to Sched. E because it was not an asset capable of being converted into money.

Dicta of LORD HALSBURY, LORD WATSON and LORD MACNAGHTEN in *Tennant* v. *Smith* (1), [1892] A.C. 150 at pp. 157, 159 and 163, applied.

Decision of FINLAY, J. (150 L.T. 59; [1933] 2 K.B. 521), affirmed.

Notes. The Income Tax Act, 1918, Rules applicable to Sched E, r. 6 and r. 18 (2), were replaced by the Income Tax Act, 1952, Sched. IX, para. 5 and para. 16 (2) respectively. Paragraph 5 and para. 16 (2) of Sched. IX to the latter Act were repealed by the Finance Act, 1956, s. 44 (9) and Sched. V, Part I. A position similar to that under para. 16 (2) of Sched. IX to the Act of 1952 was retained by para. 6 (a) of Sched. II to the Act of 1956.

Referred to: *Salmon* v. *Weight*, [1935] All E.R. Rep. 904; *McMillan* v. *Guest*, [1942] 1 All E.R. 606; *Thomas* v. *Norton*, *Norton* v. *Thomas* (1952), 34 Tax Cas. 398.

For the Finance Act, 1956, Sched. II, para. 6 (a), see 36 HALSBURY'S STATUTES (2nd Edn.) 449.

Cases referred to:

(1) *Tennant* v. *Smith*, [1892] A.C. 150; 61 L.J.P.C. 11; 66 L.T. 327; 56 J.P. 596; 8 T.L.R. 434; 3 Tax Cas. 158, H.L.; 28 Digest 17, *87*.

(2) *Colquhoun* v. *Brooks* (1888), 21 Q.B.D. 52; 57 L.J.Q.B. 439; 59 L.T. 661; 52 J.P. 645; 36 W.R. 657; 4 T.L.R. 494, C.A.; on appeal (1889), 14 App. Cas. 493; 59 L.J.Q.B. 53; 61 L.T. 518; 54 J.P. 277; 38 W.R. 289; 5 T.L.R. 728; 2 Tax Cas. 490, H.L.; 17 Digest (Repl.) 305, *1121*.

Appeal by the taxpayer and cross-appeal by the Crown from an order dated July 17, 1933, of FINLAY, J.

The facts are shortly stated in the headnote and are fully set out in the judgment of the Master of the Rolls.

FINLAY, J., held that the taxpayer was assessable to income tax under Sched. E of the Income Tax Act, 1918, on his pay and allowances, but that the annual value of the official residence was not income chargeable with tax since it was not money nor was it convertible into money.

R. W. Needham, K.C., and *Cyril King* for the taxpayer.

The Solicitor-General (*Sir Donald Somervell, K.C.*) and *R. P. Hills* for the Crown.

LORD HANWORTH, M.R.—This appeal has raised some interesting points which have been well presented to us, and the question that arises is: What is the right assessment to be made on the present appellant under Sched. E?

It is important in this, as in all other tax cases, to have regard to the facts which are proved for our consideration. On July 19, 1928, the appellant, an established civil servant, left the United Kingdom, retaining no residence therein, to take up an appointment as deputy cashier in H.M. Naval Base at Singapore. This appointment was approved by the Lords Commissioners of the Admiralty in May, 1928, as from Aug. 1, 1928. The official pay of the appellant as the holder of that appointment was payable to and received by him in the colony of the Straits Settlement from Aug. 1, 1928, to July 24, 1931, during his residence in the colony. His official pay for the period from July 25, 1931, to Sept. 30, 1931, during his return voyage from the Straits Settlement and during subsequent leave of absence granted in respect of his service in the colony was payable and was paid to him in London except for the sum of £52, which he received as an advance in the colony. The appellant landed in the United Kingdom on his return thereto on Sept. 22, 1931. Since Oct. 1, 1931, he has served as deputy cashier at H.M. Torpedo Factory, Greenock, to which he was appointed (his appointment to date Oct. 1, 1931) in August, 1931. From July 19, 1928, until Oct. 1, 1931, the appellant was not resident in the United Kingdom. He says that, by reason of that fact, that he was not resident in the United Kingdom, that his employment was outside the

United Kingdom, he ought not to be rendered liable to income tax, thus invoking the principles of *Colquhoun* v. *Brooks* (2).

There is a subsidiary point on which the Crown enters a cross-appeal, that during the time he was at Singapore, or rather a portion of the time, he had an official house provided for him, which he occupied, and the terms on which it was occupied were "that it was not to be let in whole or in part to any person whatsoever." During the time that he was at Singapore he received certain other allowances; he received an allowance which is called a "colonial allowance," and also an allowance he received during part of the time when he was not occupying the official house was an allowance for house rent. Those allowances were paid to him. Mr. Needham agrees that these allowances (colonial allowances, i.e., allowances granted to meet the increased cost of living, and allowances in respect of housing when he was not occupying the official residence) are allowances in respect of which the taxpayer is to be charged, or not to be charged, in accordance with whether he is liable, or not liable, on the main point which Mr. Needham has argued before us.

I turn, therefore, to consider whether or not he is liable to pay income tax when having his residence abroad. Schedule E applies the income tax to persons who are holders of office or who are officers brought within its terms. Schedule E provides:

> "Tax under Sched. E shall be charged in respect of every public office or employment of profit, and in respect of every annuity, pension, or stipend payable by the Crown or out of the public revenue of the United Kingdom, other than annuities charged under Sched. C, for every twenty shillings of the annual amount thereof."

It will be observed that that schedule purports to bring within its ambit public offices, employments of profit, and, apparently, pensions and stipends payable out of the public revenue. We have in the present case to deal with a person who was employed in an office. It is not claimed that he is otherwise than the holder of an office, and the office that he held was the office of deputy cashier in His Majesty's Naval Base at Singapore. The wide words of Sched. E, as they stand, deal with "every public office." But we then have certain rules which are explanatory of Sched. E.

I do not assent to the doctrine that some rules can be taken to be machinery, and, therefore, of less moment or authority than others. It appears to me that we have to look at the rules applicable to Sched. E, each and all of them, as forming a part of the statute under which income tax is levied, and that we have no right to determine for ourselves a priori what is the scheme, or ought to be the scheme, of the Income Tax Acts. We are not blessed with any information as to what the scheme is, except by an observance of the actual terms of the Act itself. I, therefore, look at r. 1, which provides:

> "Tax under this schedule shall be annually charged on every person having or exercising an office or employment of profit mentioned in this schedule . . . in respect of all salaries, fees, wages, perquisites, or profits whatsoever therefrom for the year of assessment."

What are the offices of profit or employments of profit mentioned in this schedule? We then have to go to r. 6, which provides:

> "The tax shall be paid in respect of all the public offices and employments of profit within the United Kingdom or by the officers hereinafter respectively described,"

and it is perhaps of importance to take note that three of the paragraphs which follow refer to "officers in His Majesty's Navy," "commissioned officers in His Majesty's Military Forces," "commissioned officers in His Majesty's Air Force," whereas the other paragraphs all refer to certain offices and not to persons. I am concerned to see whether or not this office which was held by the taxpayer was an office of profit within the United Kingdom. For the purpose of finding that out, there is r. 18, and I cannot say that r. 18 is entirely subsidiary to r. 1 or r. 6. It appears to me that, step by step, these rules are to be found each in progress making clear the steps that are required for the elucidation of the schedule generally. Rule 18 (2) provides:

> "A person chargeable in respect of an office or employment of profit shall be deemed to exercise it at the head office of the department under which it is held, and shall be assessed and charged at that head office, although the duties of the office or employment are performed, or any profits thereof are payable elsewhere, whether within the United Kingdom or not."

That seems to afford the key to what is meant by the words "offices and employments of profit within the United Kingdom," which is the very point on which one wanted further elucidation, and it says that such a person, if he is within r. 18 (2), is to be assessed and charged at that head office. Here there is a head office, because the taxpayer is an established civil servant appointed by the Lords Commissioners. The rule provides that although the duties are performed elsewhere, and although the profits are payable elsewhere—payable, it may be, in the shape of a colonial allowance, and payable elsewhere—whether within the United Kingdom or not, a person is to be charged at the head office, and he is to be deemed to exercise his office at the head office. What answer is suggested to the applicability of that rule? It is only these words, "a person chargeable," and it is said that one must not look at the rule until one has found a person chargeable. There are two answers to that, to my mind, each of which is sufficient for the present case. "A person chargeable" is a proleptic expression, and a person is brought within the charge by reason of the office which is deemed to be exercised at the head office of the department, or it may be that he is the holder of an office as contradistinguished from the persons who are dealt with under the letters to which I have already referred, (d), (e), and (f) in r. 6.

On the whole it is sufficient for the present purpose—and I am quite satisfied to accept the interpretation suggested—that "a person chargeable" is a proleptic expression. I think it would be almost pedantic to limit the words of sub-r. (2) of r. 18 to those persons who have been found to be chargeable. But I have indicated another interpretation which can be given to the rule. If the view that I have preferred is right, we find that you must look at the employment as one which, although not in fact exercised, is to be deemed to be exercised at the head office, and you have to make the supposition that it is exercised at the head office, and then you will find that the machinery of the Act works well enough, because, of course, as indicated under the rules to which we have referred, the tax is exacted by means of the deductions from the pay and allowances granted to the office holder. We have, then, a direction that such a person so exercising his employment abroad, but deemed to be exercising it at the head office of the department—which is the Admiralty—is to be chargeable in respect of all profits which are payable to him elsewhere. Those two words really answer another point put by Mr. Needham, that if you are to deem that Singapore for this purpose is London, you cannot deem that the allowances paid to him by way of a colonial allowance, or the like, are also to be brought under the purview of what goes on in London, for their very character is that they are a colonial allowance, a presumption being involved that he is employed away from London. There is no difficulty about that. Once a person is to be assessed, you must carry out your assessment in accordance with the rule, and the actual facts are no longer the touchstone of what is to happen, because this sub-rule says that "A person chargeable in respect of an office shall be deemed to exercise it at the head office"—"deemed" being a word which necessarily is in contradiction to the facts of the case. Under those circumstances it appears to me that the taxpayer is liable. It is said that these words, to which I have referred, in r. 18 (2), can be made sufficiently useful if you are considering the case of a man who, employed at home, from time to time is sent on temporary journeys or temporary employment outside the United Kingdom, and that such temporary employment or temporary journeys are not to break his employment or make it otherwise than exercised over here. But I know of no reason why I should put that limited meaning on sub-r. (2); I cannot assume that that was the purpose. I have to take the words as they are, and these words of sub-r. (2) are words of old standing, for they are to be found in s. 147 of the Income Tax Act, 1842. The fact that they were of wide import and intended to cover a wide area is to my mind illustrated by the fact that in s. 148 of that Act you had the withdrawal of Ireland from the possibility of being included in the construction to be placed on s. 147.

That seems to me to answer the whole case. I therefore pass now to the cross-appeal in which the Crown says that in this case the official residence occupied by the taxpayer was a part of his perquisites or profits which he received as holding this office. Here I think it is important to bear in mind what has been found by the commissioners in fact. MR. BRAITHWAITE said this:

> "I have no doubt that the income tax is not chargeable on the value of the official residence which was occupied by the appellant in Singapore."

And MR. WILLIAMSON said:

> "The inclusion in the assessment of the value of this official residence in Singapore appears to rest only on a convention by which the value of such residence is treated as an emolument of office for the purposes of both taxation and pension, and this, in the case of residences abroad, cannot be supported in law for income tax, whatever may be the position as regards pension."

It appears to me, therefore, that if this question of what was the tenure of this house by the taxpayer was a question of fact, those facts have been found against the Crown by the commissioners, and that after, to my mind, correctly directing themselves in law. If it is to be taken as a pure question of law, then I think that *Tennant* v. *Smith* (1) is directly against the contention of the Crown. We must bear in mind that we are told in the Case that the condition of the occupation of an official house was "that it was not to be let in whole or in part to any person whatsoever"; that means, in other words, that the taxpayer could not himself make any profit out of it. To the extent to which it afforded lodging to himself or his family it was an asset, but no more. In *Tennant* v. *Smith* (1) I do not think the decision turned on whether or not tax under Sched. A had been paid by someone else in respect of the house occupied by the bank manager. LORD HALSBURY said ([1829] A.C. at p. 157): "The thing sought to be taxed is not income unless it can be turned into money," and LORD WATSON said ([1892] A.C. at p. 159):

> "I do not think it comes within the category of profits, because that word, in its ordinary acceptation, appears to me to denote something acquired which the acquirer becomes possessed of and can dispose of to his advantage—in other words, money—or that which can be turned to pecuniary account."

LORD MACNAGHTEN said ([1892] A.C. at p. 163):

> "On examining that schedule it became obvious that it extends only to money payment or payments convertible into money."

It appears to me that those words of LORD HALSBURY, of LORD WATSON, and of LORD MACNAGHTEN so definitely indicate that you have to consider what could be turned into money, turned to the advantage of the resident, that when you bear in mind this limited power over the house which the taxpayer had, there is a negation of treating that official residence as a valuable asset which ought to be brought into the table of the salary, fees, perquisites, or profits for which the taxpayer is liable to be taxed under Sched. E.

For these reasons it appears to me that both the appeal and the cross-appeal fail, and they must both of them be dismissed with such costs as are appropriate to the issues which are raised in them.

SLESSER, L.J.—I am of the same opinion. I think that sub-r. (2) of r. 18 is wide enough to cover the case where all the duties of the office or employment are performed outside the United Kingdom. The words material to this are,

> "although the duties of the office or employment are performed, or any profits thereof are payable elsewhere, whether within the United Kingdom or not,"

and I find it quite impossible to limit those words, as Mr. Needham has asked us to do, to cases where the duties are occasional or partial and not whole. Here on the facts it is clear that this gentleman did perform the whole of his duties outside the United Kingdom, and I find it very difficult to understand, once it is assumed that the whole of the duties are performable outside the United Kingdom, how it can possibly be said that such a person is not "a person chargeable" under the schedule, and yet give meaning to the rule at all. Mr. Needham was himself oppressed by this difficulty; he sought to escape from it by saying: "It may well be that this sub-r. (2) applies to cases where a person is in a public office within the United Kingdom, but has occasional duties outside it." As I say, I see no reason for limiting the construction in that way. If, therefore, the construction be applied generally to persons whose duties are outside the United Kingdom, the direction is that such a person shall be deemed to exercise his office at the head office and be assessed and charged at the head office. By the opening words of Sched. E: "Tax under Sched. E shall be charged in respect of every public office," and by r. 6 the tax is to be paid in respect of all public offices within the United Kingdom. That, by itself, might or might not be sufficient to bring this gentleman within its operation. It might conceivably be said that in so far as he was appointed an established civil servant in this country, he was within the United Kingdom, although his duties, within the contemplation of sub-r. (2) of r. 18, were not so within the United Kingdom. I do not think it is necessary to decide that point, but I would like to say, in order to guard myself, that I do not at the moment accept what is said by FINLAY, J., in *Robinson* v. *Corry* where he says ([1933] 2 K.B. at p. 532):

> "I assent to the view that if the charging schedule itself is not wide enough to cover an office held under the Admiralty where, in fact, the duties of the office are performed outside the United Kingdom, this machinery section will not suffice to bring it into charge."

Cases may come before the court for consideration where officers chargeable under Sched. E do not serve under any head office of any department, so as to bring them within the ambit of r. 18 (2). When those cases come up for consideration it will have to be decided whether they are covered by r. 6 of Sched. E, irrespective of the assistance of r. 18 (2). As I say, I wish to keep that point open, and I am not prepared to accept the view at the moment expressed by FINLAY, J. But, on the point which we have to consider, namely, the application of r. 18 (2), in my opinion that applies directly to this civil servant as employed by the Commissioners of the Admiralty, and he therefore, being a person who is to be deemed to exercise his office at the head office of the department under which he is employed and to be assessed and charged at that office, falls in any event directly owing to that notional assessment of charge at the head office within r. 6 and consequently within the ambit of the whole schedule.

I agree with the reasons which my Lord has given why the cross-appeal should be dismissed.

ROMER, L.J.—I agree, and have very little to add. Personally, I can only read r. 18 (2) of the Rules applicable to Sched. E as meaning that a person who holds an office or employment under one of the government departments is to be deemed for the purposes of the schedule to exercise it at the head office of the department, whether in fact his duties are performed outside the United Kingdom or not. The only possible difficulty, I think, in applying that construction to what seem to me to be plain words is the fact that the sub-rule begins with the words, "A person chargeable." There is no reason that I can see why "a person chargeable" should not mean a person who, looking at all these rules as a whole, is chargeable, including the rule itself which commences with these words.

A As regards the cross-appeal by the Crown, I only want to point this out. The Solicitor-General called our attention to several passages in the speeches of noble Lords in *Tennant* v. *Smith* (1), referring to Sched. A, but it was necessary that they should deal with Sched. A because the appellant in that case was asserting that his income from all sources did not exceed £400. LORD MACNAGHTEN ([1892] A.C. at pp. 161, 162) points out that for the purpose of ascertaining whether his B income from all sources did or did not exceed £400 he would have to take into consideration any property in respect of which he was taxable under Sched. A or Sched. B. He examines the facts of the case, comes to the conclusion that the gentleman was not chargeable under Sched. A or Sched. B, and then goes on to say that, unless he can be brought under Sched. A or Sched. B his occupation of the property in question was immaterial. In the present case the taxpayer's C occupation of this property is immaterial because it cannot be brought under Sched. A or Sched. B, being property situated outside this country.

For these reasons, in addition to those which have been given by my Lords, I agree with the order that the Master of the Rolls has mentioned.

Appeal and cross-appeal dismissed.

D Solicitors: *Linklaters & Paines*; *Solicitor of Inland Revenue.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

E

WESTMINSTER COACHING SERVICES, LTD. *v.* PIDDLESDEN HACKNEY WICK STADIUM, LTD. *v.* SAME

F [KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Humphreys, JJ.), May 10, 1933]

[Reported 149 L.T. 449; 97 J.P. 185; 49 T.L.R. 475; 31 L.G.R. 245; 29 Cox C.C. 660]

Road Traffic—Stage carriage—Vehicle provided to carry passengers free to stadium—No separate cash payment—Inclusion of fare in admission payment G *—Offence—Authority to prosecute—"Person authorised by chief officer of police"—General authority—Road Traffic Act*, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 61 (1) (*a*), *s.* 95.

The first appellants were proprietors of motor coaches, and the second appellants proprietors of a greyhound racing stadium. It was agreed between them that the first appellants should provide motor coaches to convey passengers to H and from the stadium free of charge. No payment was made by any of the passengers to either of the appellants in respect of either journey. On entering the stadium (which they were not compelled to do) the passengers paid exactly the same charge for admission as other persons who had not travelled in the vehicles. A ticket was issued to each passenger entering the coach which he could exchange at the turnstile for another ticket entitling him to a free ride I back to his starting point. Passengers were picked up and were allowed to alight en route. The appellants were convicted respectively of using and of causing to be used a motor vehicle as a stage carriage without there being in force a road service licence authorising such use. The informations were laid by a sergeant and signed by a superintendent of the metropolitan police and also by an assistant commissioner, who held a general letter of authorisation to prosecute signed by the Commissioner of Police.

Held: (i) the proceedings were commenced by a person authorised in that behalf by a chief officer of police, within the meaning of s. 95 of the Road

Traffic Act, 1930; (ii) (HUMPHREYS, J., dubitante on this point) the definition of a "contract carriage" in s. 61 (1) (c) of the Act was overridden by sub-s. (2), so as, in certain circumstances, to make the vehicle a "stage carriage" within the meaning of s. 61 (1) (a); and, as there was evidence on which the magistrate could find that the payments made by the passengers were payments made partly in respect of the journey, the vehicles were used and permitted to be used by the appellants respectively as stage carriages and not as contract carriages.

Notes. By s. 24 of the Road Traffic Act, 1934, a definition of "stage carriage" was enacted which omitted the words "stage by stage, and stopping to pick up or set down passengers along the line of route" contained in s. 61 (1) (a) of the Act of 1930, but it is submitted that this omission does not affect the present decision which was substantially based on the effect of s. 61 (2). Section 24 of the Act of 1934 was repealed by the Road Traffic Act, 1956, the definition of "stage carriage" being re-enacted in s. 39 thereof.

As to stage carriages, see 31 HALSBURY'S LAWS (2nd Edn.) 728 et seq., and for cases see DIGEST Supps., tit. Street and Aerial Traffic, cases 76a et seq. For Road Traffic Act, 1930, see 24 HALSBURY'S STATUTES (2nd Edn.) 569; and for Road Traffic Act, 1956, see 36 HALSBURY'S STATUTES (2nd Edn.) 795.

Case referred to:

(1) *Jones* v. *Wilson*, [1918] 2 K.B. 36; 87 L.J.K.B. 1040; 119 L.T. 45; 82 J.P. 277; 62 Sol. Jo. 653; 16 L.G.R. 614; 26 Cox C.C. 265, D.C.; 33 Digest 95, *643*.

Case Stated by a metropolitan magistrate.

The appellants were convicted respectively of using and of causing to be used a motor vehicle as a stage carriage without there being in force in respect of it a road service licence authorising such use, contrary to s. 72 of the Road Traffic Act, 1930. Both informations were laid by a sergeant of the metropolitan police employed at the commissioner's office, and were signed by Superintendent May, of the Public Carriage Department, and by Mr. H. A. Tripp, an assistant commissioner, who held a general letter of authorisation to prosecute, signed by the Commissioner of Police, Lord Trenchard.

The two cases, which were heard together, were, mutatis mutandis, in the same terms, the facts being as follows:

On June 29, 1932, passengers were taken in two motor vehicles, the property of Westminster Coaching Services, Ltd., from Aldgate to the Hackney Wick Stadium, the property of the appellants, Hackney Wick Stadium, Ltd., at which greyhound racing meetings were held. Neither of the motor vehicles was licensed as a stage carriage, and each was adapted to carry more than eight passengers. On each of them there was displayed a notice bearing the words: "Free transport to and from the Hackney Wick Stadium." Each passenger, on boarding one of the vehicles at Aldgate, was handed by a conductor employed by Westminster Coaching Services, Ltd., a ticket bearing the words:

> "Free ride to Hackney Wick Stadium. Exchange this ticket at the turnstile for a free ticket to take you back to your starting point. No payment is allowed."

No payment was made by any of the passengers either to Westminster Coaching Services, Ltd., or to Hackney Wick Stadium, Ltd., or their servants in respect of the journey from Aldgate to Hackney Wick Stadium. On arrival at the stadium, passengers from the vehicles entered the stadium, but there was nothing to prevent any passenger from declining to do so. Those who entered the stadium paid exactly the same admission charges as other persons who had not travelled in any of the motor vehicles belonging to Westminster Coaching Services, Ltd. Each passenger entering the stadium was given, on payment of the ordinary admission charge, and the surrender of his ticket, another ticket bearing the words:

> "Hackney Wick Stadium. This ticket will give you a free ride on the coach back to your starting point after the racing. No payment is allowed."

After the racing, on the forecourt of the stadium there were assembled a number of motor vehicles of Westminster Coaching Services, Ltd. Persons who had come from the stadium were queued up for the vehicles which were going to various destinations. Those who had tickets for the return journeys were allowed to board the motor vehicles; those who were not in possession of such tickets were not allowed to board them. The vehicles then proceeded to their destinations, passengers being allowed to alight en route. No payment other than the ordinary admission charge was made by any passenger to either of the appellants in respect either of the journey from Aldgate to the stadium or from the stadium to Aldgate. The purpose of issuing the coach tickets was to enable the stadium company to ascertain what proportion of the number of persons attending the stadium were conveyed by the coaches and to facilitate the organisation and management of the crowds attending. By means of the free service the takings of the stadium had increased by about 20 per cent., and the object of the stadium company in providing the service was to attract people to the stadium. At the material date an agreement existed between Hackney Wick Stadium, Ltd., and Westminster Coaching Services, Ltd., contained in a letter dated May 31, 1932, from Hackney Wick Stadium, Ltd., to Westminster Coaching Services, Ltd., of which the material parts were:

> "We hereby request you to carry for us passengers to and from Hackney Wick Stadium, upon vehicles to be operated or contracted by you as contract carriages to various points to be mutually agreed upon. In consideration of your carrying such passengers we agree to pay you the sum of £1 10s. per vehicle per race meeting. Under no circumstances are you to charge or receive from passengers carried on these vehicles any sum whatever by way of reward, the contract for such conveyance being one entirely between our respective companies, and the amount due to you under the contract being payable solely by us. This arrangement is to commence on Friday next, the 3rd prox., and to remain in force for one month from this date."

On behalf of the appellants it was contended that the proceedings had not been instituted in accordance with s. 95 of the Road Traffic Act, 1930, and that the appellants were respectively using or causing to be used the motor vehicles as contract carriages within the meaning of s. 61 (1) (c) of the Act, and that, accordingly, they did not require a road service licence. On behalf of the respondent it was contended that the proceedings had been duly instituted and that the vehicles were being used as stage carriages.

The magistrate was of opinion that the respondent was authorised by the Commissioner to institute the proceedings and that the appellants were not respectively using or causing the vehicles to be used as contract carriages, but as stage carriages. He, therefore, convicted the appellants and fined each of them £5 and ordered each to pay five guineas costs.

The Road Traffic Act, 1930, provides:

> Section 61 (1): "Public service vehicles shall . . . be divided into the following classes: (a) Stage carriages; that is to say, motor vehicles carrying passengers for hire or reward at separate fares . . . and not being express carriages as hereinafter defined; (b) Express carriages; . . . (c) Contract carriages; that is to say, motor vehicles carrying passengers for hire or reward under a contract expressed or implied for the use of the vehicle as a whole at or for a fixed or agreed rate or sum. . . ."
>
> Subsection (2): "It is hereby declared that where persons are carried in a motor vehicle for any journey in consideration of separate payments made by them, whether to the owner of the vehicle or to any other person, the vehicle in which they are carried shall be deemed to be a vehicle carrying passengers

for hire or reward at separate fares, whether the payments are solely in respect of the journey or not."

Section 72 (1) provides for the grant by Traffic Commissioners of road service licences, "and a vehicle shall not be used as a stage carriage or an express carriage except under such a licence."

Section 95: "Proceedings for an offence under this Part of this Act . . . shall not in England be instituted except by or on behalf of the Director of Public Prosecutions or by a person authorised in that behalf by commissioners of a traffic area, a chief officer of police, or the council of a county, county borough, or county district."

A. S. Comyns Carr, K.C., and *R. P. Winfrey* for the appellants.
G. D. Roberts for the respondent.

LORD HEWART, C.J.—In my opinion, this appeal ought to be dismissed. I think there were grounds upon which the learned magistrate was entitled to find, (i) that the respondent was duly authorised to institute the proceedings, and (ii) that the appellants were not using the motor vehicles referred to as contract carriages, but as stage carriages.

With regard to the first point, s. 95 of the Road Traffic Act, 1930, says:

> "Proceedings for an offence under this Part of this Act, other than a breach of the regulations as to the conduct of passengers in public service vehicles, shall not in England be instituted except by or on behalf of the Director of Public Prosecutions or by a person authorised in that behalf by commissioners of a traffic area, a chief officer of police, or the council of a county, county borough, or county district."

Here the information was laid by a police sergeant acting under the authority of the Assistant Commissioner of Police, and, indeed, by the Assistant Commissioner himself. There is in existence, and was produced, a letter of general authorisation dated Feb. 5, 1932, which letter bore at its foot the signature of the Commissioner of Police, Lord Trenchard. In my opinion, in those circumstances, the learned magistrate was entitled to find that the proceedings were commenced by a person authorised in that behalf by a chief officer of police.

On the second point, it is urged that these vehicles were not stage carriages, but were contract carriages. It is important to remember, however, that sub-s. (2) is no less a part of s. 61 of the Act than is sub-s. (1). Subsection (2) provides as follows:

> "It is hereby declared that where persons are carried in a motor vehicle for any journey in consideration of separate payments made by them, whether to the owner of the vehicle or to any other person, the vehicle in which they are carried shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares whether the payments are solely in respect of the journey or not."

The last are the important words. It may well be that it is not possible to earmark any particular part of the sum which passengers by these vehicles paid for entrance to the stadium as payment for the journey, though also it may well be that a person of proper skill, having the account before him, could perform that task, but the case finds:

> "The object of Hackney Wick Stadium, Ltd., in providing the service of motor vehicles was to attract people to the stadium. Since the service was commenced thousands of similar tickets have been issued, and by means of the service the takings of the Hackney Wick Stadium have been increased by about 20 per cent."

What is the ticket? It is a ticket bearing the words:

> "Hackney Wick Stadium. This ticket will give you a free ride on the coach back to your starting point after the racing."

I think that the magistrate was entitled to find that these coaches were not contract coaches, but were used as stage carriages, and, therefore, this appeal fails.

AVORY, J.—I am of the same opinion. The whole question is whether these vehicles were being used as stage carriages within the meaning of s. 61 of the Road Traffic Act, 1930, or whether they were being used as contract carriages within the meaning of that same section. Although it is, in my opinion, possible to say that in the circumstances the vehicles came within the actual words of the definition of a contract carriage in s. 61 (1) (c), it is necessary to consider whether sub-s. (2) of that section does not override the definition of a contract carriage and in certain circumstances make the vehicle a stage carriage within the meaning of the section. That is my view of the way in which sub-s. (2) has to be construed, and, construing it in that way, I am satisfied that the persons who were carried in these vehicles were carried in consideration of separate payments made by them to another person—that is, to the stadium—and that the payments which they made to the stadium were partly in respect of the journey and partly in respect of their admission to the stadium. In those circumstances, the vehicle is to be deemed to be "a vehicle carrying passengers for hire or reward at separate fares"; and, if so, it ceases to be a contract carriage within the definition. In the circumstances of the present case, in my opinion, it becomes a stage carriage, because, so far as the return journey is concerned, it is clear upon the finding in the case that passengers are permitted to alight en route.

By the admission that was made at the Bar by the learned counsel, and looking at the terms of the contract (which, although not dated until Aug. 18, was, in my opinion, evidence of the terms on which these vehicles were being used on the date in question), it seems to be clear that on the outward journey to the stadium passengers were picked up at different points. The contract provides that the coaches are to be hired for the purpose of conveying patrons to the stadium from terminal points specified in the schedule, and when one turns to the schedule one finds that it includes any point within a radius not exceeding a distance between Hackney Wick Stadium and Aldgate Station. It is clear, therefore, that under this arrangement passengers could be picked up at different points on their way to the stadium, and it is equally clear that they could alight at different points on their return and so the vehicles are brought by the facts of this case and by sub-s. (2) clearly within the description of stage carriages, which is

> "motor vehicles carrying passengers for hire or reward at separate fares . . . stage by stage, and stopping to pick up or set down passengers along the line of route,"

and particularly within the last words of the definition of stage carriages, namely,

> "any other motor vehicles carrying passengers for hire or reward at separate fares and not being express carriages as hereinafter defined."

I think it is clear that they were not express carriages within the definition, and therefore that there was ample evidence on which the magistrate could find that they were stage carriages.

I only wish to add a word or two upon the point that was taken, that these proceedings were not authorised in the manner required by s. 95 of the Road Traffic Act, 1930. In my opinion, there was evidence that the proceedings were instituted by a person authorised in that behalf by a chief officer of police. Mr. Tripp, the Assistant Commissioner, had, in fact, a general authority to institute proceedings, and in doing that in this case he was acting on behalf of the Commissioner. It is necessary, however, I think, that I should say some words on *Jones* v. *Wilson* (1), which was so much relied upon in support of the opposite view. It is to be observed that *Jones* v. *Wilson* (1) was decided under a different statute. It was decided under the Inland Revenue Regulation Act, 1890, which provided by s. 21 that:

> "It shall not be lawful to commence proceedings against any persons for the

> recovery of any fine . . . under any Act relating to inland revenue . . . except by order of the commissioners. . . ."

That case was decided on the ground that there was no evidence that the proceedings were instituted by order of the commissioners. It is in view, not so much of the judgment of Darling, J., and the judgment which I delivered in that case, but in view of some observations made by Shearman, J., that I have thought it necessary to point out the distinction between that case and the present one. There is, in my opinion, all the difference in the world between saying proceedings are not to be instituted except by order of so-and-so and saying that proceedings are only to be instituted on behalf of a particular person. For these reasons I agree that the first point also fails and that the appeal should be dismissed.

HUMPHREYS, J.—As to the first point, I entirely agree with the judgments of the other members of the court, and I have nothing to add.

As to the second point, I confess that I have felt much greater doubt about the matter than I gather has troubled either of the other members of the court. These motor vehicles, I think admittedly, and certainly, in my opinion, come precisely within the definition of "contract carriages" as defined in s. 61 (1) (c) of the Road Traffic Act, 1930, and contract carriages are not required to hold the particular licence for the absence of which the appellants in this case were fined. They do not, as I think, come within the definition of "stage carriages" which is to be found in sub-s. (1) (a) of that section, if it is read by itself, because the definition is

> "motor vehicles carrying passengers for hire or reward at separate fares, stage by stage, and stopping to pick up or set down passengers along the line of route."

I doubt whether anyone would describe the motor vehicles in this case as motor vehicles which carry passengers for hire or reward at separate fares, if there was no other definition to be found of "stage carriages" than those words, because, as the case finds, the passengers paid no fare at all, and the journey was represented as being a free journey. To my mind, it does not add anything to the strength of the argument of the other side to say that, from a business point of view, it was worth the while of the owners of the stadium to give a free journey to some of the people who were going to pay for entrance to their performance.

The difficulty that has been created here in the way of the appellants is by sub-s. (2). Subsection (2), in my view, adds something to the definition of "stage carriage," inasmuch as it increased the number of the cases in which motor vehicles carrying passengers for hire or reward may be said also to be carrying them for hire or reward for a journey in consideration of separate payments made by them, because it declares that

> "where persons are carried in a motor vehicle for any journey in consideration of separate payments made by them, whether to the owner of the vehicle or to any other person, the vehicle in which they are carried shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares, whether the payments are solely in respect of the journey or not."

Whatever may have been the intention of those who are responsible for those words in that subsection, I have come to the conclusion, though with considerable doubt, that they are wide enough to cover the facts of this case. As the learned magistrate has so found, I do not think this court is called upon to differ from him. Therefore, although with doubt, which I once more will repeat I still maintain, I am not prepared to differ from the judgment which has been delivered by the other members of the court.

Appeal dismissed.

Solicitors: *J. R. Cort Bathurst*; *Wontner & Sons.*

[*Reported by* T. R. Fitzwalter Butler, Esq., *Barrister-at-Law.*]

WITHERS *v.* GENERAL THEATRE CORPORATION

[COURT OF APPEAL (Scrutton, Greer and Romer, L.JJ.), June 26, 27, 1933]

[Reported [1933] 2 K.B. 536; 102 L.J.K.B. 719; 149 L.T. 487]

Contract—Theatrical engagement—Breach—Loss of publicity—Measure of damages—Loss of opportunity to acquire enhanced reputation—Option to employ actor in different classes of theatre.

An actor employed to appear at a well-known theatre or music hall who is prevented from so appearing by anticipatory breach of contract is entitled to damages for the loss of the opportunity of acquiring future professional reputation or of maintaining his reputation by appearing at that theatre or music hall, but he is not entitled to damages for any injury to his then present professional reputation by such breach.

Clayton (Herbert) and Waller (Jack), Ltd. v. *Oliver* (1), [1930] A.C. 209, explained and applied.

Per SCRUTTON, L.J., and ROMER, L.J.: Where a contract contains an option or provides for alternative ways of performance the measure of the damages for a breach of the contract is in general the loss arising by reason of the defendant having failed to do that which was least, not that which was most, beneficial to the plaintiff, and, therefore, where a contract engaging an actor to perform at a famous London music hall provided that the employers could exercise an option that he should play instead at one or more less famous halls either in London or the provinces, the measure of damages for breach of the contract must be based on the performance of the contract most favourable to the employers and least favourable to the actor, i.e., that the actor had been deprived of the opportunity of appearing at the less famous halls and not of that of appearing at the famous London hall.

Notes. Considered: *Fielding* v. *Moiseiwitsch* (1946), 175 L.T. 265. Referred to: *Moss* v. *Chesham Urban District Council* (1945), 172 L.T. 301.

As to measure of damages generally, see 11 HALSBURY'S LAWS (3rd Edn.) 233 et seq., and for cases see 17 DIGEST (Repl.) 129, 130.

Cases referred to:

(1) *Clayton (Herbert) and Waller (Jack), Ltd.* v. *Oliver*, [1930] A.C. 209; 99 L.J.K.B. 165; 142 L.T. 585; 46 T.L.R. 230; 74 Sol. Jo. 187, H.L.; 17 Digest (Repl.) 129, *371*.

(2) *Marbé* v. *George Edwardes (Daly's Theatre), Ltd.*, [1928] 1 K.B. 269; 96 L.J.K.B. 980; 138 L.T. 51; 43 T.L.R. 809, C.A.; 17 Digest (Repl.) 129, *370*.

(3) *Addis* v. *Gramophone Co., Ltd.*, [1909] A.C. 488; 78 L.J.K.B. 1122; 101 L.T. 466, H.L.; 17 Digest (Repl.) 74, *1*.

(4) *Robinson* v. *Robinson* (1851), 1 De G. M. & G. 247; 21 L.J.Ch. 111; 18 L.T.O.S. 293; 16 Jur. 255; 42 E.R. 547, L.JJ.; 17 Digest (Repl.) 95, *117*.

(5) *Cockburn* v. *Alexander* (1848), 6 C.B. 791; 18 L.J.C.P. 74; 12 L.T.O.S. 349; 13 Jur. 13; 136 E.R. 1459; 41 Digest 338, *1902*.

(6) *Kaye Steam Navigation Co.* v. *Barnett* (1932), 48 T.L.R. 440; 76 Sol. Jo. 414; Digest Supp.

Appeal by the defendants from a verdict of a special jury and judgment for £1,675 damages for the plaintiff awarded in an action tried by LORD HEWART, C.J.

By a contract in writing entered into between the plaintiff and the defendants it was provided that the plaintiff should appear in a sketch known as "Withers' Op'ry," at the London Palladium, for three weeks, beginning July 6, 1931, at a gross salary of £300 a week, the plaintiff providing the supporting actors and the properties. Attached to the contract was a term initialed by the plaintiff in these words:

> "In consideration of this agreement it is understood and agreed that notwithstanding anything in this agreement to the contrary, should the management so desire, the artist agrees to transfer these engagements to any hall owned, controlled by, or associated with the management either in London or the provinces, without charging transfer expenses."

The defendants cancelled the contract on July 2, 1931, but pleaded that they terminated it in consequence of a breach thereof by the plaintiff in that the presentation of the sketch was greatly inferior to that in the United States of America, so that the sketch was in no way suitable for production at the Palladium. The Lord Chief Justice left the following questions to the jury: (i) Did the plaintiff admit to Mr. Parnell [the defendants' booking manager] at an interview at Portsmouth, on July 1, 1931, that the presentation of the sketch was not up to standard, and that he did not think it advisable to present the sketch at the Palladium for the following week, as had been agreed?—"No." (ii) If not, damages?—"£675 loss of profit and £1,000 damages for loss of publicity."

The defendants appealed against the verdict and judgment, but before the Court of Appeal did not dispute the jury's finding as to liability or that the plaintiff was entitled to £675 damages for breach of contract. They contended that the verdict for £1,000 damages for loss of publicity had been obtained on a wrong and/or insufficient direction in point of law.

Sir Patrick Hastings, *K.C.*, and *W. van Breda* for the defendants.
Doughty, *K.C.*, and *F. W. Beney* for the plaintiff.

SCRUTTON, L.J.—This is a case of some difficulty, and I have felt during the argument some doubt as to what is the proper course to take. The case raises the question of the assessment of damages for loss by an actor of publicity, and since the doctrine that such damages may be given for such loss of publicity has been stated by the Court of Appeal in *Marbé* v. *George Edwardes* (*Daly's Theatre*), *Ltd.* (2), and confirmed in *Clayton* (*Herbert*) *and Waller* (*Jack*), *Ltd. v. Oliver* (1), there is no doubt that juries have viewed this question in a way which places the court in some difficulty. In *Clayton's Case* (1) Lord Buckmaster thought the jury had given a startling amount of damages, just as they did in *Marbé's Case* (2), but that the damages were not so extravagant as to vitiate the verdict. The Court of Appeal in *Marbé's Case* (2) found some difficulty in answering the question whether the jury had not exceeded permissible bounds in the damages they gave for loss of publicity, and in both cases the difficulty of the subject-matter is shown by Lord Buckmaster's opinion in *Clayton's Case* (1). One is reluctant to order new trials, but after considering the arguments put before us I have come to the conclusion that there has not been a satisfactory trial of this case on the issue of damages for loss of publicity, or a satisfactory direction by the learned judge at the hearing. I do not think this is a case to be dealt with by entering judgment, or rather by striking out of the judgment the £1,000 damages for loss of publicity, but that it is a case which on that issue requires a new trial.

I will deal first of all shortly with the facts, secondly with the law established by the authorities and, thirdly, with the course of the trial. The facts, as I understand them, are these. The plaintiff, Mr. Withers, a music-hall artist, had a sketch which depended for its success very largely upon two matters: first, his skill as an actor, for he was practically the only actor in the sketch; and, secondly, on the exact timing of the appearances of a number of properties and other artists with the acting of Mr. Withers. Unless the appearance of the properties was exact to time and the other artists timed their actions exactly, the piece might be a disastrous failure. Mr. Withers had been in England before, with something like the same sketch, and had had great success, and he returned to the United States and had continued his success there. After a considerable interval of time he desired to come back to England, and the company that controls the Palladium and other theatres or halls, the General Theatre Corpn., Ltd., were ready to engage him as an attraction to appear on the terms of a contract, the terms of which I must state presently. Mr. Withers, apparently, quite realised that he had to get the full sketch to work to time, but he was not anxious to bring a company with him to England. It seems that he was going to engage his company in England and start straight away at the Palladium; he appreciated that his company required considerable rehearsal to get the whole sketch to work neatly and in time and he asked to have a preliminary trial at some place which was not the Palladium, where there would be less publicity and an audience not used, perhaps, to such a high standard of performance as that at the Palladium. He asked for a trial of a week at Portsmouth at a much smaller salary.

He started with the week at Portsmouth, and there is no doubt that, there being a performance on the Monday, things went all wrong; the properties did not work at the right times, and the supporting artists did not work with the properties at the right time. The manager at Portsmouth was so shocked, if the managers of music halls are ever shocked, at the idea that this performance was going to be presented at the Palladium, that he communicated with the Palladium authorities in London, saying: "You had better come down and see this." That was on the Monday, and the Palladium authorities apparently appreciated what was the matter, that the sketch was not working smoothly at the start, so they gave it another day and came down on the Wednesday, and on that day they thought that it would not be in a condition by the following Monday to be performed at the Palladium. They communicated to Mr. Withers their view, but he protested strongly. One of the points in the case at one time was—and a question was asked of the jury upon that issue—whether Mr. Withers agreed on the Wednesday that his sketch would not be in a fit state to appear at the Palladium on the following Monday. The defendants' witnesses suggested that he did agree; Mr. Withers said that he did not, and the jury have found that he did not. Mr. Withers's case was that by the Saturday he had got the sketch into a condition that it would have been fit to perform at the Palladium on the following Monday. The defendants' witnesses disagreed with that view. Counsel for the defendants has suggested that a question on that subject ought to have been asked, but no question was asked, and their counsel does not dispute that the defendants must abide by the verdict against them that there was a breach of contract on their part. In these circumstances one need not trouble further about what does appear to be a point which ought to be considered whether the question ought to have been asked of the jury whether the plaintiff was ready and willing to produce on that Monday at the Palladium a sketch in such a condition that it was fit to appear at a high-class place of entertainment like the Palladium.

Counsel for the defendants confines his objections to the damages which were awarded against his clients—£675, loss of salary for three weeks at £225 a week, net loss, as to which he makes no complaint, and £1,000 alleged to be for "loss of publicity." He says that counsel for the plaintiff asked the jury to give damages (i) on the basis that there was a contract binding the defendants to let Mr. Withers appear at the Palladium, and (ii) that by not being allowed to appear at the Palladium Mr. Withers lost reputation. He had been "turned out," to use counsel's phrase, "of the Palladium"—turned out of the opportunity of appearing—and had lost reputation by that action of the defendants. Counsel for the defendants contends: (i) If I am right that there was no binding contract to appear at the Palladium, the plaintiff has given no evidence of any loss of reputation or loss of publicity that would have followed through his appearing under the clause in the contract at some of the other halls of the company which, under that clause, counsel says they had a right to require him to do. (ii) He says also that counsel for the plaintiff asked the jury to give damages for this loss of reputation by being turned out of the Palladium, and the learned judge at the trial did not give the jury any direction as to the way in which they were to assess the damages for the admitted breach of the contract. It is of some interest that the leading counsel for the defendants, who has had a great deal to do with shaping the doctrine of what are the damages for loss of publicity, should now be complaining of its operation.

The law on the subject is, speaking generally, that in actions for wrongful dismissal for not allowing a service, the court can give only the pecuniary loss of the plaintiff, and cannot include compensation for the manner of the dismissal, for the injured feelings of the plaintiff, or for the loss he may sustain from the fact that the dismissal makes it more difficult for him to obtain fresh employment. That is the language of the headnote in the Law Reports of the report of *Addis* v. *Gramophone Co., Ltd.* (3) and of the considered opinion of LORD LOREBURN in that case.

In May, 1928, came *Marbé* v. *George Edwardes* (*Daly's Theatre*), *Ltd.* (2). The plaintiff was a lady who had been offered a contract to appear in a play, with a further supporting or collateral contract to advertise her. She was not allowed to appear in the play, and she claimed damages for breach of contract and damages because she had not had the opportunity of appearing in the play and had lost her reputation thereby. The jury gave her £3,000 damages for loss of publicity, and LORD BUCKMASTER expressed the opinion in *Herbert Clayton and Jack Waller, Ltd.* v. *Oliver* (1) that those damages were extravagant. The Court of Appeal, in *Marbé's Case* (2), was of opinion that the amount of damages awarded was large, and the point for their consideration was whether they were so excessive that a new trial ought to be granted. BANKES, L.J., expressed himself in this way as to the damages that should be given ([1928] 1 K.B. at p. 281):

> "In my opinion it is sufficiently established that where there has been a breach of contract to employ an actress, whose reputation depends on the continued and successful practice of her art, and where the engagement is accompanied by promises of widespread publicity and advertisement which will probably lead to future opportunities following on successful performance, the court recognises that the damages for that breach may properly include such a sum as a jury may award to compensate the plaintiff for the loss of the reputation which would have been acquired, or damage to reputation already acquired, or to use another expression, for loss of publicity."

That statement appears to me to contemplate two classes of damage: (i) "I, the actress or actor, look forward to a reputation which I shall get by appearing in this play; you have deprived me of that opportunity of acquiring the reputation." (ii) "I, the actress or actor, have now a reputation, which is damaged by your saying that you will not let me perform this play after you have engaged to do so." Those appear to me to be two distinct classes of damage on two distinct classes of loss of reputation. *Marbé's Case* (2) was treated as one of importance to theatrical managers, actors, and artists, and a subsequent case was taken to the House of Lords in order to obtain an ultimate decision whether *Marbé's Case* (2) had been rightly or wrongly decided. That was *Herbert Clayton and Jack Waller, Ltd.* v. *Oliver* (1). As I read the judgments in that case of the House of Lords, the law lords considered that the statement of BANKES, L.J., has gone too far, and, therefore, as LORD DUNEDIN said, the five law lords who heard the case were specially consulted upon, and agreed upon, the exact words in which LORD BUCKMASTER expressed what it was competent for the jury to consider. LORD BUCKMASTER considered the matter in this way ([1930] A.C. at p. 217). He said that these theatrical contracts were something more than a mere contract on the employees' part to render service; opportunity for such service was contemplated and agreed to be furnished.

> "It is clear that the great object of any gentleman wishing to become a distinguished actor when he has already established a reputation in the provinces, is to have an opportunity of appearing upon the London stage and before a London audience. That is the object for which a person enters into a contract of this description, and it would be defeated if the effect of the contract is this: that if the gentleman who engaged him is not bound to employ him and does

> A not in fact do so, so as to give him an opportunity to display his talent and abilities, yet he is not to be at liberty to act elsewhere, unless by the permission of the gentleman who engaged him"

Having laid that down as a general rule, he adds ([1930] A.C. at p. 220): "What are known as vindictive or exemplary damages in tort find no place in contract. . . ." B He then uses these words, which had been considered and agreed by the five noble lords who heard that case ([1930] A.C. at p. 220)

> "It was competent for the jury to consider that the plaintiff was entitled to compensation because he did not appear at the Hippodrome, as by his contract he was entitled to do, and in assessing those damages they may consider the loss he suffered (i) because the Hippodrome is an important place of public C entertainment; and (ii) that in the ordinary course he would have been 'billed' and otherwise advertised as appearing at the Hippodrome. The learned judge put the matter as a loss of reputation, which I do not think is the exact expression; but he explained that as the equivalent of loss of publicity, and that summarises what I have stated as my view of the true situation."

I take that to be the considered judgment of the House of Lords. Damage to a D reputation already existing by not allowing an appearance is not a matter which has to be considered, but what has to be considered is that, if the actor had been allowed to appear, that appearance would give him publicity, and he has been deprived of that opportunity of appearing. That I take to be the law, and it is quite certain that in this case that distinction, somewhat difficult to explain, but important in assessing damages in these publicity cases, was not explained to the E jury at all by the learned judge at the hearing of the action.

The contract is in this form. It is in terms a contract to appear for three weeks at the London Palladium, commencing on July 6, 13 and 20, at a gross salary of £300 a week, the actor, Mr. Withers, providing the supporting actors and the properties. There was attached to that printed contract and schedule a term which the defendants had taken care to get initialed by Mr. Withers, in order that he F might be fully aware that it was in the contract:

> "In consideration of this agreement it is understood and agreed that notwithstanding anything in this agreement to the contrary, should the management so desire, the artist agrees to transfer these engagements to any hall owned, controlled by, or associated with the management either in London or the G provinces without charging transfer expenses."

So that is a clause which gives the option to the defendants either to require Mr. Withers to appear at the Palladium or to require him to appear for three weeks at the same salary at any other hall they control, and, therefore, if the case has gone to the jury on the assumption that, whatever the defendants say, Mr. Withers had a right against them to appear at the Palladium H whether they wished it or not, it has gone to the jury, in my opinion, on a wrong basis, because it was a contract under which the defendants had an option either to require Mr. Withers to appear at the Palladium or to transfer his services to one or the other of a number of halls which they controlled. These included some important halls in large towns and others in subordinate towns, and, as counsel for the plaintiff very properly stated to us, while matters were in negotia- I tion, the plaintiff was told by the defendants: "We may give you two weeks at the Palladium and one week at another hall. This will, of course, depend on how you stand up at the Palladium during the first two weeks"—that is to say, I suppose, this depends on how your performance goes at the Palladium. It was quite clear, therefore, that the contract was not a contract under which the plaintiff had an absolute right to appear at the Palladium; it was a contract under which the defendants had an option.

In a case of option, or alternative ways of performing a contract by a defendant, there is the well-settled rule as to how the damages for breach of the contract are to be assessed. I give it as it was expressed in Chancery by LORD CRANWORTH, L.J., in *Robinson* v. *Robinson* (4) (1 De G. M. & G. at p. 257):

> "Where a man is bound by covenant to do one of two things, and does neither, there, in an action by the covenantee, the measure of damage is in general the loss arising by reason of the covenantor having failed to do that which is least, not that which is most, beneficial to the covenantee."

At common law, MAULE, J., expressed the rule in *Cockburn* v. *Alexander* (5) (6 C.B. at p. 814):

> "Generally speaking, where there are several ways in which the contract might be performed, that mode is adopted which is the least profitable to the plaintiff and the least burthensome to the defendant."

A very common example, showing how this rule works, is this: A. undertakes to sell to B. 800 or 1,200 tons of a certain commodity; he does not supply B. with any of the commodity. On what basis are the damages to be fixed? They are fixed in this way. A. will perform his contract if he supplied 800 tons, and the damages must, therefore, be assessed on the basis that he has not supplied 800 tons and not on the basis that he has not supplied 1,200; not on the basis that he has not supplied the average 1,000, and not on the basis that he might reasonably be expected, whatever the contract was, to supply more than 800 tons. The damages are assessed on the basis as MAULE, J., said that the defendant will perform the contract in the way most beneficial to himself and not in the way that is most beneficial to the plaintiff.

The last case that Sir Patrick Hastings referred to was that of *Kaye Steam Navigation Co.* v. *Barnett* (6), where there was an option under a charterparty. BRANSON, J., following and citing *Robinson* v. *Robinson* (4), said that you must assume the defendant exercised the option in the way in which it would have been least beneficial to the plaintiff.

Those two cases appeal to my mind because they both happen to have been cases of charterparties; but ROMER, L.J., said that the example which appeals to him is that of a lease determinable at the end of seven, fourteen, or twenty-one years by the landlord, which has been determined wrongfully at the end of five years by the landlord. On what basis are damages to be assessed? Answer: On the basis that the landlord can determine in seven years, and, therefore, the plaintiff cannot get damages except on the assumption he had only two more years to run, that being the period for assessment of damages.

There is no explanation whatever in the present case by the learned judge or reference by counsel for the plaintiff to the way in which that measure should be worked out. Counsel for the defendants did twice call the attention of the learned judge to the marginal clause which gives this option. Unfortunately, there is no direction by the learned judge at all on that option. Counsel for the plaintiff said that, inasmuch as the management had not in fact so elected that the plaintiff should appear at a hall other than the Palladium, that clause can have no effect. The earlier cases show that, in the event of a contract containing such a clause, it is not what in fact happens, but what may happen, that is the criterion as to the performance of the contract by the defendant, that is to decide the issue as to the amount of damages.

We have been favoured with a good many readings of the shorthand notes of the proceedings, but as I read them, from the start the jury were given erroneous views as to the way in which they ought to deal with the question of damages. When counsel for the plaintiff opened the case he asked for a substantial sum for damages for the loss of publicity, as it is called.

> "It is not an injury to his reputation, but the loss of publicity, the loss of the commercial value of his act through his being turned down."

That expression seems to me misleading, and to suggest that the measure is a man's loss of reputation because he has been dismissed, which, as I understand, is what the House of Lords objected to in the language used by BANKES, L.J., in *Marbé's Case* (2). At a further stage in his argument counsel said what I think he now admits to be inaccurate, although he said it was merely a rhetorical inaccuracy, and, therefore, did not matter, that the plaintiff might reasonably have expected he would be allowed to perform at the Palladium, and that, therefore, he must be given damages on the basis that the reasonable expectation was not fulfilled. That is not, as I understand it, the principle in regard to the measure of damages which has been laid down, and indeed I understand that this the learned counsel for the plaintiff admits. The jury ought not to have been asked what the plaintiff might have expected, but they ought to have been told what was the performance by the defendants required under the contract, and what would be the most beneficial performance of the contract to the defendants and the least beneficial to the plaintiff. The damages cannot exceed an amount calculated upon that basis; they cannot be based upon the most beneficial performance to the plaintiff, or upon what he might reasonably expect.

That being the inaccuracy, as it seems to me, in the plaintiff's presentation of the case, and the defendants' counsel twice calling the attention of the judge to the clause giving the defendants an option, I think it is quite obvious in reading the summing-up of the learned judge that he thought it was a very serious question whether the plaintiff ought to have a verdict at all. He speaks of it as the major point and deals with the damages first in very short compass. He said:

> "The defendants engaged the plaintiff and his company to appear and perform at the London Palladium."

That, in my view, mis-stated the contract. The contract was to perform at the London Palladium or some such other minor hall as the defendants might desire. The learned judge continued:

> "No doubt it is a serious matter if it is known that an artist is expected to appear and does not appear at a well-known music hall like the Palladium, and you would have to put some figure upon that loss of publicity."

That seems to me to be language similar to that used by BANKES, L.J., in *Marbé's Case* (2) when he spoke of loss of reputation because an actor was not allowed to perform. That was a measure of damages which, in my view, as I have already stated, the House of Lords, in *Herbert Clayton and Jack Waller, Ltd.* v. *Oliver* (1), intended to exclude by the phraseology used by LORD BUCKMASTER to which the five law lords had agreed in settling the criterion for the measure of damages in such a case. I appreciate that if a proper direction as to the measure of damages had been given to the jury in the terms enunciated by the House of Lords, no one can say what would have happened, but the fact remains that the jury cannot have understood the distinction which I have endeavoured to state with care, for they received on that no direction at all. Suppose that the defendants had said: "No, we do not propose to allow you to perform at the Palladium; we propose to give you three weeks at the contract salary at three other allied halls." The jury were not told that they might have to consider what was the effect of the loss of publicity at three minor halls and not at the Palladium.

In these circumstances I have come to the conclusion, seeing that the verdict of £1,000 on that issue is the same as that given in *Herbert Clayton and Jack Waller, Ltd.* v. *Oliver* (1), which the House of Lords said was excessive, and seeing that no direction was given to the jury on the measure of damages, that there must be a new trial on the question only of damages. I do not think this is a case for entering judgment, by which I understand counsel for the defendants to mean the striking from this judgment of the sum of £1,000 awarded for loss of publicity. I do not think it is a case for that, because a jury might well consider that they could judge what the difference between an appearance at the Palladium and an appearance at, say, Penge, would be in publicity value. I do not think that this is a case in which one can say that there is no evidence on which a jury could come to a determination of that matter. But in fact they received no explanation of

A the criterion as to the measure of damages, and in those circumstances I am afraid there must be a new trial on the issue of damages as to the loss suffered by the plaintiff of the opportunity of enhancing his professional reputation, there being no complaint of the verdict for £675, net loss of salary.

GREER, L.J.—I agree that there must be a new trial. I am not sure that I B entirely agree that the defendants are entitled to a new trial on both the grounds put forward by their counsel. He said that there was a misdirection because the learned judge treated this agreement as an agreement to be performed at the Palladium. He said, secondly, that there was a misdirection because there was an inaccurate statement as to what damages can be recovered on the ground of loss of publicity.

C I think it is unnecessary to decide the first point. I have been rather impressed with the view put forward by counsel for the plaintiff that, primâ facie, this was an agreement to employ the plaintiff at the Palladium with a condition that in a certain event he should agree that his opportunities to perform at the Palladium should be changed into those for performing at some other of the music halls under the control of the appellants. The breach of contract was an anticipatory breach, D refusing to allow the plaintiff to enter upon the first week of his engagement; and the question is: What loss of publicity did he suffer by reason of that breach of the agreement at that time? I am inclined to think the jury were entitled to say, if they had been adequately directed: "We are satisfied that if the agreement, which was wrongfully broken in anticipation on July 2, 1931, had been allowed to continue, the primâ facie obligation would be still in operation, and that there would E not have been any obligation or desire on the part of the defendants that the plaintiff should appear at one of the other halls." It would seem that if the jury had found that that was their view of the facts, that finding would have been in accordance with the considered probabilities of the case; that is to say, that, if the agreement had not been broken, it would have been carried out in its primâ facie meaning, namely, as an agreement to perform at the London Palladium for the F three weeks mentioned in the schedule. Be that as it may, I am satisfied that there was not in this case—and I can quite understand why—a sufficient explanation to the jury in the summing-up by the learned judge of the measure of damages with regard to the item of loss of publicity.

It is a difficult task to put into words what exactly is the limitation upon the liability of defendants, in the position of these defendants, to pay for loss of pub- G licity, but it ought to have been done, as otherwise the jury might be led to believe that they can give any damages they like, namely, damages for loss of reputation arising out of a breach of contract, and add damages for loss of publicity arising out of a breach of contract. I take it, there is no dispute that for a breach of contract other than of a contract to do work as an artist in a theatre, music hall or elsewhere, the damages are limited to the pecuniary loss arising from the breach H of contract; and, however clear it may be that the person whose contract has been broken suffers general damages for lost reputation, he cannot get anything on that head from a jury. This rule does not apply merely to contracts of employment; it applies to most contracts. One can well understand that such a contract, for example, as a building contract may be broken at a time and in such circumstances as would have very serious results upon the reputation of the builder, who might I be financially damaged to a very great extent, yet all he can recover is what he would have been paid for his work, less the expense of doing it, if the performance of the agreement had been continued.

But there is this exception, with regard to an agreement by an artist who engages to perform at a theatre or music hall, and I understand the exception to be that when a proprietor of a theatre or music hall engages an artist to perform, he is making him two promises: He is giving him consideration which consists of two different elements—(i) a salary; that is the first promise; and (ii) the opportunity to play in public some part which will attract attention, and that is the second promise. On breach of the contract he is entitled to damages for the loss of salary. For the loss of the opportunity of impressing the public with his artistic value and so enhancing or maintaining his reputation, he is entitled also to recover damages; but he is not entitled to recover such damages as counsel for the plaintiff, in his address to the jury, asked them to give. In that counsel's final speech, which was made just before the summing-up, he said:

> "Members of the jury, does it do a man any good to be turned out of the greatest hall in England? If the accurate and quite sober truth is told about it, what good does it do, and what harm does it do to him? Do you think that everyone who discusses this matter in England and America will confine themselves to the strict and accurate truth? It will be known that the show was a failure and that the show was not put on at the Palladium."

I suggest that that goes a long way beyond anything that could be justified as an accurate description of the measure of damages for loss of publicity, and the summing-up of the learned judge, coming as it did almost immediately after that address for the plaintiff, is, I think, in one respect subject to criticism, and that is that the direction about the damages was too short and did not correct the impression that must just have been given by the powerful oration that counsel had just made to the jury. All the learned judge said about that issue was in these words:

> "No doubt it is a serious matter if it is known that an artist is expected to appear and does not appear at a well-known music hall like the Palladium, and you would have to put some figure upon that loss of publicity."

If that passage had been a little further expounded and explained, no exception could have been taken to it; but I think that the defendants are entitled to criticise it on the ground that it was too brief on this point and that it did not contain the explanation which was necessary after the decision of the House of Lords in *Herbert Clayton and Jack Waller, Ltd.* v. *Oliver* (1) as to the extent of the liability for damages for the loss of publicity.

On that ground I think this court, though with some reluctance, must order a new trial. I can quite understand the learned Lord Chief Justice, having thus dealt with the question of damages, did not doubt that the real matter before him was the question of liability and not the question of damages for loss of publicity, although that also had to be dealt with. I agree that this verdict should be set aside so far as the damages for loss of publicity are concerned, and a new trial ordered as regards those damages.

ROMER, L.J.—I agree that there must be a new trial on this issue as to damages. Counsel for the plaintiff said, and I think very rightly, that in a case like this one ought not to criticise and examine too meticulously the observations made by counsel or the summing-up of the learned judge, and I disclaim any intention of doing so; but looking at the matter broadly, I have come to the conclusion that it never was brought to the minds of the jury that the plaintiff was not entitled to recover damages for his loss of reputation—that is to say, the damage his reputation may have suffered by the repudiation of this contract by the defendants as distinct from the damage he sustained by reason of the loss of opportunity of enhancing his reputation by appearing under the terms of his contract. Nor do I think that it was sufficiently brought home to the minds of the jury that the defendants were not under any obligation to employ the plaintiff at the Palladium, but that they had the option of employing him elsewhere within certain limits mentioned in the contract.

In my opinion, the new trial should be granted upon both those grounds. As to the first, I do not desire to add anything to what has been said about the law and facts being complicated; and as to the second, I only wish to say this. It must be observed that at the time the defendants repudiated the contract on July 2, 1931, they had not lost the right of exercising the option which, in my opinion, they had under the contract of directing the plaintiff to appear, not at the Palladium, but at one of their other halls belonging to or under their control. The jury ought to have taken into consideration the possibility, and the probability, that if the defendants had not repudiated the contract on July 2, 1931, they would have directed the plaintiff, acting under the express terms of their contract, to give his performance elsewhere than at the Palladium. For these reasons I think that there must be a new trial upon the issue as to damages for loss of publicity.

New trial ordered.

Solicitors: *Lawrence Messer & Co.*; *Kenneth Brown, Baker, Baker.*

[*Reported by* C. G. Moran, Esq., *Barrister-at-Law.*]

R. *v.* MIDDLESEX JUSTICES. Ex parte BOND

[Court of Appeal (Scrutton, Greer and Slesser, L.JJ.), February 7, 1933]

—Res judicata—Divorce suit against applicant for order—Ouster of jurisdic-

J.P. 130; 49 T.L.R. 247; 31 L.G.R. 169; 29 Cox, C.C. 620]

Justices—Husband and wife—Custody of child—Previous order refusing custody—Res judicata—Divorce suit against applicant for order—Ouster of jurisdiction of justices.

On April 25, 1930, the husband filed his petition for divorce. The wife entered an appearance, but did not defend the suit. On Nov. 3, 1930, the husband obtained a decree nisi, with an order for the custody of a girl, one of the children of the marriage. He made no application for the custody of the other child, a boy. On May 4, 1931, the wife applied to a court of summary jurisdiction under the Guardianship of Infants Acts for the custody of the boy, but the court declined to make the order on the ground that the decree had not been made absolute. On May 18, 1931, the decree was made absolute, and on Aug. 24, 1931, the wife again applied to the court of summary jurisdiction for the custody of the boy, but on its being brought to the attention of the justices that the wife, having appeared to the petition, could apply to the Divorce Court for an order for the custody of the boy, they again refused the application. On April 11, 1932, the wife made a third application to the same court—differently constituted—and on this occasion the court granted her an order for custody and an order was made that the husband should pay 5s. weekly for the maintenance of the boy until he reached the age of sixteen years. The husband then obtained a rule nisi directed to the justices calling on them to show cause why a writ of certiorari should not issue to quash the order of April 11, 1932.

Held, by the Divisional Court and by the Court of Appeal, that on April 11, 1932, the matter was res judicata by reason of the order which had been made on Aug. 24, 1931, and, therefore, the order of April 11 was bad.

Held, by the Divisional Court (Lord Hewart, C.J., and Avory, J.; du Parcq, J., dubitante), the Court of Appeal declining to decide this question, that the jurisdiction of the Divorce Court with regard to the custody and maintenance of a child of a marriage which had been before that court was an exclusive and overriding jurisdiction which ousted the jurisdiction of the justices to deal with the matter.

Notes. Rule 34 of the Matrimonial Causes Rules, 1924, has been replaced by r. 33 of the Matrimonial Causes Rules, 1957 (S.I., 1947, No. 619). A respondent

A spouse is now not entitled, unless otherwise ordered, to apply for custody of a child of the marriage, unless a statement has been included in the memorandum of appearance setting out arrangements for the care, support and upbringing of the child.

Considered: *Burman* v. *Woods* (1947), 91 Sol. Jo. 493. Referred to: *Re Wakeman, Wakeman* v. *Wakeman*, [1947] 2 All E.R. 74.

B As to orders for custody, maintenance and education of children, see 12 HALSBURY'S LAWS (3rd Edn.) 392 et seq., and for cases see 27 DIGEST (Repl.) 554 et seq.

Cases referred to:

(1) *Vigon* v. *Vigon and Kuttner*, [1929] P. 157; 98 L.J.P. 63; 140 L.T. 407; 93 J.P. 112; 27 L.G.R. 147; 73 Sol. Jo. 44; 45 T.L.R. 182; on appeal, [1929] C P. 245; 99 L.J.P. 9; 141 L.T. 610; 45 T.L.R. 641; 27 L.G.R. 766, C.A.; Digest Supp.

(2) *Craxton* v. *Craxton* (1907), 71 J.P. 399; 23 T.L.R. 527; 51 Sol. Jo. 484, D.C.; 27 Digest (Repl.) 361, *2982*.

Appeal from an order of a Divisional Court of the King's Bench Division.

William Frederick Bond and Hettie Maud Bond were married on April 16, 1919, D and there were two children of the marriage, a girl born on Dec. 14, 1920, and a boy, Alick Geoffrey Arthur Bond, born on July 3, 1923. On April 25, 1930, the husband filed a petition for the dissolution of his marriage. The wife entered an appearance, but did not defend the petition. A decree nisi was pronounced on Nov. 3, 1930. Custody of the daughter was granted to the husband; no application was made for the custody of the son, A. G. A. Bond.

E On May 4, 1931, the wife applied to a court of summary jurisdiction, sitting at Uxbridge, under s. 5 of the Guardianship of Infants Act, 1886, and s. 3 (2) and s. 7 (1) of the Guardianship of Infants Act, 1925, for the custody and maintenance of the son. The court refused to hear this application on the ground that the decree nisi in the divorce suit had not been made absolute. On May 18, 1931, the decree nisi was made absolute. On Aug. 24, 1931, the wife again applied to F the same court for the custody of the son. On the justices being informed that the wife, having appeared to the petition, could still apply to the High Court (Probate, Divorce and Admiralty Division) for an order for the custody and maintenance of the son, the chairman said: "If that is the case, we think the application should be made there. We cannot deal with this." Accordingly, the justices refused to make an order. On April 11, 1932, the wife made a third application to the court G of summary jurisdiction sitting at Uxbridge, when the bench was differently constituted from that of Aug. 24, 1931. The justices on this occasion made an order that the legal custody of the son should be committed to his mother, and that the father be ordered to pay the wife 5s. weekly for the maintenance of the infant, while under the age of sixteen years. According to an affidavit sworn in the proceedings before the High Court the chairman of the justices gave as the ground of H their decision

> "that the previous application had been dismissed under a misapprehension, in that the justices were not then aware that the divorce proceedings had been undefended, or that the said proceedings took place in Lincoln, or that no request was addressed therein to the court in respect of the said child, and I that the previous decision was a mistake."

The husband then obtained a rule nisi directed to the Uxbridge justices calling upon them to show cause why a writ of certiorari should not issue to remove the order of April 11, 1932, into the High Court that it might be quashed. After argument the Divisional Court held ([1933] 1 K.B. 72) (i) that the issue before the justices on April 11, 1932, was res judicata by the decision of the justices on Aug. 24, 1931; and (ii) (per LORD HEWART, C.J., and AVORY, J.; DU PARCQ, J., dubitante) that, as the High Court had become seised of the matrimonial cause between the father and mother of the infant, the jurisdiction of the justices under the Guardianship of Infants Acts was ousted. The rule nisi, therefore, was made A absolute. The wife appealed.

Lord Hewart, C.J., in giving judgment, said: In my opinion, this rule ought to be made absolute, and for my part I should be prepared to base that decision on the ground that the matter was in the hands of the Divorce Division of this court. That view is supported by the decision of Bateson, J., in *Vigon* v. *Vigon and Kuttner* (1) and the observations of Bucknill, J., in *Craxton* v. *Craxton* (2). B Something has been said about hardship, but there is no real hardship because, by r. 34 of the Matrimonial Causes Rules, 1924, a respondent, after entering appearance, may be heard on any question as to costs, and a respondent who is husband or wife of the petitioner may be heard also as to the custody of or access to the children. More than that, it is now provided by s. 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, that in any proceedings for divorce the C court, either before or by or after the final decree, may make such provision as appears just with respect to the custody and maintenance of children, the marriage of whose parents is the subject of the proceedings. The present matter has been for some time past in the hands of the Divorce Court, and I think that the jurisdiction of that court is an overriding jurisdiction. [His Lordship added that, in his opinion, the order of the justices of April 11, 1932, was bad as the matter was D then res judicata in view of the previous orders of the justices.]

Avory, J.: I agree. I think that the rule should be made absolute on both grounds. With regard to the point regarding jurisdiction I need not repeat what has been said. I will only refer to the words of Bucknill, J., in *Craxton* v. *Craxton* (2) (23 T.L.R. at p. 528): "What right had the justices to give the wife the custody of the child when there was a suit pending in the Divorce Court?" It is true that E in this case a suit is not pending, but s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, puts the matter in the same position as if it were. The inconvenience of holding that there is concurrent jurisdiction in the Divorce Court and in the justices is obvious, for, if the justices may make an order, as in this case, there is nothing to prevent the husband going to the Divorce Court the next day and asking, possibly successfully, for a contrary order. The question might F see-saw between the two courts, producing an absolute scandal. I agree that we ought to uphold the view of Bateson, J., in *Vigon* v. *Vigon and Kuttner* (1) and make this rule absolute.

du Parcq, J.: I am not entirely satisfied that the jurisdiction of the Divorce Court is exclusive, but, even if the justices were wrong in thinking that they had no jurisdiction, I think that the matter was res judicata on April 11, 1932, and on G that ground I agree that the rule should be made absolute.

The wife appealed.

The Guardianship of Infants Act, 1886 (49 & 50 Vict., c. 27), provides:

> Section 5: "The court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either H parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same or otherwise as to costs as it may think just." I

> Section 9: "In the construction of this Act the expression 'the court' shall mean—In England the High Court of Justice or the county court of the district in which the respondent or respondents or any of them may reside. . . ."

The Guardianship of Infants Act, 1925 (15 & 16 Geo. 5, c. 45), provides:

> Section 3 (2): "Where the court under . . . [s. 5 of the Guardianship of Infants Act, 1886] makes an order giving the custody of the infant to the mother, then . . . the court may further order that the father shall pay to

> A the mother towards the maintenance of the infant such weekly or other periodical sum as the court, having regard to the means of the father, may think reasonable."
>
> Section 7 (1): "For the purposes of the Guardianship of Infants Act, 1886, . . . the expression 'the court' shall include a court of summary jurisdiction. . . . (3) Where on an application to a court of summary jurisdiction under the B Guardianship of Infants Act, 1886, . . . the court makes or refuses to make an order, an appeal shall, in accordance with rules of court, lie to the High Court: Provided that, where any such application is made to a court of summary jurisdiction, and the court considers that the matter is one which would more conveniently be dealt with by the High Court, the court of summary jurisdiction may refuse to make an order and in such case no appeal shall lie to C the High Court."

The Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), provides:

> Section 193 (1): "In any proceedings for divorce . . . the court may from time to time, either before or by or after the final decree, make such provision D as appears just with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court."

By the Matrimonial Causes Rules, 1924:

> Rule 34: "After entering an appearance a respondent in a cause may, with- E out filing an answer, be heard in respect of any question as to costs, and a respondent who is husband or wife of the petitioner may be heard also as to custody of or access to children."

J. F. Compton Miller for the wife.
Van Oss and R. N. Kirkby for the husband.

F **SCRUTTON, L.J.**—This case raises, but I am afraid will not decide, a question which has evidently given rise to considerable difficulty. It is unnecessary to say that the Divorce Division of the High Court has jurisdiction over married relations, and by s. 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, it is provided:

> "In any proceedings for divorce . . . the court may from time to time, either G before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of the proceedings. . . ."

By r. 34 of the Matrimonial Causes Rules, 1924, it is provided:

> "After entering an appearance a respondent in a cause may, without filing an H answer, be heard in respect of any question as to costs, and a respondent who is husband or wife of the petitioner may be heard also as to the custody of or access to children."

Mr. William Frederick Bond brought a petition for divorce against his wife, Mrs. Hettie Maud Bond, and she entered an appearance in the suit. She, therefore, under r. 34 of the Matrimonial Causes Rules, 1924, though she did not defend the I case, would be entitled to be heard by the Divorce Division as to the custody of the children of the marriage. The court found her guilty of adultery and made a decree nisi. Before the decree was made absolute on May 4, 1931, Mrs. Bond applied for an order for the custody of her child Alick Bond to a court of summary jurisdiction which has jurisdiction under the Guardianship of Infants Act, 1886, to make orders as to the custody of and access to children in a number of cases where there is no question as to divorce, such as the death of the father or of the mother, or the death of a guardian appointed. The justices, on hearing that proceedings were still pending in the Divorce Division, declined to make an order. They may have so acted under the provisions of s. 7 (3) of the Guardianship of Infants Act, A 1925, which enacts:

> "Provided that, where any such application is made to a court of summary jurisdiction, and the court considers that the matter is one which would more conveniently be dealt with by the High Court, the court of summary jurisdiction may refuse to make an order and in such case no appeal shall lie to the High Court." B

At any rate, they declined to make any order on the application of the mother. That was the first decision of the Uxbridge justices.

The decree was made absolute on May 18, 1931. Mr. Bond had obtained custody of a daughter of the marriage from the Divorce Division, but he had made no application for the custody of Alick Bond, the child in question in this case. On C Aug. 24, 1931, Mrs. Bond again applied to the court of summary jurisdiction sitting at Uxbridge for the custody of Alick Bond, and the Uxbridge justices repeated their refusal to deal with the matter.

Mrs. Bond was not disheartened. On April 11, 1932, she applied a third time to the Uxbridge justices, when the Bench was differently constituted from that of Aug. 24, 1931, for an order for the custody of her son, and on this occasion the D justices made an order for custody of the child in favour of the mother, and ordered Mr. Bond to pay 5s. weekly for the maintenance of the child until he reached the age of sixteen years. According to an affidavit sworn in the proceedings before the Divisional Court the chairman of the justices gave as the ground of their decision that

> "the previous application had been dismissed under a misapprehension, in that E the justices were not then aware that the divorce proceedings had been undefended."

If that was the reason given, I cannot see what that had to do with the matter. The chairman is said to have continued, "or that the said proceedings took place in Lincoln"—that appears to have still less to do with the matter, because the father at the time of the petition was stationed at Cranwell with the Royal Air F Force, and Lincoln was the most convenient place at which to bring the petition—"or that no request was addressed therein to the court in respect of the said child." That appears to be true, but it does not remove the jurisdiction of the Divorce Division, because application may be made after decree absolute. Then he is said to have continued: "and that the previous decision was a mistake." Speaking generally a bench of justices has no authority to overrule the decision of a previous G bench on the ground that it was "a mistake."

On that order being made, Mr. Bond applied for a writ of certiorari that it should be removed into the High Court and there quashed as being made without jurisdiction. The Divisional Court granted the writ of certiorari quashing the order on two grounds. First they said:

> "this is res judicata; the point has been decided on two previous applications H by the court of summary jurisdiction and, there being no evidence of any change of circumstances, it was not open to that court to decide in a way differing from the order which that court had previously made."

It is quite clear that the justices with fresh evidence before them could have altered the order. It might have been shown that the child was four or five years older, I or that the expenses of maintaining the child had increased. Again, there might have been fresh information as to the father's means; but it appears to me clear that the justices could not alter their previous order when there was no evidence before them of any fresh circumstances; and it appears that in this case there was no evidence whatever of any fresh circumstances.

The Divisional Court took the view that the matter was res judicata. I am of the same opinion, and that is sufficient to decide this case. It is an excellent rule not to go, for the purposes of your decision, beyond what is necessary. I see that

A in *Vigon* v. *Vigon and Kuttner* (1) the Court of Appeal declined to decide the point as to jurisdiction. The Divisional Court has in this case taken the view that the jurisdiction of the Divorce Division is paramount or overriding in the sense, as I understand it, that when it has before it the principal question of the relations of husband and wife under the marriage tie, including the custody of children, it is the body which alone is seised of these questions and it is not open, while divorce B proceedings are pending, to parties to those proceedings who have appeared in the court to go to a court of summary jurisdiction and ask for an order on a matter which is within the jurisdiction of the Divorce Division. I have great sympathy with that view, but I do feel that the language of the relevant statutes gives rise to some difficulty, because the Guardianship of Infants Act, 1925, though it might have provided that where divorce proceedings were pending the sole jurisdiction as C to the custody of children should be with that Division, has not done so, but has provided by s. 7 (3) that where such an application is made to a court of summary jurisdiction and the court considers that the matter is one which would more conveniently be dealt with by the High Court, the court of summary jurisdiction may refuse to make an order, and in such a case no appeal shall lie to the High Court. Obviously it is extraordinarily inconvenient if a court of summary jurisdiction has D equal jurisdiction with the High Court in a divorce matter as to the custody of children, and I feel that there is a great deal to be said for the view taken by the Divisional Court, but at present I do not think it right that the Court of Appeal should commit themselves to decide that point one way or the other, when that course is unnecessary. In this case there is a conclusive answer to the appeal against the writ of certiorari quashing the order of the court of summary juris- E diction, namely, that the decision complained of was one given when the matter which it decided had already been decided between the same parties on the same facts.

For these reasons I think the appeal fails and must be dismissed with such costs as are appropriate to a poor person's case.

F **GREER, L.J.**—I agree. Subsection (1) of s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, provides that

> "In any proceedings for divorce . . . the court may from time to time either before or by or after the final decree make such provision as appears just with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct G proper proceedings to be taken for placing the children under the protection of the court."

It is observable that power is given to the court to make those orders, but there is no direction that the court shall make any orders, nor is there in the statutes, so far as I know, anything which says in so many words that the power so granted to the Divorce Division of the High Court shall exclude the power of any judge H before whom a similar application may be made under the Guardianship of Infants Act, 1886, or of any court, whether it be a court of summary jurisdiction or the High Court. But I agree that it is extremely inconvenient that this application should be made to any court other than the Divorce Division of the High Court, while the Divorce Division has power to make the order which ought to be made on full consideration of the disputes that have taken place between husband and I wife.

But though I express some doubt whether the jurisdiction is exclusive, I do not think it necessary to decide that point on the present appeal, because I am satisfied that the other reason given by the Divisional Court is right, namely, that in this case the parties have, both before and since the decree was made absolute, litigated before this court of summary jurisdiction the question whether that court was entitled to make any order, notwithstanding the divorce proceedings and the powers given to the Divorce Division. As I understand the decision of the courts of summary jurisdiction on both these occasions, it was based on the ground of law that they had no jurisdiction to deal with the matter at all. That decision may be right or it may be wrong, but so long as it stands, whether it is right or wrong in law, it is binding on the parties to the litigation, and there is in law an estoppel which prevents the divorced wife from making a fresh application based on the same facts, so far as that matter for decision is concerned, namely, so far as it is concerned with the jurisdiction of the court of summary jurisdiction.

For these reasons I agree that the appeal should be dismissed.

SLESSER, L.J.—On the first application of Mrs. Bond for the custody of this child on May 4, 1931, the court of summary jurisdiction decided that, as the matter was then pending in the High Court of Justice, they had no jurisdiction to make an order, at any rate until the decree was made absolute. On May 18, 1931, the decree was made absolute, and on Aug. 24, 1931, on the second application of Mrs. Bond for the custody of this child, the court of summary jurisdiction dismissed the application with the words, "We cannot deal with this." I am of opinion, therefore, that the justices decided conclusively, at any rate, on Aug. 24, 1931, that, the decree absolute having been made in the Divorce Division, they had no jurisdiction. On Mrs. Bond's third application for the custody of this child, the court of summary jurisdiction purported to exercise jurisdiction notwithstanding their previous decision, and it is argued that, in so far as the statute permits more than one application to the court of summary jurisdiction, there was no estoppel per rem judicatam by reason of the earlier decisions. I think that this argument is ill-founded. The question which was raised on the third occasion, when this court of summary jurisdiction entertained jurisdiction, was identical both as regards the subject-matter and the matters to be decided in law as on the two earlier occasions. On all three occasions the only question of jurisdiction was whether what had happened in the Divorce Court was or was not of such a compelling nature that the court of summary jurisdiction had no jurisdiction, and, therefore, as has been stated by my Lords, this case is concluded by the decision on the earlier occasions by the courts of summary jurisdiction that they had no jurisdiction, which operated as an estoppel on the third occasion, and to that extent I think the decision of the King's Bench Division was right.

I would reserve, however, the further grounds which are stated by two of the learned judges in the Divisional Court, but not by DU PARCQ, J., as to the respective authorities of these two courts. I do find, without expressing any concluded opinion, at least one indication that the Divorce Division has, as has been stated in one of the cases, a paramount jurisdiction, and that is in s. 7 (3) of the Guardianship of Infants Act, 1925, where in a proviso it is expressly provided that where an application is made to a court of summary jurisdiction and the court considers that the matter is one which would more conveniently be dealt with by the High Court, the court of summary jurisdiction may refuse to make an order. Therefore, one of the grounds upon which they can refuse to make the order is the consideration that the matter would more conveniently be dealt with by the High Court. Those words seem inapt to deal with a case which is already before the High Court. If, therefore, there is an entirely concurrent jurisdiction, it would appear that the court of summary jurisdiction has power under that proviso not to deal with the matter when it is one which would more conveniently be dealt with by the High Court, but may not take that into consideration when it is actually being dealt with by the High Court. That appears to afford some ground for the view that the legislature contemplated that, when the High Court has seisin of the matter, the matter would not be debated before the court of summary jurisdiction. As I say, I express no concluded opinion on that point; it is sufficient to say on the question of jurisdiction there is here a complete estoppel.

Solicitors: *Pierron & Morley*; *W. A. L. Osborn.*

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

Re GORRINGE AND BRAYBON, LTD.'S, CONTRACT

[CHANCERY DIVISION (Bennett, J.), February 9, 1933]

[Reported [1934] Ch. 614; 151 L.T. 347]

Trustee—Partition—Land held by trustees for sale—Power to partition—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 28 (3) (*a*).

Trustees for the sale of land **held** to be entitled to the net proceeds of the sale absolutely within s. 28 (3) (a) of the Law of Property Act, 1925, and so to be competent to partition the land.

Notes. Followed: *Re Brooker, Public Trustee* v. *Young*, [1934] All E.R. Rep. 703.

Case referred to:

(1) *Re Thomas, Thomas* v. *Thompson*, [1930] 1 Ch. 194; 99 L.J.Ch. 140; 142 L.T. 310; Digest Supp.

Summons.

At the date of the partition deed hereafter mentioned the legal estate in certain land at Kingston-by-Sea in the county of Sussex was vested in trustees upon the statutory trusts, and the proceeds of sale to arise under the statutory trusts were vested as to one moiety in Lieut.-General Sir George Frederick Gorringe beneficially, as to one-sixth part in William Hugh Gorringe beneficially, as to another sixth part in Sir George Frederick Gorringe and William Hugh Gorringe upon certain trusts under which Mabel Elizabeth King was entitled to a life interest with remainder to her children with certain remainders over in default of children, and as to the remaining sixth part in the same persons upon similar trusts in favour of Dorothea Lewknor Gorringe and her children. By a partition deed dated Nov. 21, 1927, the statutory trustees partitioned the land subject to the statutory trusts among the persons entitled to it, and conveyed a certain part of it to Sir George Frederick Gorringe in fee simple in severalty. By a contract dated Aug. 12, 1932, made between Sir George Frederick Gorringe, of the one part, and Braybons, Ltd., of the other part, Sir George Frederick Gorringe agreed to sell to Braybons, Ltd., part of the land conveyed to him by the said partition deed.

An abstract was delivered to the purchasers and they delivered a requisition alleging that the partition deed was void in view of the decision of FARWELL, J., in *Re Thomas* (1). As the requisition was persisted in the vendor took out this summons claiming that a good title had been shown.

Gavin Simonds, K.C., and *Raymond Jennings* for the vendor.

Swords, K.C., and *Gravenor Hewins* for the purchasers.

BENNETT, J. [after stating the facts set out above, and reading s. 28 (3) of the Law of Property Act, 1925, continued:] Sir George Gorringe acquired the two sixth shares of two of his brothers, so that on Dec. 31, 1925, he was absolutely entitled to one moiety of the property, William Gorringe was absolutely entitled to one-sixth, and the two brothers as trustees were entitled to the remaining two-sixths. The question is whether they were "absolutely entitled" within the meaning of the subsection, and whether the deed of partition is valid. There is no doubt that as regards one moiety Sir George was entitled to give the consent required by the subsection, and William was entitled to do so as regards one-sixth. Were the two of them as trustees so entitled as regards the remaining two-sixths? If the property had been sold under the statutory trusts, these two persons would have been absolutely entitled to the net proceeds of sale in the same proportions, and it is contended that the two brothers as trustees are absolutely entitled to the two-sixths and able to give the necessary consent.

On the other hand it is contended that the two-sixths are not "absolutely" vested in the trustees, because they are trustees, and that the word "beneficially" must be read into the subsection. This contention is to some extent based on the decision in *Re Thomas* (1).

But that case seems plainly distinguishable. There the trustees of the will in whom the property was vested, held it upon different trusts as regards different undivided shares, and the result of the Law of Property Act, 1925, was that the entirety of the land became vested in the trustees upon the statutory trusts. It was argued that the tenants for life were each absolutely entitled to one-fourth. FARWELL, J., in his judgment says:

> "They contend that the settled fourths are absolutely vested in the respective life tenants, who are of full age. It is impossible, however, to accede to that contention, and therefore s. 28 (3) does not apply."

That is all that was decided in that case, and it is distinguishable from the present case. In my judgment, the two trustees here were entitled to the two-sixths of the net proceeds of sale absolutely, within the meaning of s. 28 (3).

I therefore make a declaration that the partition was validly effected under s. 28 (3) and that the vendor has shown a good title to the property.

Solicitors: *Quicke & Card*, for *H. Montague Williams & Son*, Brighton; *Thomas Eggar & Son*, for *Nye & Donne*, Brighton.

GOLDEN HORSESHOE (NEW), LTD. *v.* THURGOOD (INSPECTOR OF TAXES)

[COURT OF APPEAL (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), December 6, 7, 15, 1933]

[Reported [1934] 1 K.B. 548; 103 L.J.K.B. 619; 150 L.T. 427; 18 Tax Cas. 280]

Income Tax—Deduction in computing profits—Purchase of "tailings" from gold-mining company—Purchaser treating tailings for extraction of gold—Deduction of cost of tailings from proceeds of sale of gold—Income Tax Act, 1918 (8 *& 9 Geo.* 5, *c.* 40), *Sched. D, Rules applicable to Cases I and II, r.* 3 (*a*).

The G.H.S. company was incorporated in 1899, and for more than a quarter of a century worked gold mines in Western Australia. The residuals or "tailings" that remained after the extraction of the gold from the crushed ore were deposited in five large dumps and accumulated to the amount of over two-and-a-half million tons. In 1929 the G.H.S. company sold its gold mines, but reserved the tailings, and retained the right for ten years to treat the tailings for the benefit of the G.H.S. company or its nominee and other rights, including the right to sell the tailings either for removal from the site or for treatment on the site. The G.H.S. company prepared plant for the treatment of the tailings, and in September, 1929, a new company was incorporated to take over the tailings, plant, machinery and other assets of the G.H.S. company. Of the purchase price paid by the new company, £122,750 was allocated to the tailings, and this figure was accepted as correct by the Inland Revenue Commissioners. The business of the new company at all times after it commenced operations was the extraction of gold from the tailings and the sale of the gold. The new company claimed that in its assessment to income tax for the period from Sept. 9, 1929, to Sept. 30, 1930, there should be set off against the proceeds of sale of gold sold during that period the cost to the new company of the tailings worked during that period.

Held: a deduction should be allowed as claimed by the new company because the cost to the new company of the tailings was money wholly and exclusively laid out or expended for the purpose of its trade within the Income Tax Act, 1918, Sched. D, Rules applicable to Cases I and II, r. 3 (a), the tailings constituting the new company's raw material and not part of its fixed capital.

Dictum of Channell, J., in *Alianza Co., Ltd.* v. *Bell* (1), [1904] 2 K.B. at p. 678, applied.

Notes. The Income Tax Act, 1918, Sched. D, Rules applicable to Cases I and II, r. 3 (a), was replaced by the Income Tax Act, 1952, s. 137 (a).

Considered: *Davies* v. *Shell Co. of China, Ltd.* (1951), 32 Tax Cas. 145; *Stow Bardolph Gravel Co.* v. *Poole*, [1954] 3 All E.R. 637. Referred to: *Van den Berghs, Ltd.* v. *Clark*, [1935] All E.R. Rep. 874; *Lowry* v. *Consolidated African Selection Trust, Ltd.*, [1938] 4 All E.R. 689; *Abbott* v. *Albion Greyhounds (Salford), Ltd.*, [1945] 1 All E.R. 308; *Reynolds and Gibson* v. *Crompton*, [1950] 2 All E.R. 502.

For the Income Tax Act, 1952, s. 137, see 31 Halsbury's Statutes (2nd Edn.) 134.

Cases referred to:

(1) *Alianza Co.* v. *Bell*, [1904] 2 K.B. 666; 73 L.J.K.B. 755; 91 L.T. 463; 53 W.R. 23; 20 T.L.R. 634, K.B.; affirmed, [1905] 1 K.B. 184; 74 L.J.K.B. 219; 92 L.T. 184; 53 W.R. 257; 21 T.L.R. 134; 5 Tax Cas. 60, C.A.; affirmed, [1906] A.C. 18; 75 L.J.K.B. 44; 93 L.T. 705; 54 W.R. 413; 22 T.L.R. 94; 50 Sol. Jo. 74; 5 Tax Cas. 172, H.L.; 28 Digest 47, *238*.

(2) *City of London Contract Corpn., Ltd.* v. *Styles* (1887), 4 T.L.R. 51; 2 Tax Cas. 239, C.A.; 28 Digest 47, *239*.

(3) *John Smith & Son* v. *Moore*, [1921] 2 A.C. 13; 90 L.J.P.C. 149; 125 L.T. 481; 37 T.L.R. 613; 65 Sol. Jo. 492; 12 Tax Cas. 266, H.L.; Digest Supp.

(4) *Inland Revenue Comrs.* v. *Adam*, 1928 S.C. 738; 14 Tax Cas. 34; Digest Supp.

(5) *Miller* v. *Fairie*, 1878, 6 R. (Ct. of Sess.) 270; 16 Sc.L.R. 189; Digest Supp.

(6) *Coltness Iron Co.* v. *Black* (1881), 6 App. Cas. 315; 51 L.J.Q.B. 626; 45 L.T. 145; 46 J.P. 20; 29 W.R. 717; 1 Tax Cas. 287, H.L.; 28 Digest 6, *13*.

(7) *Kauri Timber Co., Ltd.* v. *Comr. of Taxes*, [1913] A.C. 77; 109 L.T. 22; 28 Digest 47, *237c*.

(8) *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328; 41 L.J.C.P. 146; 26 L.T. 709; 20 W.R. 990, Ex. Ch.; 31 Digest (Repl.) 206, *3376*.

(9) *Wiltshear* v. *Cottrell* (1853), 1 E. & B. 674; 22 L.J.Q.B. 177; 20 L.T.O.S. 259; 17 Jur. 758; 118 E.R. 589; 31 Digest (Repl.) 202, *3333*.

(10) *Jones* v. *Tankerville*, [1909] 2 Ch. 440; 78 L.J.Ch. 674; 101 L.T. 202; 21 T.L.R. 714.

(11) *Knowles* v. *McAdam* (1877), 3 Ex D. 23; 47 L.J.Q.B. 139; 37 L.T. 795; 26 W.R. 114; 1 Tax Cas. 161; 28 Digest 6, *12*.

(12) *Atherton* v. *British Insulated and Helsby Cables*, [1925] 1 K.B. 421; 94 L.J.K.B. 319; 132 L.T. 288; 41 T.L.R. 55, C.A.; affirmed, [1926] A.C. 205; 95 L.J.K.B. 336; 134 L.T. 289; 42 T.L.R. 187; 10 Tax Cas. 155, H.L.; 28 Digest 52, *264*.

(13) *Mallett* v. *Staveley Coal and Iron Co.*, [1928] 2 K.B. 405; 97 L.J.K.B. 475; 139 L.T. 241; 13 Tax Cas. 772, C.A.; Digest Supp.

(14) *Morley* v. *Lawford & Co.* (1928), 140 L.T. 125; 45 T.L.R. 30; 72 Sol. Jo. 825; 14 Tax Cas. 229, C.A.; Digest Supp.

(15) *Anglo-Persian Oil Co., Ltd.* v. *Dale*, [1932] 1 K.B. 124; 100 L.J.K.B. 504; 145 L.T. 529; 47 T.L.R. 487; 75 Sol. Jo. 408; 16 Tax Cas. 253, C.A.; Digest Supp.

(16) *Vallambrosa Rubber Co.* v. *Farmer (Surveyor of Taxes)*, 1910 S.C. 519; 5 Tax Cas. 529; 28 Digest 44, *k*.

(17) *Smith* v. *Incorporated Council of Law Reporting for England and Wales*, [1914] 3 K.B. 674; 83 L.J.K.B. 1721; 111 L.T. 848; 30 T.L.R. 588; 6 Tax Cas. 477; 28 Digest 52, *262*.

(18) *Cape Brandy Syndicate* v. *Inland Revenue Comrs.*, [1921] 1 K.B. 64; 12 Tax Cas. 358; 90 L.J.K.B. 113; 37 T.L.R. 33; affirmed, [1921] 2 K.B. 403; 90 L.J.K.B. 461; 125 L.T. 108; 37 T.L.R. 402; 65 Sol. Jo. 377; 12 T.C. 368, C.A.; 42 Digest 666, *765*.

(19) *Martin* v. *Lowry*, [1926] 1 K.B. 550; 95 L.J.K.B. 497; 135 L.T. 523; 42 T.L.R. 233; 70 Sol. Jo. 301; 11 Tax Cas. 297, 310, C.A.; affirmed, [1927] A.C. 312; 96 L.J.K.B. 379; 136 L.T. 580; 43 T.L.R. 116; 71 Sol. Jo. 18; 11 Tax Cas. 320, H.L.; 28 Digest 22, *114*.

(20) *Boileau* v. *Heath*, [1898] 2 Ch. 301; 67 L.J.Ch. 529; 78 L.T. 622; 46 W.R. 602; 34 Digest 608, *62*.

Case Stated by the commissioners for the general purposes of the income tax for the City of London pursuant to the provisions of s. 149 (1) of the Income Tax Act, 1918, for the opinion of the High Court of Justice.

"1. At meetings of the said commissioners held at Gresham College, Basinghall Street, in the City of London, on Feb. 22 and March 21, 1932, Golden Horse Shoe (New), Ltd., an incorporated company, having its registered office at Friars House, 39/41, New Broad Street, in the said City (hereinafter called 'the appellant company') appealed against assessments to income tax made upon it under the rules applicable to Case I of Sched. D of the Income Tax Act, 1918, for the year ended April 5, 1930, in the sum of £5,256, less wear and tear £530.

"2. The question for the decision of the commissioners was whether for the purposes of assessment of its profits and gains under Case I of Sched. D of the Income Tax Act, 1918, the appellant company was entitled to deduct any sum in respect of certain dumps of tailings, its rights in which had been acquired by the appellant company from the Golden Horse Shoe Estates Co., Ltd.

"3. The Golden Horse Shoe Estates Co., Ltd. (hereinafter called 'the old company') was formed in 1899 to acquire the undertaking and assets of the Golden Horse Shoe Mining Co., Ltd., and to carry on the business of a gold-mining company. For more than a quarter of a century the old company worked gold mines in Western Australia. During this period it had been a great producing company and had raised approximately 5,000,000 tons of ore. The residuals or 'tailings' that remained after the extraction of gold from the crushed ore were deposited and accumulated partly on surface lands comprised in the old company's mining leases and partly on sites of which it held 'tailings leases.' Several attempts were made during the lifetime of the old company to turn these tailings to profitable account by an extraction of the gold they were known to contain. It was not found possible, however, with the plant then available, to re-treat them at a remunerative cost.

"In June, 1926, the old company found itself short of funds, and, efforts to raise fresh capital having proved unavailing, it closed down its mines. At the end of 1928 it came under the control of a group whose principal representative was Mr. Frederic Howard Hamilton. Mr. Hamilton, who on the assumption of control by his group became the chairman of the old company, stated in the course of his evidence before us that in the opinion he formed at the time the company had potentialities. He and his colleagues on the newly constituted board considered that if an amalgamation with a neighbouring company could be effected the mines might be successfully re-opened. Moreover, with the assistance of reports obtained from experts, Mr. Hamilton and his co-directors came to the conclusion that by the installation of modern plant, with which at the time the old company was not equipped, the tailings might be profitably re-treated.

"The position of affairs at the end of 1928 is set out in a circular letter addressed by the secretary to the shareholders of the old company on Dec. 8, 1928.

"Acting upon the view that an amalgamation of its mines with those of a neighbouring company was desirable, the old company entered into negotiations with Lake View and Star, Ltd. The agreement referred to in the next paragraph hereof was the outcome of these negotiations.

A "4. By an agreement in writing dated Feb. 22, 1929, and made between the old company of the one part and Lake View and Star, Ltd., of the other part, after reciting that Lake View and Star, Ltd., owned free from incumbrances twenty-nine gold-mining leases in the Kalgoorlie District of Western Australia, certain of which leases adjoined leases belonging to the old company, it was agreed (inter alia) as follows:

B " '(i) The old company should sell and transfer and Lake View and Star, Ltd., should purchase and take over as from the completion date fixed by cl. 7 thereof the gold-mining and other leases at Kalgoorlie aforesaid belonging to the old company (particulars of which leases were set out in the schedule thereto) and the mining rights, mills, stamps, dwelling-houses, C offices, buildings, ore-houses, plant, machinery, stores, stocks, ores at grass and all other the undertaking property and rights of the old company in Western Australia other than (a) the tailings dumps and the rights in connection therewith referred to in cl. 3 of the agreement, and (b) cash bullion money on deposit, investments or moneys due or to become due on shares or on capital or debts due to the vendor company on the said completion D date, all of which (except as aforesaid) were thereinafter referred to as the "said property.". . .

" '(iii) There were reserved from the sale all tailings dumps upon the said property, and the old company or its nominee was to have the sole right for a period of ten years from the date of the agreement to treat the said dumps for the benefit of the old company or its nominee and in connection therewith E was also to retain and have for the said period free of charge certain rights therein specified including the right to sell all or any part of the said dumps either for removal from the said property or for treatment thereon. It was also provided that at the end of the said period of ten years, the dumps, whether treated, or untreated, should belong to and be the property of Lake View and Star, Ltd. . . .'

F "The consideration for the sale was (in part) the allotment to the old company or its nominees of 900,000 shares of 4s. each in the capital of Lake View and Star, Ltd.

"5. Under the provisions of the above-mentioned agreement the old company parted with all its leases, both mining leases and tailings leases, and was left with only such properties and rights as were expressly excepted from the G sale by cl. 1 of the agreement. The tailings dumps were excepted from the sale because it was felt that with new and up-to-date plant a profit could be made from their re-treatment.

"6. The tailings dumps referred to in the said agreement are five large conical dumps, known respectively as the Main Conical, the Main Northern, the East Dump, the West Dump, and the South Dump. The tallest is 245 ft. H high. The evidence given before us showed that the tailings of which they are composed take the form of a fine powdery substance that is readily dispersed in dry and windy weather, and that the old company incurred considerable expenditure in an endeavour to abate the nuisance to the neighbourhood occasioned by the dispersal of dust from the dumps. The dumps are situated on lands comprised in mining and tailings leases granted to the old I company. A tailings lease, unlike a mining lease, contains no conditions as to the employment of labour. In view of the reports as to their value the old company commenced construction of a reduction plant for treatment of the tailings, which were estimated to amount to over 2½ million tons. The balance-sheet of the old company at Sept. 5, 1929, shows the costs to date of the new re-treatment plant at £11,991.

"7. The old company was wound up and the said shares in Lake View and Star, Ltd. (allotted to the old company as aforesaid) were distributed amongst the shareholders, and the appellant company was formed to take over the remaining assets and to treat the tailings dumps. The scheme is set out in the annual report of the old company dated August, 1929. A

"8. The appellant company was incorporated on Sept. 9, 1929, as a company limited by shares under the Companies Acts, 1908 to 1917. The capital of the company was £220,000, divided into 1,100,000 shares of 4s. each. The objects for which the company was formed, as stated in the memorandum of association, included the following: B

" '(a) To adopt, enter into, and carry into effect, with or without modification, the agreement referred to in art. 3 of the articles of association of the company for the acquisition by the company of the undertaking property and assets of the Golden Horse Shoe Estates Co., Ltd., and to complete the purchase of such undertaking, property and assets, or any part thereof, and to develop, work, turn to account, or deal with the same, and to exercise any of the hereinafter-mentioned powers and objects of the company, which powers and objects may be exercised independently of the primary object stated in this clause. C

" '(b) To prospect for, dredge for, open, work, explore, quarry, develop, excavate, win, purchase or otherwise obtain tin, gold, platinum, silver, copper, coal, iron, precious stones, and other minerals or deposits, oil, mineral and other rights, properties, and works, and to carry on and conduct the business of raising, crushing, washing, smelting, reducing and amalgamating ores, metals and minerals, and oils, to render the same saleable and fit for use, and to buy, sell, refine and deal in bullion, specie, coin, precious metals and precious stones, oil and other substances or products on, within, or under any property of the company, and to grant prospecting, mining and other licences, rights, or privileges for such purposes.' D E

"9. By an agreement in writing dated Sept. 9, 1929, and made between the old company and Edgar Protheroe Jones, the liquidator thereof, of the one part and the appellant company (thereinafter called 'the new company') of the other part, it was agreed (inter alia) as follows: F

" '(i) The old company and its liquidator should sell and transfer and the new company should purchase and take over all the undertaking, business, machinery, plant, chattels, money, credits, debts, bills, notes, goodwill, things in action (including the benefit of all pending contracts), shares, securities, and other property and effects of the old company of any nature or kind whatsoever. G

" 'The consideration for the sale was the agreement by the new company: (i) to pay all existing liabilities of the old company; (ii) to pay the costs and expenses of the winding-up of the old company; and (iii) to allot and issue to the liquidator of the old company 1,099,993 shares of 4s. each in the capital of the new company for distribution amongst the members of the old company share for share.' H

"10. By a licence in writing dated Nov. 25, 1930, after reciting (inter alia) the agreement of Feb. 22, 1929, mentioned in para. 4 hereof, Lake View and Star, Ltd. (thereinafter called 'the licensor') granted and demised unto the appellant company (thereinafter called 'the licensees') exclusive licence, use, and authority by itself, its servants, agents, and workmen, either with or without horses, vehicles (motor driven or otherwise), or tramways, and as often as might in the opinion of the licensee be necessary, to enter upon the surface of the whole of the leases mentioned in Sched. I thereto (namely, the lands upon which the said tailings dumps were situate) (i) for the purpose of removing the said tailings from off the said leases mentioned in Sched. II thereto, and that whether for the purpose of treating the same as in terms of sub-cl. (f) of cl. 3 of the thereinbefore recited agreement or (ii) for the purpose of depositing the said tailings which should be treated upon the said leases or any of them on I gold-mining leases 1085E and 1219E for a term of ten years from Feb. 22, 1929, for the purposes of removing and treating the said tailings, yielding and paying therefor during the said period of the licence thereby granted in advance a rent of 1s. per annum. And it was thereby mutually agreed and declared by and between the parties thereto that at the expiration or sooner determination of the licence thereinbefore granted, all tailings, whether treated or untreated, and wheresoever deposited, should belong to and be the absolute property of the licensor.

"By way of explanation of the circumstances in which the said licence was granted Mr. Hamilton stated in the course of his evidence before us that inasmuch as the Government of Western Australia had a certain charge upon the whole property of both Lake View and Star, Ltd., and the old company, the appellant company's lawyer in Western Australia advised that the position as between the appellant company and Lake View and Star, Ltd., should be defined.

"11. At the date of the sale by the old company to the appellant company the boards of the two companies were composed of the same persons. The shareholders and officers were also the same. In January, 1932, the books and accounts of the old company were handed over to the appellant company.

"12. There was evidence which the commissioners accepted that the plant and debtors were worth the figure set out in this account. The 4s. shares of the appellant company were first quoted on the Stock Exchange on Oct. 22, 1929, when the price was 1s. 6d. to 1s. 7½d.

"13. The business carried on by the appellant company from its inception has been that of extracting gold from tailings by a re-treatment process and selling the gold so obtained.

"14. The directors' report was presented at the ordinary general meeting of the appellant company held on Dec. 22, 1930, together with the audited statement of accounts covering the period from the inception of the company on Sept. 9, 1929, to Sept. 30, 1930. The profit-and-loss account showed a debit of £122,750 in respect of 'tailings purchased' and a credit of £104,102 in respect of 'tailings stock at Sept. 30, 1930.' The amount of the debit corresponds with the amount shown as allocated to 'tailings' in the account referred to in para. 12 hereof. The manner in which the credit in respect of stock at Sept. 30, 1930, has been computed is shown in a columnar statement.

"Mr. Arthur Cutforth, a fellow of the Institute of Chartered Accountants, a member of the Council of the Institute of Chartered Accountants, and a member of the firm of Deloitte, Plender, Griffiths & Co., chartered accountants, gave evidence before the commissioners to the following effect:

> " 'He had examined the printed balance-sheets of the appellant company for the two years to September, 1930, and September, 1931, a copy of the report dated Nov. 3, 1928, addressed by Mr. McAulay to Mr. Hamilton, together with the schedule annexed thereto, and the columnar statement herein referred to. He agreed that the figures contained in the schedule to Mr. McAulay's report purported to show the estimated potentialities of the several tailings dumps therein described, that the columnar statement was based upon the figures in the schedule to Mr. McAulay's report, and that the columnar statement showed the total estimated value of the dumps prior to the commencement of re-treatment at a figure of £147,686. On the footing that the appellant company had purchased the dumps for £122,750 and assuming the accuracy of Mr. McAulay's estimates and of the estimates of the costs of re-treatment, the columnar statement in his opinion correctly apportioned the purchase price amongst the several dumps respectively. The method adopted by the appellant company in computing the value of the untreated tailings stock remaining on hand at Sept. 30, 1930, for the purposes of its accounts was in his view correct. In his opinion the tailings in

question were floating assets and not fixed assets and were rightly dealt with as stock-in-trade of the appellant company.'

"15. On behalf of the appellant company it was contended:

"(i) That the trade carried on by the appellant company was not a trade of mining, and that upon no true analogy could the operations of the appellant company be compared with operation characteristic of the trade of gold mining;

"(ii) That the rights acquired by the appellant company in the tailings dumps were rights of property in a substance severed from the soil, and that at no material time did the dumps or the tailings of which they were composed form a part of the land on which they were deposited;

"(iii) That the tailings were the raw material of the appellant company's trade, and that for the purpose of the computation of the appellant company's assessable profits the tailings ought to be regarded as a part of the company's stock-in-trade;

"(iv) That in the computation of the appellant company's assessable profits for the period from Sept. 9, 1929, to Sept. 30, 1930, there should be deducted from the proceeds realised by sales of bullion the cost to the company of the tailings treated during the period, and that such cost had been correctly computed in the preparation of the company's accounts for the period; and

"(v) That the assessment made upon the appellant company ought to be reduced to the sum of £426 less an allowance of £426 on account of wear and tear.

"16. For the Inland Revenue it was contended:

"(i) That such rights as the appellant company had in the tailings dumps were part of the undertaking which the company was formed to acquire, and that any sum paid therefor was capital expenditure.

"(ii) That the tailings dumps formed part of the land on which they were deposited, but (whether technically this was so, or not) the purchase of the appellant company's rights in the tailings dumps was the purchase of a wasting asset which formed part of the capital of the company.

"(iii) That any sum paid by the appellant company for the acquisition of its rights in the tailings dumps was capital expenditure and was not a proper deduction in arriving at the appellant company's profits and gains under Case I of Sched. D of the Income Tax Act, 1918.

"(iv) Alternatively, (i) that the true value of the said 1,099,993 shares (which formed part of the consideration for the acquisition of (inter alia) the said tailings dumps) was not 4s. per share but a sum not exceeding 1s. 7½d. per share, and (ii) that the consideration paid by the appellant company for its rights in the said tailings dumps was (a) the true value of the said shares, (b) the liabilities discharged by the appellant company, and (c) the liquidator's expenses, less such proportion thereof as was attributable to the assets taken over by the appellant company other than the said tailings dumps.

"(v) That the assessment was correctly made and should be increased to £5,476 less wear and tear £530.

"17. The following cases were referred to: *Alianza Co., Ltd.* v. *Bell* (1), *City of London Contract Corpn., Ltd.* v. *Styles* (2), *John Smith & Son* v. *Moore* (3), *Inland Revenue Comrs.* v. *Adam* (4), and *Miller* v. *Fairie* (5).

"The commissioners found that the sum of £122,750, the purchase price of the tailings, was not deductible for the purposes of income tax and disallowed the appeal. The appellants thereupon expressed their dissatisfaction with the findings of the commissioners as being erroneous in point of law and required them to state a Case for the opinion of the High Court of Justice."

Sir W. A. Jowitt, K.C., and *F. H. Talbot* for the company.

The Solicitor-General (*Sir Boyd Merriman, K.C.*) and *R. P. Hills* for the Crown.

FINLAY, J.—This is a case which is not free from difficulty. On the whole, I have arrived at the view that the city commissioners were right.

The case is one in which I think it is necessary to ascertain, first, what were the facts as they have been found for us, and then to endeavour to apply the principle of law which has to be applied. I agree with a very great deal that Sir William Jowitt has said, and I agree with him that one has to ascertain—and it is by no means an easy thing to do—where the line is to be drawn in cases of this class, and then to see on which side of the line on the facts of the particular case the question to be decided falls.

The Golden Horseshoe (New), Ltd., an English company, appealed against an assessment to Sched. D. The question which arose for the decision of the commissioners was, as they themselves define it, whether the appellant company was entitled to deduct any sum in respect of certain dumps of tailings, its rights in which had been acquired by the appellant company from the Golden Horse Shoe Estates Co., Ltd. It is not necessary that I should go in great detail through the facts which are set out on the third and the following paragraphs of the case. The Golden Horse Shoe Estates Co., Ltd., called the old company, was formed as long ago as 1899; it was formed to acquire the undertaking of a gold-mining company; and for more than a quarter of a century it had worked gold mines. It extracted large quantities of gold. There were what are called in the case, residuals or tailings, and those were deposited and accumulated, partly, at all events, on surface lands. Efforts were made to turn these tailings to account, but they did not prove profitable, and the result was that the tailings remained in large mounds containing thousands of tons. The old company, apparently, got into some difficulty, and the result was that the mine of the old company was incorporated with the mines of a neighbouring company. It is not necessary to go into the negotiations, but the substance is that the old company conceived that the tailings might probably, in the light of the development of modern knowledge, be turned to account, and, in the transfer by the old company of its mine to the Lake View and Star, Ltd., the tailings, dumps, and rights in connection therewith were excluded, and the old company was to have the sole right for a period of ten years from the date of the agreement to treat the said dumps for the benefit of the old company or its nominees. The tailings were in five large dumps, the tallest being 245 ft. high. The old company proceeded to start a reduction plant for the treatment of the tailings, which were estimated to amount altogether to over two-and-a-half million tons. The old company having, as I have explained, transferred the bulk of its business to Lake View and Star, Ltd., was then wound up, and the new company, who are the appellants, was formed in order to acquire these dumps, to treat them, and to endeavour to make a profit by treating them.

The new company having been formed, it acquired the dumps, and proceeded to work them. In para. 13 of the Case it is stated:

> "The business carried on by the appellant company from its inception has been that of extracting gold from tailings by a re-treatment process and selling the gold so obtained."

Documents in the case show that elaborate investigations were made by borings and otherwise, experiments, of course, designed to establish whether as a fact these tailings could be profitably treated, and the conclusion, apparently, arrived at was that they could be profitably treated. The appellant company was formed to treat them and has treated them, and it is in respect of the profits which it has so made that the question, by no means free from difficulty, now arises.

The case came before the City of London commissioners; the various contentions of the parties were put before the commissioners, and some, at all events, of the most important of the cases were put and the commissioners said:

> "The commissioners found that the sum of £122,750, the purchase price of the tailings, was not deductible for the purposes of income tax and disallowed the appeal."

The point in the case is whether that was capital expenditure and, therefore, not deductible, or whether it was expenditure in the nature of income expenditure and

therefore deductible. To put it in another way, was it like money used to acquire A
a mine which was to be worked, in which case it is clear that it would not be deductible, or was it like money used to acquire stock-in-trade; was it like money which a draper expends in order to stock his shop, in which case it would be clear that it would be deductible?

A good deal was said, both in the argument of Sir William Jowitt and in the
argument of the Solicitor-General, as to whether this was or was not a question of B
fact. Of course, if it was a question of fact, and if there was evidence to support the view of the commissioners, that would end the matter, because on any question of fact their view is decisive; but, while keeping the point open, I do not propose to treat the case on that basis, for I think there is force in the contention of Sir William Jowitt that here what has really happened is that the commissioners have
stated the facts, and then have arrived at a conclusion on those facts, and that the C
conclusion is really a conclusion of law, namely, whether, applying the correct principles of law to the facts as found, the deduction is one which can or which cannot be made. I propose, therefore, to examine the facts as they have been found, attaching weight, of course, as I naturally should attach weight, to the conclusion arrived at by the city commissioners, but not treating it as a conclusion
of fact in the sense of being a conclusion by which I am necessarily bound. A D
number of cases were cited to me. I do not think it is necessary, or that it would be useful that I should go through them all; they have many times been reviewed in judgments of great authority. The matter begins, probably, with the *Coltness Iron Co.* v. *Black* (6). It seems to me clear, since that decision, that both in computing profits for Sched. A and for Sched. D one has to exclude from the
computation the sum paid to acquire a mine or anything in the nature of a mine. E
I say both for Sched. A and for Sched. D, for the reason that in the next case, about which I ought to say a word, *Alianza Co., Ltd.* v. *Bell* (1), it was clear beyond all doubt that the decision in *Coltness Iron Co.* v. *Black* (6) was a decision not only on Sched. A, but also a decision on Sched. D. The *Alianza Case* (1) related to a caliche bed situated in Chile, in South America, and the case came before all the
courts. In his judgment CHANNELL, J., says ([1904] 2 K.B. at p. 673): F

> "The question in this case which we have to consider is, what is the nature of the adventure or concern which the particular company is carrying on? If it is merely a manufacturing business, then the procuring of the raw material would not be a capital expenditure; but if it is like the working of a particular mine or bed of brick earth and converting the stuff worked into a marketable com-
> modity, then the money paid for the prime cost of the stuff so dealt with is G
> just as much capital as the money sunk in machinery or buildings."

That case went to the Court of Appeal and to the House of Lords, and in both the view taken by CHANNELL, J., was affirmed. It is not necessary to read the judgments, but I may perhaps call attention to a passage towards the end of the
judgment of SIR RICHARD HENN-COLLINS, M.R., where he refers to *City of London* H
Contract Corpn., Ltd. v. *Styles* (2). There a claim was made by a company to deduct a sum of money which it had paid in order to acquire the benefit of certain unexecuted contracts; it had bought a business from another company; and, among the things bought, were certain unexecuted contracts. It was in effect claimed that the company was entitled to deduct that part of the purchase money which
related to the unexecuted contracts. In the course of that case, BOWEN, L.J., put I
a point which I think is very material. He said:

> "You do not use it for the purpose of your concern, which means for the purpose of carrying on your concern; but you use it to acquire the concern."

That was quoted with approval by SIR RICHARD HENN-COLLINS, and also it was referred to by STIRLING, L.J. It is difficult to state any principle in these cases which is necessary and always decisive; but I think an important test is BOWEN, L.J.'s test whether you acquire it for the purpose of carrying on your concern, or to acquire the concern which you are carrying on. The *Alianza Case* (1) went to the House of Lords. It is not necessary that I should refer in detail to what was there said.

That, in substance, is what the Solicitor-General rested his argument on, and, on the whole, I have arrived at the conclusion that he was justified in resting his argument on it. He said: "There, in the case of the bed of caliche, you get a decision under Sched. D, and the substance of the decision was this, that you could not deduct, in arriving at annual profits and gains, the sum which was laid out for the acquiring of the bed of caliche which the company was to work." I do not think I need refer to the later cases in great detail. *Kauri Timber Co., Ltd.* v. *Comr. of Taxes* (7) is a well-known case in the Privy Council relating to the sale of timber. There is also the important case of *John Smith & Son* v. *Moore* (3) which is a decision of the House of Lords, and which I think well illustrates the principle that whereas you can make no deduction in respect of coal in a mine that you are going to work, you can make a deduction in respect of coal which you have bought and got into your yard, and which you are going to sell, because that is just the stock-in-trade of your business as coal merchant. I think that the difference of opinion that arose in the House of Lords was just on the question whether the contracts which were there in question resembled coal in the mine or coal in the yard.

Several cases were cited to me by Sir William Jowitt relating to the difficult question of fixtures adhering to the land: *Holland* v. *Hodgson* (8), *Wiltshear* v. *Cottrell* (9), and *Jones* v. *Tankerville* (10), and one or two other cases on that line. No doubt the question whether there is an interest in the land is a matter, with others, to be considered, but I cannot think that that is the decisive test. To adopt an illustration which the Solicitor-General took from *Wiltshear* v. *Cottrell* (9), where there were certain things affixed to the land, and then a granary just standing by its own weight, supposing the whole of that business, including the things affixed and the granary, had been acquired by persons going to carry on business, I cannot think that the things affixed could have been brought in and the granary excluded, so to speak, on the ground that the granary did not form part of the land, and was not an interest in the land; and while I think that the question is not to be lost sight of, I cannot think that it is necessarily the governing consideration in these cases.

On the whole, and not without hesitation, I have formed the view that the commissioners were right. I think that this is, to adopt the test adopted by Channell, J., like the working of a particular mine or bed of brick earth and converting the stuff worked into a marketable commodity. The new company acquired the dumps in order to work them and, by various processes to convert the material extracted into a marketable commodity, namely, gold. I have, on the whole, arrived at the conclusion that, applying the test of Channell, J., this was analogous rather to a right to mine than to the purchase in bulk of a stock-in-trade. I think that the conclusion arrived at by the commissioners was sound and, on that ground, the appeal will be dismissed.

The company appealed.

Sir W. A. Jowitt, K.C., and *F. H. Talbot* for the company.

The Solicitor-General (*Sir Donald Somervell, K.C.*) and *R. P. Hills* for the Crown.

LORD HANWORTH, M.R.—This appeal raises once more the difficult question as to what expenditure may be deducted from the profit-and-loss account in order to compute the amount of the profits and gains to be charged with income tax.

The facts are important. The Golden Horse Shoe Estates Co., Ltd., was formed in 1899 to acquire the undertaking and assets of the Golden Horseshoe Mining Co., Ltd., and to carry on the business of a gold-mining company. For more than twenty-five years this company worked gold mines in Western Australia. During this period it had been a great producing company and had raised five million tons of ore. The residuals, or tailings, that remained after the extraction of gold from the crushed ore were deposited, and accumulated, partly on surface lands comprised in the company's mining leases, and partly on sites of which it held "tailings leases." In spite of attempts made by the company to turn these tailings to profitable account by an extraction of the gold they were known to contain, it was not found possible with the plant then available to re-treat them at a remunerative cost.

In February, 1929, the company assigned—to put it shortly—all its gold-mining leases, mills, stamps, dwelling-houses, offices, stocks, &c., and "all other the undertaking property and rights of the company in Western Australia," to a company called the Lake View and Star, Ltd.; but there were reserved from this assignment all tailings dumps on the property of the company, which was to retain the sole right for a period of ten years from the date of assignment to treat the said dumps for the benefit of the company, or its nominee; and in connection therewith it was to retain and have for these ten years, free of charge, certain rights therein specified, including the right to sell all, or any part of the said dumps either for removal from the said property or for treatment thereon. The tailings dumps were so excepted because it was thought that with new plant a profit could be made out of their re-treatment.

These dumps are five in number and the tallest is 245 ft. high. They are composed of a fine powdery substance which is blown about in dry and windy weather, and it is estimated that they contain some two-and-a-half million tons in bulk. The company had prepared a new plant for the re-treatment of the dumps at a cost of £11,991.

The appellant company, the Golden Horseshoe (New) Co., was incorporated on Sept. 9, 1929, for the purpose of taking over, and it did take over, the tailings dumps, machinery, plant, and assets which had been excepted from the assignment to the Lake View and Star Co. as already stated, including the benefit of all pending contracts, and for the purpose of working and re-treating the tailings dumps so as to recover the gold therefrom during the balance of the term of ten years. The capital of the new company was £220,000 divided into 1,100,000 shares of 4s. each. An account "K," before us, showed the allocation of the purchase consideration for the company assigned to the appellant company, in which the consideration for the tailings dumps was placed at £122,750; sundry plant at £12,129 15s. 7d.; debtors, £60,710; and cash, £32,574. The commissioners accepted these figures as correct.

The appellant company started work, and the business carried on by it from its inception has been that of extracting gold from these tailings dumps by a re-treatment process and selling the gold so obtained.

The company appealed against an assessment to income tax under Sched. D, Case I, made on it for the year ended April 5, 1930, in the sum of £5,256, less an allowance for wear and tear of £530. The company contended that its business was not mining for gold, but only treating the dumps known to contain gold so as to recover it, that the tailings were the raw material of the company's trade, and that for the purpose of the computation of its assessable profits, the tailings ought to be regarded as part of the company's stock-in-trade, and the cost of so much of it as was consumed in obtaining the profits and gains ought to be deducted in their computation—in other words, that there should be deducted from the profits realised by the sales of bullion, the cost to the company of the tailings treated during the same period.

The contention of the Inland Revenue was that the tailings were part of the undertaking which the company was formed to acquire, and that any sum paid therefor was capital expenditure—that the tailings dumps were a wasting asset which formed part of the capital of the company and could not be taken into account any more than the caliche of the nitrate fields could be allowed for in *Alianza Co.* v. *Bell* (1). The commissioners disallowed the company's claim, and on an appeal to the High Court FINLAY, J., confirmed the decision of the commissioners. Hence the company now appeal to this court.

The question involved is always a troublesome one, and is not rendered less

A difficult by recalling the principle which has many times been approved in the courts, that prudent directors of a company would make provision for the wasting character of their enterprise: see per LORD CAIRNS in *Coltness Iron Co.* v. *Black* (6) (6 App. Cas. at p. 324), CHANNELL, J., in the *Alianza Case* (1) ([1904] 2 K.B. at p. 674), and LORD COLLINS, M.R., in the same case ([1905] 1 K.B. at p. 193). Yet that principle is not, except to a limited, though in recent years to an increas-B ing extent, recognised in the method of the computation of profits and gains to the income tax.

The attempt was made to give authority to a rule that a deduction for exhausted capital ought to be made in the calculation of the "full amount of the balance of profit or gains" in *Knowles* v. *McAdam* (11), but that case was overruled in *Coltness Iron Co.* v. *Black* (6). In that case it was held that the tenant of C minerals was not entitled to deduct from the gross profits a sum representing the amount of capital expended in making bores and sinking shafts which had been exhausted by the year's working. The decision in *Alianza* v. *Bell* (1), in the King's Bench Division, and in the Court of Appeal, is to the same effect, the wasting asset there being the caliche in Chile, from which nitrates and iodine are extracted, and which is measurable in quantum, and estimable in duration, from D the outset of the working.

The same rule has been applied to cases other than dealings with mines or minerals or standing timber: *Kauri Timber Co.* v. *Comr. of Taxes* (7). Thus in *City of London Contract Corpn.* v. *Styles* (2) (2 Tax Cas. at p. 239) a company took over a business and the unexecuted contracts in relation to it, which they proceeded to carry out, and under which they were able to earn a profit in the E course of their execution; and again in *John Smith & Son* v. *Moore* (3), where some forward contracts for coal were acquired by a newcomer in a business of selling coal, and it was held that the money laid out in the purchase of these contracts was not laid out in the purchase of the stock—that is coal—the staple article of the business, but as fixed capital for the purpose of enabling the trader in coals to acquire a source from which he could fill the contracts of the business F carried on. This case is, however, interesting as illustrating the divergence of legal opinion that arises on the problem in the present case and the difficulty of finding any exact test by which to solve it.

I have in successive judgments in *Atherton* v. *British Insulated and Helsby Cables* (12), in *Mallett* v. *Staveley Coal and Iron Co.* (13), in *Morley* v. *Lawford & Co.* (14), and in *Anglo-Persian Oil Co.* v. *Dale* (15), said much—perhaps as much as I G can find it useful to say—on the subject, and in cases which afford illustrations on both sides of the line. In *Mallett's Case* (13), the outlay on the surrender of the coal seams to the lessor was held to be an expenditure of capital. In *Lawford & Co.'s Case* (14) a payment of a guarantee given in the course, and for the purpose, of the business was held to be a permissible deduction. In the *Anglo-Persian Case* (15) it was held that money paid to cancel an agreement of agency was a deduction H proper to the carrying on of the business. In *Atherton* v. *British Insulated and Helsby Cables* (12), in the House of Lords, there was a divergence of opinion among the noble Lords—three to two. The majority held, affirming the Court of Appeal, that a payment to a pension fund, to make it actuarially sound for all the existing staff, was a capital expenditure and not to be deducted in the computation of profits and gains.

I The above cases serve to establish the difficulty of the question rather than to affirm any principle to be applied in all cases. Indeed, in the last case cited, sub nom. *British Insulated and Helsby Cables* v. *Atherton* (12) ([1926] A.C. at p. 212), LORD CAVE says that a payment once and for all—a test which had been suggested by LORD DUNEDIN in *Vallambrosa Rubber Co.* v. *Farmer (Surveyor of Taxes)* (16)—was not true in all cases, and he found authority for that statement in *Smith* v. *Incorporated Council of Law Reporting for England and Wales* (17), and the *Anglo-Persian Case* (15) already referred to is another.

The test of circulating as contrasted with fixed capital is as good a test in most cases to my mind as can be found; but that involves the question of fact: was the outlay in the particular case from fixed or circulating capital? It is clear that there may be an immediate outlay for the purpose of the trade carried on—a large outlay on the stock-in-trade which is to be marketed over such a span of time as the business warrants. An illustration of such an outlay is to be found in *Cape Brandy Syndicate* v. *Inland Revenue Comrs.* (18) and in *Martin* v. *Lowry* (19), where the purchase was under a single contract and a large trading organisation was thereafter set up to deal with the goods so purchased.

After careful consideration of the present case, in the course of which my mind has fluctuated on either side, I think it is to be decided on its own facts—that none of the tests suggested afford a strict rule of guidance. It seems then that the company bought these dumps—which were no longer in a natural, but in an artificial condition, which were in such a state that they would not have passed under a lease of "beds opened, or unopened, or minerals" (see *Boileau* v. *Heath* (20))—for the purpose of treating them as their stock-in-trade, lying stored and ready to their hand, at a fair price of £122,750, and their intention was to use them up and make what they could of them by and after treatment. They had not to win them from the soil; they had been gotten already. If the metaphor of working a mine be applied, it might be said that the purchase of the dumps was a capital outlay. If the metaphor of making gas or coke from coal, or of a miller making flour from wheat, be applied, it may be said that it was an outlay to be placed in the profit-and-loss account. But metaphors do not provide exact definitions and are often misleading. It is safer to give an interpretation to the facts of this case as found in the Case Stated and on the law relevant to them. The commissioners have not reached their decision on a finding of fact. Their phrase is uncertain in its meaning, whether they intended to express a finding of fact or not, or a conclusion according to their interpretation of the law.

Under r. 3 (a) of the Rules applicable to Cases I and II of Sched. D, a deduction is allowed in computing the amount of the profits and gains, if it is "money wholly and exclusively laid out or expended for the purpose of the trade." Is it not true that the expenditure on the tailings dumps was for the purpose of the trade of re-treating them and no other? I know of no better exposition of the tests to be applied to facts such as are found here than those propounded by CHANNELL, J., in his decision in the *Alianza Case* (1). He says ([1904] 2 K.B. at p. 673):

> "The legislature might, if it chose, say that the gross receipts of a business should be treated as profits for the purpose of income tax without any allowance for current expenses, and, if it did say so, the rule would have to be followed. But it has not gone quite so far as that. I find nothing in the rules to say that if the business to be assessed is that of manufacturing an article and selling it, and nothing more, the cost price of the material consumed in the manufacture is not to be taken into account in assessing the profits. In the ordinary case, the cost of the material worked up in a manufactory is not a capital expenditure; it is a current expenditure, and does not become a capital expenditure merely because the material is provided by something like a forward contract under which a person for the payment of a lump sum down secures a supply of the raw material for a period extending over several years. I do not think it would be necessary that the payment for the raw material should be in the year of assessment, or even in the three years over which the average extends. It is not necessary to deal with that point at present, and I do not decide it; I merely say that I do not think it would be necessary. The question in this case which we have to consider is what is the nature of the adventure or concern which this particular company is carrying on. If it is merely a manufacturing business, then the procuring of the raw material would not be a capital expenditure. But if it is like the working of a particular mine or bed of brick earth, and converting the stuff worked into a marketable commodity, then the money paid for the prime cost of the stuff so dealt with is

just as much capital as the money sunk in machinery or buildings. In my opinion, the particular adventure here belongs to the latter category. This company must be treated as a company formed for the purpose of working and developing the bed of caliche."

On the facts before him he came to the conclusion that the adventure of winning and working the bed of caliche was an outlay of capital. The present facts seem to point to a manufacturing business applied to raw material already won and gotten. On this view, and for these reasons, the appeal must be allowed with costs here and below, and the case remitted for the assessment to be adjusted accordingly. I would desire to add, as we are differing from FINLAY, J., that he expressed his decision with considerable doubt; and the case is one of a class that, as already mentioned, affords a variety of legal opinion.

ROMER, L.J.—The question to be decided in this case is whether the dumps are to be regarded as fixed capital or as circulating capital. If they are the former, it is conceded by the appellants that the assessment made on them is correct. If, on the other hand, they are floating or circulating capital, it is conceded that the cost of them to the appellants must be debited in the profit-and-loss account, the account being credited with the cost price of what was left of the dumps at the end of the year of assessment. The dumps, in other words, must be dealt with in the profit-and-loss account as stock-in-hand has to be dealt with in the profit-and-loss account of any other trader. The reason for this distinction being drawn between fixed and floating or circulating capital is not far to seek. In assessing a trader to income tax under Sched. D, Case I, the revenue authorities are only concerned with his annual gains and profits; that is, gains and profits in the year of assessment or whatever may be the other material interval of time. They are not in the least concerned with his financial position as a whole at the end of the time as compared with his financial position at the beginning. Changes in the value of his fixed capital are therefore disregarded except where it is otherwise expressly provided in the Act. On the other hand, changes in his floating or circulating capital must be taken into consideration in ascertaining his annual gains and profits. For the profits or losses in a year of trading cannot be ascertained unless a comparison be made of the circulating capital as it existed at the beginning of the year with the circulating capital as it exists at the end of the year. It is, indeed, by causing the floating capital to change in value that a loss or profit is made.

Unfortunately, however, it is not always easy to determine whether a particular asset belongs to the one category or the other. It depends in no way on what may be the nature of the asset in fact or in law. Land may in certain circumstances be circulating capital. A chattel or a chose in action may be fixed capital. The determining factor must be the nature of the trade in which the asset is employed. The land on which a manufacturer carries on his business is part of his fixed capital. The land with which a dealer in real estate carries on his business is part of his circulating capital. The machinery with which a manufacturer makes the articles that he sells is part of his fixed capital. The machinery that a dealer in machinery buys and sells is part of his circulating capital, as is the coal that a coal merchant buys and sells in the course of his trade. So, too, is the coal that a manufacturer of gas buys and from which he extracts his gas. For the purpose of ascertaining his profit in a year it is clear that he must debit his profit-and-loss account with the purchase price of the coal that he treats in the course of that year, and that, too, whether he buys it in that year or buys it in advance. It is part of the cost of producing the gas that he sells. Such cases as these cause no difficulty. But now suppose that the gas manufacturer, instead of buying his coal from outside sources, purchases a coal mine and produces the coal that he requires by mining. The cost of extracting from the mine the coal treated will, of course, be a permissible deduction in ascertaining the profits of his business in the year. But he may not debit his profit-and-loss account with the sum by which the value of his mine has depreciated in consequence of the extraction of that coal. For the mine is regarded as being fixed capital: see *Coltness Iron Co.* v. *Black* (6) and *Alianza Co.* v. *Bell* (1). If, on the other hand, instead of buying the mine, the gas manufacturer had bought a quantity of coal already extracted from the mine and stacked on the surface, the price of the coal would have been regarded as part of the circulating capital. The reason for this distinction is not at first sight very easy to discover. It must, as it seems to me, be found in this: that in the former case the purchase of the mine is not a purchase of coal but a purchase of land with the right of extracting coal from it. The land is regarded merely as one of the means provided by the manufacturer for causing coal to be brought to his gasworks, and therefore as much part of his fixed capital as would be any railway trucks or lorries provided by him for the same purpose. The land is regarded as a capital asset of the same nature as the coal contracts that were held to be fixed capital in *John Smith & Son* v. *Moore* (3). In that case LORD SUMNER said ([1921] 2 A.C. at p. 38):

> "The business carried on was not that of buying and selling contracts, but of buying and selling coals, and the contracts which enabled the seller of the coals to acquire the coals were no more the subject of his trading as a stock-in-hand for sale than a lease of a brickfield would be the subject of a sale of bricks."

It seems to follow from these considerations that the question to be decided in the present case resolves itself into this: Are the dumps the raw material of the appellants' business or do they merely provide the means of obtaining that raw material? In my opinion they are the raw material itself. It was contended on the part of the Crown that the raw material of the appellants' business is gold. But this is not so. Gold is the finished product of their business, just as much as gas is the finished product of the gas manufacturer's business. The raw material in the one case is the tailings of which the dumps are composed, and the raw material in the other is the coal. If, instead of buying the whole dump at one time, the appellants had purchased and treated with the process so many tons of tailings a month, I do not see how it could be contended that the cost of purchase was not an expense that could be deducted for the purpose of ascertaining the profit made by them by the sale of the resultant gold. The fact that they bought the whole stock of the material at once cannot make any difference. If in the one case the material used in a year represents circulating capital, so it does in the other case. "In the ordinary case," says CHANNELL, J., in *Alianza Co.* v. *Bell* (1) ([1904] 2 K.B. at p. 673),

> "the cost of the material worked up in a manufactory is not a capital expenditure [by which, of course, he meant is not a fixed capital expenditure]; it is a current expenditure, and does not become a capital expenditure merely because the material is provided by something like a forward contract, under which a person for the payment of a lump sum down secures a supply of the raw material for a period extending over several years"

—in the present case the appellants by payment of a lump sum down secured a supply of their raw material for several years. None the less the sum so paid is part of their circulating capital and cannot be disregarded in ascertaining their yearly gains and profits earned by its use. The sum so expended has been found by the commissioners to be £122,750, and that finding is binding on the parties to this appeal and on us.

For these reasons I am of opinion that the appeal should be allowed with costs.

Appeal allowed.

Solicitors: *Birkbeck, Julius, Edwards & Co.*; *Solicitor of Inland Revenue.*

[*Reported by* J. H. G. BULLER, ESQ., *and* G. P. LANGWORTHY, ESQ., *Barristers-at-Law.*]

LAMBE *v.* INLAND REVENUE COMMISSIONERS

[KING'S BENCH DIVISION (Finlay, J.), July 25, 1933]

[Reported [1934] 1 K.B. 178; 103 L.J.K.B. 69; 150 L.T. 190;
18 Tax Cas. 212]

Surtax—Total income—Interest due in respect of sum lent on mortgage—Interest not paid—Inclusion in mortgagee's total income—Authority for making a contingent assessment—Apportionment of interest paid in respect of several years.

During the tax year ending April 5, 1931, £491 accrued due to the taxpayer in respect of mortgage interest. None of the interest was paid, and it was doubtful whether it would ever be paid, but the taxpayer did not waive his right to receive it. The Crown claimed that the £491 ought to be included in the taxpayer's total income for the purposes of surtax, but informed the taxpayer that tax in respect of that sum would not be collected until the interest was received by him.

Held: the mortgage interest was not liable to be included in the taxpayer's total income for the purposes of surtax until it was actually received; and, furthermore, there was no authority for the making of a suspended or contingent assessment.

Per **Curiam**: If arrears of mortgage interest in respect of several years were paid in one sum, they ought, for the purposes of assessment to surtax, to be attributed to the years in which the interest fell due.

Notes. Considered: *Dewar* v. *I.R. Comrs.*, [1935] All E.R. Rep. 568. Referred to: *Champneys Executors* v. *I.R. Comrs.* (1935), 19 Tax Cas. 375.

As to liability to tax of income due but not received, see 20 HALSBURY'S LAWS (3rd Edn.) 408, para. 757; and for cases on the subject see 28 DIGEST 109 et seq.

Cases referred to:

(1) *Leigh* v. *I.R. Comrs.*, [1928] 1 K.B. 73; 96 L.J.K.B. 853; 137 L.T. 303; 43 T.L.R. 528; 11 Tax Cas. 590; Digest Supp.

(2) *I.R.Comrs.* v. *Blott*, [1921] 2 A.C. 171; 90 L.J.K.B. 1028; 125 L.T. 497; 37 T.L.R. 762; 65 Sol. Jo. 642; 8 Tax Cas. 101; 28 Digest 107, *663*.

(3) *I.R. Comrs.* v. *Earl of Haddington*, [1924] S.C. 456; 8 Tax Cas. 711; 28 Digest 111, *d*.

(4) *Grey* v. *Tiley* (1932), 16 Tax Cas. 414.

(5) *Simpson* v. *Bonner Maurice's Executors* (1929), 45 T.L.R. 581; 14 Tax Cas. 580, C.A.; Digest Supp.

(6) *St. Lucia Usines and Estates Co.* v. *Colonial Treasurer of St. Lucia*, [1924] A.C. 508; 93 L.J.P.C. 212; 131 L.T. 267; 68 Sol. Jo. 456.

(7) *Hawley* v. *I.R. Comrs.* (1925), 134 L.T. 502; 9 Tax Cas. 331; 28 Digest 110, *682*.

(8) *Greenwood* v. *F. L. Smidth & Co.*, [1922] 1 A.C. 417; 91 L.J.K.B. 349; 127 L.T. 68; 38 T.L.R. 421; 66 Sol. Jo. 349; 8 Tax Cas. 193; 28 Digest 36, *186*.

Case Stated under the Income Tax Act, 1918, s. 7 (6) and s. 149, and also the Finance Act, 1927, s. 42 (7), by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

"1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on June 3, 1932, for the purpose of hearing appeals, Lieut.-Comdr. C. E. Lambe, R.N. (hereinafter called 'the appellant') appealed against an assessment to surtax in the sum of £9,025 for the year ending April 5, 1931, made upon him under the provisions of the Income Tax Acts.

"2. In computing the appellant's total income from all sources for the purposes of surtax for the said year ending April 5, 1931, there was included a sum of £491 11s. representing interest due to the appellant from Messrs. North and Rose for that year upon a sum of £7,500, which was advanced by the appellant to Messrs. North and Rose under the circumstances hereinafter set out.

"3. The appellant is the life tenant of an estate in Cornwall which comprises a number of china clay works. One of the said works, or setts known as 'Rocks' was leased to Messrs. North and Rose for a term expiring on Sept. 29, 1942, at a minimum yearly rent of £200, and royalties, plus fixed rents, amounting to £29 per annum.

"4. The appellant advanced to Messrs. North and Rose on the security of a mortgage of the said sett the sum of £6,500 on April 24, 1926, and three further sums of £200, £600 and £200 respectively on Nov. 19, 1926, Jan. 25, 1927, and Nov. 14, 1929, all the said advances bearing interest at the rate of 6 per cent. per annum minimum fluctuating with the prices realised by Messrs. North and Rose for china clay produced by them on the said work. The interest on the said advances was duly paid up to Sept. 29, 1929, but no payments either in respect of principal or interest have since been made.

"5. For the year ending March 31, 1931, a sum of £491 11s. was due and owing to the appellant by Messrs. North and Rose in respect of interest on the said advances, which together amounted to the sum of £7,500.

"6. In February, 1931, Messrs. North and Rose were in financial difficulties and the appellant appointed Mr. Samuel John Dyer to be receiver under a statutory power contained in his mortgage security. In March, 1931, Messrs. North and Rose called a meeting of their creditors, and on March 24, 1931, the said Samuel John Dyer was appointed receiver and manager by an order of the Chancery Division of the High Court of Justice in an action '1931 L. 531,' wherein the appellant was plaintiff and the said North and Rose were defendants, and he has carried on the business ever since. Immediately after the appointment of the receiver, the appellant advanced a further sum of £500, and it was stated before us that the appellant was about to make a further advance to the receiver.

"7. The appellant has not received the said sum of £491 11s., and it was stated before us that it is doubtful whether the appellant ever will receive the said sum. The appellant, however, has not waived his right to receive it. The appellant's solicitors on Feb. 3, 1932, wrote to the clerk to the Special Commissioners undertaking if the said sum should be paid duly to return same for surtax purposes.

"8. In two financial years prior to the year ending on April 5, 1931, the interest due from Messrs. North and Rose was not paid in full at the due date, the unpaid balance being paid later in subsequent financial years. Such interest in the full amount due was, nevertheless, included in the supertax or surtax assessments made upon the appellant for the financial years in which the interest became due and payable in spite of the protests of the appellant's solicitors. The duty in respect of the unpaid balance of the interest, however, was not demanded from and paid by the appellant until the full amount of the interest itself was actually received by him.

"9. The Special Commissioners, whose duty it was to make the assessment under appeal, were of opinion that the said sum of £491 11s. being payable in the year ending April 5, 1931, should be included in the computation of the appellant's total income from all sources for the said year.

"They informed the appellant, however, that the duty on the said sum would not be collected until the said sum of £491 11s. was in fact received by the appellant.

"10. It was contended on behalf of the appellant that:

"(a) The said sum of £491 11s. should not be included in the computation of the appellant's total income for the purposes of surtax for the year ending April 5, 1931.

"(b) The assessments under appeal should be reduced by £491 11s.

"(c) That the matter in dispute was covered by the decision in *Leigh* v. *I.R. Comrs.* (1), and that in the case of interest there can be no 'receivability' without 'receipt.'

A "11. It was contended on behalf of the Crown that:

"(a) Mere delay in the payment of the said sum of £491 11s. would not justify its exclusion from the computation of the appellant's total income for the year ending April 5, 1931.

"(b) The assessment was correctly made and should be confirmed.

B "12. The commissioners who heard the appeal were not satisfied on the evidence produced before them that the said sum of £491 11s. would never be paid to the appellant, and held that the said sum was correctly included in the computation of the appellant's total income.

"They therefore confirmed the assessment, having satisfied themselves that the duty on the said sum of £491 11s. would not be collected from the appellant unless C and until the said sum was in fact received by him.

"13. The appellant immediately after the determination of the appeal declared to the commissioners his dissatisfaction therewith as being erroneous in point of law, and in due course required them to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 7 (6) and s. 149, and the Finance Act, 1927, s. 42 (7)."

D *Bowe* for the appellant.

The Solicitor-General (*Sir Boyd Merriman, K.C.*) and *R. P. Hills* for the Crown.

FINLAY, J.—This is rather a curious case, and, as to the principle which it raises, rather an important case. It is a Case Stated by the Special Commissioners with reference to an appeal by the appellant, Lieut.-Commander C. E. Lambe, of E the Royal Navy, against an assessment to surtax which has been made on him for the year ending April 5, 1931, and the substantial point which arose in the appeal before the commissioners was whether there should be included a sum of £491 11s., which represented interest due to the appellant from a firm called North and Rose for that year, being interest on £7,500 which had been advanced by the appellant to Messrs. North and Rose. The appellant is a life tenant of an estate in Cornwall F which comprises a number of china clay works. One of these works was leased to Messrs. North and Rose for a term expiring in 1942. The appellant advanced various sums to Messrs. North and Rose on the security of the said works, all the advances bearing interest at the rate of 6 per cent., or rather, bearing interest at a minimum rate of 6 per cent., but fluctuating with the prices for china clay. This interest was paid up to Sept. 29, 1929, but there has been no payment since then, G and for the year ending March 31, 1931, a sum of £491 11s. was due and owing to the appellant by North and Rose. This firm of North and Rose had got into financial difficulties, and the appellant apparently appointed a receiver, and he has carried on the business ever since. The commissioners find that the appellant has not received the said sum of £491 11s. and they add that it was stated before them that it was doubtful whether the appellant ever will receive the said sum. The H appellant, however, has not waived his right to receive it. The Special Commissioners, whose duty it was to make the assessment, were of the opinion that the sum of £491 11s. being payable in the year ending April 5, 1931, should be included in the computation of the appellant's total income from all sources for the said year. They informed the appellant, however, that the duty on the said sum would not be collected until the said sum of £491 11s. was in fact received by the appel- I lant. The matter came before the Special Commissioners sitting in their other capacity, that is as an appellate tribunal, and the commissioners who heard the appeal said:

> "We were not satisfied on the evidence produced before us that the said sum of £491 11s. would never be paid to the appellant, and held that the sum was correctly included in the computation of the appellant's total income. We therefore confirmed the assessment, having satisfied ourselves that the duty on the said sum of £491 11s. would not be collected from the appellant unless and until the said sum was in fact received by him."

Now that raises a rather curious state of affairs. It is quite clear that an assessment to supertax once made and confirmed constitutes a debt due to the Crown. What the Special Commissioners here have done is to confirm the assessment, but they say that before they confirmed the assessment they satisfied themselves that

> "the duty on the said sum of £491 11s. would not be collected unless and until the said sum of £491 11s. was in fact received by him."

I am satisfied that the Special Commissioners did satisfy themselves that the sum would not be collected. I am also perfectly satisfied that any officials connected with the collection of the tax would loyally abide by the direction which had been given by the Special Commissioners. But having said that, I must add that I think that this procedure is exceedingly unsatisfactory. The general position is that an assessment is made, that it is either confirmed or it is discharged, or it is modified, but there emerges, if the assessment is confirmed to any extent, a sum which is due and exigible from the subject who had been assessed.

I know of no provision, and my attention has been drawn to no provision, in the Acts which authorises the making of what one may not inappropriately call a contingent assessment; that is to say, an assessment which says: We assess you on £491 11s., but having assessed you we tell you that you need not pay unless and until you receive that sum of £491 11s. My attention was called to an observation —it was only, I think, a passing observation—of ROWLATT, J., in a case where he referred to the possibility of some such arrangement being made. That the arrangement, having been made, would in this or in any other case, be honourably observed I do not for one moment doubt, but I must repeat for myself that I cannot think that this is a satisfactory method of disposing of an appeal. If the legislature think fit to give authority to make assessments in this contingent form that will be perfectly all right, but until that is done I feel that an assessment must be definite, and that the Special Commissioners, if they are appealed to, must either confirm the assessment, modify the assessment, or discharge the assessment, but that they cannot, as they have done here, confirm it, saying that they have, before confirming it, and I suppose as a condition of confirming it, satisfied themselves that unless and until a particular event takes place it will not be enforced. I have thought it right to make these observations on what has taken place in this case because no doubt the matter is one of some general importance.

I now come to the point in the case, treating the Special Commissioners, as I think I clearly must treat them, as having confirmed the assessment which was made, and the point now is whether that assessment was correctly confirmed. The position is as it is found in the Case, and I do not think that there can be the slightest doubt that Messrs. North and Rose had defaulted in the sense that they had failed to pay the interest which was due and owing by them. I accept, as I am bound to accept, absolutely the finding of the commissioners, which is to the effect that it was not certain whether in the future Messrs. North and Rose would or would not be able to pay this sum. They might be able to pay it, or they might not be able to pay it. The Special Commissioners found expressly that they were not prepared to hold that it was certain that they would not be able to pay. I rather gather, though they do not actually say so, that it would have affected their decision if they had been able to find that.

The point in these circumstances which is raised for my decision is whether a sum due to the appellant by way of interest, but, by reason of the default of the debtor, not paid, can form part of the income of the appellant. Certainly one would suppose that income means what comes in and that it refers to what is actually received by the person. The tax is a tax on income. It is a tax on what in one form or another goes into a man's pocket. That is the general principle. Some authority was cited to me—I do not think it is necessary to go into it in detail—and I may refer to, without reading, a passage in LORD FINLAY's speech in the leading case of *I.R. Comrs.* v. *Blott* (2) in the House of Lords where he lays down the general principle as to income and what is income. My attention was called to a number of authorities in which matters somewhat like this have been considered, and with the single exception of *I.R. Comrs.* v. *Earl of Haddington* (3), which was a decision of the Court of Session where this particular point was not I think argued, though I think it cannot be denied that it is implicit in the decision, the cases are all one way on the point to be decided here, viz., whether in order to attract tax there must be income in the sense of something coming in. I was referred to *Leigh* v. *I.R. Comrs.* (1), *Grey* v. *Tiley* (4), *Simpson* v. *Bonner Maurice's Executors* (5), and *St. Lucia Usines and Estates Co.* v. *Colonial Treasurer of St. Lucia* (6). Those decisions are in agreement on the general principle which I have indicated. They do to some extent differ on one difficult point, and that point is this: What is the position where there is income receivable in a number of years, one, two, three, four, five, and nothing is received in one, two, three, four, but in five the whole of the income for the five years is paid up? Opinion may have fluctuated as to whether when that payment is made it is to be treated as income of year five in which it was made, or as income of the years one, two, three and four in respect of which, as well as the year five, it was paid. The authorities show, and particularly the judgment of Lawrence, L.J., in the *Bonner Maurice Case* (5), that the judges deciding these different cases were none of them suggesting that tax could be charged where there was in fact no income received. They all seem to me to recognise the principle that income must have been received. But there is room for a difference of opinion on the question to which year the income is to be attributed. The decision of Rowlatt, J., in *Leigh's Case* (1), which I think was not questioned, strongly favoured the view which was urged on behalf of the appellant here. I think that *Simpson* v. *Bonner Maurice* (5) is the same way. The real point in that case was remote from the present. It depended partly at least on German war legislation, and the question was whether sums received by German bankers on behalf of the appellant during the war were to be regarded as received by him. I ought to mention also *Hawley* v. *I.R. Comrs.* (7), a case which was much relied on by the Solicitor-General. But as far as I can see, it does not really support his view, because it is quite clear that there the income had in fact been received.

It appears to me to be clear both on construction and on authority that as the law stood before 1927 this claim by the Crown to assess income which has not been received and which—I use the word purposely—may never be received, must fail. But it is said that, as a result of s. 39 (2)* of the Act of 1927, a change in the law has been effected. One does not forget the principle laid down in *Greenwood* v. *F. L. Smidth & Co.* (8), and a good many other cases too, that where there is to be an extension of the area of charge one ought to look for clear words to do it and one ought primâ facie to find any extension of the area of charge in an amendment of the schedules, which, after all, are the charging sections of the Act.

The general object of s. 39 is perfectly clear. It is a section which is inserted with reference to the substitution of surtax for supertax, and there are a number of consequential provisions necessary, and this is one of them. The first part of s. 39 gets rid of a confusion which had caused much trouble due to the provisions of r. 19 of the General Rules of the Income Tax Act, 1918, which in effect said that on payment of certain sums one had to deduct tax at the rate applicable to the period over which the sums had accrued due. The result, of course, was that a great number of people had to do a rather troublesome sum because they might have one rate at one period and another at another, and that difficulty was dealt with by sub-s. (1). The Solicitor-General has placed all his reliance on sub-s. (2), which provides:

> "In estimating under the Income Tax Acts the total income of any person, any income which is chargeable with income tax by way of deduction at the standard rate in force for any year shall be deemed to be income of that year, and any deductions which are allowable on account of sums payable under

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* See the Income Tax Act, 1952, s. 524 (3), which replaced the Finance Act 1927, s. 39 (2).

> deduction of income tax at the standard rate in force for any year out of the property or profits of that person shall be allowed as deductions in respect of that year, notwithstanding that the income or sums, as the case may be, accrued or will accrue in whole or in part before or after that year."

The suggestion of the Crown appears to be that that has effected a startling change in the law, and that it has brought into the area of assessment sums which had not been received and which may never be, or never will be received. I do not think that that is the effect of s. 39 (2). I think that it is governed by the words "any income." Surtax is leviable on the total income, and I think that before this section operates there must be income; it contemplates a deduction, and one cannot deduct if there is nothing to deduct from. I think the essential condition of the application of the section is that there should be income. There should be income going out from the person paying it and coming in to the person receiving it, and there should then be deduction from that income. I think that the meaning of the section and the scheme which is now in operation is this: Supposing interest is due as in this case on a loan, if the matter goes through in the ordinary way and the interest is paid there is no difficulty. The tax is deducted at the appropriate rate, and the income is brought in as part of the income of the recipient. That is what happened during the earlier years with this loan of Lieut.-Commander Lambe. But now supposing that, by reason of the difficulties of the debtor, interest is not paid: if there is no interest paid there is, in my opinion, no income. There is nothing to assess. There is nothing to deduct from, looking at it one way, and there is nothing to assess, looking at it from the point of view of the recipient. If unfortunately the loan is irrecoverable, and if these people are never in a position to pay any more, so that it is a dead loss to Lieut.-Commander Lambe, then he will not be liable to any further assessment in respect of it. But now let us suppose that three years hence the debtors happily become prosperous again and china clay begins to pay in Cornwall, that they are in a position to pay, and they pay up, say, in 1936, the interest for that year, and also the interest for the five preceding years. Then, as it seems to me, an additional assessment can properly be made on Lieut.-Commander Lambe, and, though made in 1936, the payments will be referred to each of the years in which they were receivable, and he will be liable to assessment in respect of each of those years. That, as I read it, is the result of this section. I have thought it right to make these observations because the matter has been a good deal discussed, but it is really sufficient for the decision of the present case that I should say that, in my opinion, there is nothing in s. 39 (2) which induces me to think that a startling change in the law was effected by it or which induces me to think that as a result of it a person is liable to an assessment of supertax in respect of income which he has not received, and, to put it at the lowest, may never receive. The result is that, on the facts as they are stated, this appeal succeeds.

Solicitors: *Torr & Co.*; *Solicitor for Inland Revenue.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

LAVELL & CO. *v.* A. & E. O'LEARY (A FIRM)

[Court of Appeal (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), March 30, 1933]

[Reported [1933] 2 K.B. 200; 102 L.J.K.B. 449; 149 L.T. 227; 49 T.L.R. 388]

Distress—Impounding—Goods remaining in situ—Impounded goods in custodia legis—Impounding goods against stranger—Pound-breach—Ingredients of offence—Distress for Rent Act, 1689 (2 *Will. & M., sess.* 1, *c.* 5), *s.* 3.

Goods can be impounded although they are not gathered together and placed in any particular place, but remain in situ.

If goods are impounded as between the landlord and the tenant, they thereby become in custodia legis, and anybody, whether the tenant or a stranger, who takes them out of the pound, either innocently or with knowledge of the pound, is liable, under the Distress for Rent Act, 1689, s. 3, for damages, to be assessed at treble the value of the goods so taken out.

Impounded goods placed in a room used as a restaurant on the first floor of a building were removed by the tenant to the adjacent landing, whence they were carried by servants of the defendants to lorries and taken away. The defendants moved the goods in the ordinary course of their business as removers. They did not know that their servants were removing goods which had been impounded, or that the restaurant had been made a pound, and their servants went no further than the landing and did not enter the pound to remove any of the goods.

Held: to constitute the offence of pound-breach there must be either pound breaking in fact or some act knowingly done to assist another person to commit a pound-breach; in the present case neither of these matters had been proved; and, therefore, the defendants were not liable under s. 3 of the Act of 1689.

Notes. As to impounding, see 12 Halsbury's Laws (3rd Edn.) 133–135; and for cases see 18 Digest 339–341. For Distress for Rent Act, 1689, see 6 Halsbury's Statutes (2nd Edn.) 143.

Cases referred to:

(1) *Jones* v. *Biernstein*, [1899] 1 Q.B. 470; 68 L.J.Q.B. 267; 80 L.T. 157; 47 W.R. 239; 15 T.L.R. 164; 43 Sol. Jo. 224, D.C.; affirmed, [1900] 1 Q.B. 100; 81 L.T. 553; 48 W.R. 232; 16 T.L.R. 30, C.A.; 18 Digest 367, *1065*.

(2) *Washborn* v. *Black* (1774), 11 East 405, n.; 103 E.R. 1060, N.P.; 18 Digest 340, *743*.

(3) *Firth* v. *Purvis* (1793), 5 Term. Rep. 432; 101 E.R. 243; 18 Digest 367, *1069*.

(4) *Thomas* v. *Harries* (1840), 1 Man. & G. 695; 1 Scott, M.R. 524; 9 L.J.C.P. 308; 4 Jur. 723; 133 E.R. 511; 18 Digest 325, *599*.

(5) *Ladd* v. *Thomas* (1840), 12 Ad. & El. 117; 4 Per. & Dav. 9; 9 L.J.Q.B. 345; 4 Jur. 797; 113 E.R. 755; 18 Digest 326, *600*.

(6) *Tennant* v. *Field* (1857), 8 E. & B. 336; 27 L.J.Q.B. 33; 3 Jur.N.S. 1178; 6 W.R. 11; 120 E.R. 125; 18 Digest 326, *601*.

Appeal by plaintiffs against an order made by Macnaghten, J.

The plaintiffs were the landlords of first-floor premises in Charing Cross Road, which they had let to a tenant, Wong Gee, the proprietor of a restaurant, for seven years by a lease dated Dec. 19, 1928. On June 17, 1932, the rent was in arrear and the plaintiffs levied distress on the premises. On June 24 a further sum became due for rent, and on July 5 the plaintiffs levied a further distress. In both cases the bailiff took only "walking possession" and did not remain permanently on the premises. The impounded goods remained in the restaurant, but on July 14 Gee had them removed to a landing outside the restaurant and the defendants, who were a firm of removal contractors and had received instructions from the tenant, in the ordinary course of business removed from the premises those goods of the value of £50, consisting mainly of tables and chairs used in the restaurant. It was not disputed that the defendants had acted in perfect good faith. The plaintiffs brought an action claiming from the defendants damages for pound-breach under s. 3 of the Distress for Rent Act, 1689. The section provides:

> "And upon any pound-breach or rescous of goods or chattels distrained for rent, the person or persons grieved thereby shall, in a special action upon the case for the wrong thereby sustained, recover his and their treble damages and costs of suit against the offender or offenders in any such rescous or pound-breach, any or either of them, or against the owner of the goods distrained, in case the same be afterwards found to have come to his use or possession."

At that date goods could only be impounded in a public pound, but by the Distress for Rent Act, 1737, s. 10, it was enacted that

> "It shall and may be lawful to and for any person or persons lawfully taking any distress for any kind of rent, to impound, or otherwise secure the distress so made . . . in such place or on such part of the premises chargeable with the rent, as shall be most fit and convenient. . . . and . . . if any pound-breach or rescous shall be made of any goods or chattels, or stock distrained for rent, and impounded . . . by virtue of this Act, the person or persons aggrieved thereby shall have the like remedy, as in cases of pound-breach or rescous is given. . . ."

Macnaghten, J., held that, as the goods had been left in an open restaurant and nobody had been left in possession to guard against their removal, the plaintiffs had failed to prove as between themselves and a stranger that they had impounded or otherwise secured the goods within the meaning of the Act of 1737, and, therefore, were not entitled to the remedy of treble damages given by the Act of 1689, and he entered judgment for the defendants. The plaintiffs appealed.

J. P. Eddy and *C. S. Davis* for the plaintiffs.
Cartwright Sharp for the defendants.

The arguments sufficiently appear in the judgments.

LORD HANWORTH, M.R.—This appeal has raised an interesting point. We have come to the conclusion, for reasons somewhat different to those expressed by Macnaghten, J., that the appeal fails.

The plaintiffs were the landlords of certain premises which were let to a man called Wong Gee, who used them as a restaurant. What was let was the rooms forming the first floor of the messuages and premises known as 113, 115, and 117, Charing Cross Road,

> "together with the use in common with the owners and their tenants of the hall and staircases leading to the demised premises,"

and so on. In June, 1932, there was a sum due and owing to the plaintiffs for rent, and there was a levy by distress upon the goods of Mr. Wong Gee in this restaurant for a sum of £30 9s. 7d., to which there would be some levy fees, possession money, and so on, to be added. By July 5 a further sum had become due for rent, a sum of £97 11s. 6d., together with some further fees and possession money, and there was again a distress levied upon the premises in respect of this sum, and those two sums of £30 9s. 7d. and £97 11s. 6d. were due from Mr. Wong Gee. The goods were seized, and they were impounded upon the premises, and there was an agreement, which is called a short walking possession agreement, entered into in respect of the first levy in June which is expressed in this form:

> "For my convenience and in consideration of your not leaving your man in close possession of the goods, chattels, and effects distrained upon by you at the Canton Café, 113–117, Charing Cross Road, W.C., I hereby agree (i) to pay the lawful fees in respect to your man as if he were in close possession; (ii)

> A that you and your man may re-enter the premises peaceably or by force, if required, at any time; (iii) that I will not remove or allow to be removed from the premises any goods, chattels, and effects so distrained."

That enabled Mr. Wong Gee to continue to carry on his restaurant, and we have evidence that the possession man called night and morning to see that the goods were not being removed from the premises. It needs but to be stated that the B place was a café to show that the goods would not be removed from the premises, because if you are carrying on the business of a café you want the chairs, tables, tablecloths, and general impedimenta that are required to carry on the café so that you may be in a state to satisfy your customers.

We have been shortly told, and perhaps it is necessary to repeat it again, that originally the distress which was taken by the landlord was taken by way of pledge; C he had no power to sell, but he could hold for a certain time until the tenant paid him the amount owing for the rent. In order to make the landlord's remedy more effective a statute was passed in 1689,

> "An Act for enabling the sale of goods distrained for rent, in case the rent be not paid in a reasonable time."

D That enabled a sale to be made if the owner of the goods distrained shall not within five days next after such distress taken and notice thereof replevy the same. Then there was to be a power of sale, but the time limited was five days. Another statute was passed in 1737, which enabled distresses to be stored and sold on the premises, and it enabled the landlord to impound or otherwise secure the distress upon the premises and enable the sale to take place, and the last portion of E s. 10 says:

> ". . . if any pound-breach or rescous shall be made of any goods or chattels, or stock distrained for rent, and impounded or otherwise secured by virtue of this Act, the person or persons aggrieved thereby shall have the like remedy as in cases of pound-breach or rescous is given and provided by the said statute,"

F that is the statute of 1689 which had, by s. 3, enacted that upon any pound-breach or rescous of any distraint for rent the person aggrieved thereby should on a special action on the case for the wrong thereby sustained recover treble damages and costs of suit. The result, therefore, of those statutes was that there was a power of sale, and if there was any pound-breach or rescous, those persons who had offended in that way were liable, not merely for damages, but for treble damages.

G One other statute I must refer to, and that is the statute which extended the time limit, the five days of which I have spoken, to fifteen days—the Law of Distress Amendment Act, 1888, s. 6. It says:

> "The period of five days provided in the said Act of Will. & Mary, c. 5, within which the tenant or owner of goods and chattels distrained may replevy the same, shall be extended to a period of not more than fifteen days if the tenant H or such owner make a request in writing in that behalf to the landlord or other person levying the distress, and also give security for any additional cost that may be occasioned by such extension of time: provided that the landlord or person levying the distress may, at the written request, or with the written consent, of the tenant or such owner as aforesaid, sell the goods and chattels distrained, or part of them, at any time before the expiration of such extended I period as aforesaid."

When the distresses in the present case had been levied and the walking possession agreement had been entered into on June 24, the tenant requested the landlord not to remove the goods which he had distrained and impounded for rent, but to keep the goods and to remain in possession of the same until July 1. By an agreement made on June 30, that time was extended till July 4, and by a further agreement made on July 4 it was further extended to July 14. The importance of those agreements is that the tenant recognises that the landlord has distrained and has impounded for rent the goods and chattels which are on the premises at 113, 115, and 117, Charing Cross Road. All those matters were duly carried out quite properly, good distress and good agreement, and then, on July 14, the goods were removed. It appears from the evidence that the defendants, who are, as MACNAGHTEN, J., has found, a responsible firm of good repute, are removers, and they were called in at the instance of some person who, on July 13, came and asked that a van should be sent on the 14th early in the morning for the purpose of removing the goods. On the morning of the 14th, an entry was made upon the room where the restaurant was carried on and where the goods were and had been all the time safely impounded, and they were brought out on to the staircase used by the tenants of the premises, and when they were so brought out the servants of the defendants put them into a lorry, and the chairs and tables, and what not, were taken away. Evidence was given at the trial that the value of the goods that were taken away was £79 5s. MACNAGHTEN, J., found the damages, if damages were to be imposed, were £50.

The action is brought, it will be observed, not against the tenant, but against the defendants who are the removers, and the charge that is made against them is that they were guilty of pound-breach, having wrongfully seized and taken away the goods impounded as aforesaid and brought themselves, therefore, within the ambit of the section of the Act of William & Mary whereby they would be liable for pound-breach or rescous, and liable to treble damages for that misconduct. Before MACNAGHTEN, J., counsel for the defendants took up the attitude which had been taken up in the defence and which stated this:

> "It is admitted that on July 14, 1932, servants of the defendants in the course of their employment in the defendants' business as removal contractors carried down certain goods (to wit, some bentwood chairs and small deal tables) from the landing on the first floor of premises known as Nos. 113, 115 and 117, Charing Cross Road, in the county of London, placed such goods in the defendants' lorries and drove away therewith."

MACNAGHTEN, J., came to the conclusion that the goods had not been properly impounded as against the defendants who were not tenants, but were strangers to the tenancy.

Upon that point counsel for the plaintiffs has convinced us that the decision of the learned judge is untenable. It must be remembered that once goods have been impounded they are in custodia legis, as CHANNELL, J., says in *Jones* v. *Biernstein* (1) ([1899] 1 Q.B. at p. 472). That being so, was there, or was there not, in this case a pound? Although the agreement was made which recited that there was a pound, MACNAGHTEN, J., had a doubt whether or not the facts did establish a pound as against these present defendants. In my view, the facts clearly established a pound, not merely against the tenants, but against everybody else, because it is proved that these goods were in custodia legis.

I only refer to three cases of those that have been cited. There is a case, *Washborn* v. *Black* (2), in the notes to be found on p. 405 of 11 East's Reports, a case before LORD MANSFIELD in the year 1774, and that illustrates that you can have a pound although you do not take all the goods on which you have levied the distress and place them in a room or compartment, gather them together, and so on; that it is quite possible to impound the goods while they still remain in situ. In *Washborn v. Black* (2) the jury found that the plaintiff consented to what had been done. The importance of the case is that it shows that there is not a duty imposed upon the landlord to collect the goods, but that they can still be treated as impounded even though it is by consent that they are not in fact gathered together. In *Firth* v. *Purvis* (3) there were some pipes of beer which had been impounded in the sense that they had been marked by the landlord, but they remained in situ, and it was held, after argument, by the learned judges in that case, a very strong court, that there was within the meaning of the statute an impounding, the goods not having been removed, not having been placed under lock and key, but having been indicated as having been impounded by the marks that were put upon them.

That case was approved and held to be good law in *Thomas* v. *Harries* (4). The actual facts in that case do not matter, but TINDAL, C.J., says (1 M. & G. at p. 703):

> "The case of *Firth* v. *Purvis* (3), which has been cited, appears to me to go the whole length of this. There, nothing was done to the door of the cellar in which the casks were; the party simply gave notice, and the giving of that notice was treated as amounting to an actual impounding."

A very learned judge treats that as a sufficient impounding, and, therefore, it appears to me from that case, and also from *Ladd* v. *Thomas* (5) and *Tennant* v. *Field* (6), that you have not necessarily got to either shut up the premises or to collect the chattels, and there may be still a good impounding. LORD CAMPBELL says in *Tennant* v. *Field* (6) (8 E. & B. at p. 342):

> "Nothing had taken place to prejudice his rights; and the distrainer had abstained from doing what might be injurious to him. The removal might most materially have injured him. Does not this amount to making a pound of the rooms in which the distrained goods were? I am of opinion that it does, and that, consistently with the authorities, there has been an impounding before the tender."

That being so, it appears to me, particularly after the case of *Firth* v. *Purvis* (3), which was a case in which the question arose as against a stranger and not as against a tenant, that the view presented by MACNAGHTEN, J., is too narrow a view, and, if there has been a pound created, the pound is created and must be respected by all, not merely by the tenants, but by strangers as well, because the goods are in custodia legis.

I accept therefore the view presented by counsel for the plaintiffs that in the present case we have a pound, and the fact that the pound was broken unwittingly against the will of the landlord, and now we have to say whether or not the defendants were one of the offenders who were guilty of that pound-breach. That becomes a question of fact. It is quite unnecessary to show that there was knowledge on the part of the defendants. If, in fact, there was evidence and proof that there had been a pound-breach by the defendants, then they would be offenders and would be liable. Herein I want to say that I agree with the view presented by counsel for the defendants, that the rescous relates to the rescue of the goods before they reach the pound and at a time when they are being distrained and taken to the pound and that the pound-breach arises after they have been impounded. The authorities for that proposition are those that he cited to us and those which I also contributed myself, particularly in BULLER'S NISI PRIUS CASES.

On the question that we have now got to decide the learned judge took the view that the defendants were implicated in the pound-breach which was committed by Mr. Wong Gee. He says this (148 L.T. at p. 55):

> "The defendants' servants did no more than carry [the goods] down from the landing and put them in the lorry. In my opinion, if the Canton Café had in law become a pound, the plea so set up by the defendants does not avail them. It was conceded that if the offence of pound-breach is committed, the fact that it is committed unwittingly, does not matter, and it seems to me that a person who supplies the means of committing the offence—because unless the lorries had been supplied Mr. Wong Gee or his employees would not have been able to remove the goods—the persons who supplied the means of committing the offence, and without whose aid the offence could not really have been committed, must come within the class described in the statute as offenders, and be liable to the penalty of treble damages."

I find myself unable to accept that view, because the defendants are entitled to say that their ordinary business is that of removing furniture, and they are summoned day by day in the ordinary course of business to a job such as this was. Their evidence is that in the ordinary course they received notice that some furniture was to be removed, and they acceded to that order in the ordinary course.

I do not think it follows that, because the lorries were supplied and that without the lorries Mr. Wong Gee and his employees would not have been able to remove the goods, that necessarily makes the defendants offenders. Mr. Wong Gee had broken the pound; he had taken the goods out of the pound; they were in the passage or upon the landing, and certainly the possession man would have protested and insisted upon the chairs and tables being taken back into the restaurant where the pound was created if he had come upon the scene. I think, therefore, that the question arises: Are you to implicate a person who in the ordinary course of business then deals with the goods, are you to make him suffer the penalties which are imposed under s. 4 of the Act of 1868?

It is important to observe that this liability is a heavy one; it is intended to impose penal damages upon offenders. The proof ought to be quite plain and clear that the defendants were engaged in and were assisting at, or were in substance taking a hand in the pound breach, but I do not find evidence which justifies our coming to such a conclusion. There was, no doubt, some evidence that three persons actually entered the restaurant where the pound was; two of those are identified, and third one is not. The fact that one is not identified does not justify one drawing the inference that he was one of the defendants' men. All the evidence that we have got before us points to this, that the defendants were acting in the ordinary course of their business; they were called in to play their part in respect of goods which had been brought outside the pound, and at a time when the pound-breach had already been committed. I do not find myself able to accept the view that the plea of the defendants has failed, because I do not find sufficient evidence to override their plea. In these circumstances upon this question of fact we find that there has not been sufficient evidence to establish the fact that the defendants committed a pound-breach, although we are satisfied upon plaintiffs' argument that there was a pound and that that pound was a good pound as against the defendants. For these reasons, which are different from those which were given by the learned judge, we have come to the conclusion that the appeal fails, and must be dismissed with costs.

LAWRENCE, L.J.—I agree. In the statement of claim there is an allegation that the goods in question were impounded. There was a clear admission by the defendants, who were not the tenants, but were strangers, that the goods had been impounded. Their counsel has stated in this court in the frankest possible manner that he made that admission in the court below deliberately after having considered the authorities, and after having come to the conclusion that he could not successfully dispute the fact that the goods had been impounded. Having had our attention called to the cases on the subject, I think he was clearly right in making that admission, and that in the present case the goods had been properly impounded. Counsel stated that so far as the defendants were concerned, the question was whether or not they had committed a pound-breach or had knowingly been a party to the commission of a pound-breach, and that the whole of the action had been fought in the court below upon that single issue. The learned judge reserved judgment and in the result held that in the circumstances, although the goods had been effectually impounded as between the landlord and the tenant, they had not been impounded within the meaning of s. 3 of the Distress for Rent Act, 1689. In my judgment, that finding was not warranted on the facts, if, indeed, it was open to the learned judge, after the admission made on behalf of the defendants and after the evidence had been closed, to come to any such finding. The finding was a surprise to both parties, because neither the plaintiffs nor the defendants directed their minds to the question whether the goods had been validly impounded or not. In my opinion, if goods are impounded as between the landlord and the tenant, they thereupon come into the custody of the law, and anybody, whether the tenant or a stranger, who takes them out of the pound, either innocently or with knowledge of the pound, is liable under the Act for treble value of the goods so taken out.

In the present case the only question in the court below was, and in this court is, whether the defendants have committed a pound-breach so as to bring them within the purview of the section in question. As my Lord has stated, that is a pure question of fact, and, the facts in this case not being in dispute, the question is whether, on facts, the defendants have committed a pound-breach. The defendants are a reputable firm, carrying on the business of furniture removers, and have vans which they hire out for the removal of furniture; it is their daily experience to remove furniture to auction rooms and other places for the purpose of sale or storage. The tenant of the restaurant sent an emissary to the defendants, and requested a lorry to be sent round in the morning to the restaurant for the purpose of taking the furniture in the restaurant to some auction rooms. The defendants asked the person ordering the van whether porters would be required to load and unload the furniture into and out of the van, and they were told no porters would be required. Consequently, they sent a driver named Hawkins with a lorry, who, when he saw the furniture, said his lorry would not hold the whole of it, and thereupon he went back to the defendants' garage and obtained another lorry to come to the restaurant to effect the removal. The two drivers of the lorries, being willing to assist in the removal of the furniture, went up to the first floor of the building as far as the landing. The pound was in the restaurant and did not extend to the landing. There were two men in the employ of the tenant, who took the goods out of the pound and placed them on the landing, whence they were taken by the defendants' two drivers down the stairs and placed in the lorries. It is not suggested that either the defendants or their two drivers knew that the van was being used to remove goods from a pound, or that the restaurant had in fact been made a pound. Nor is it suggested that either of the two drivers went into the pound for the purposes of removing the goods. Therefore, it is clear that they did not break the pound; all that the defendants' drivers did was to carry the goods down the stairs and load them into the van after the tenant, through his servants, had broken the pound and placed the goods outside.

Counsel for the plaintiffs argued that, if the two drivers were held not to be parties to the breaking of a pound in a case like this, any person assisting in a pound-breach by taking away goods out of a pound need only be careful to remain outside the pound in order to escape liability for the pound-breach. If there had been evidence in the present case that the defendants' drivers had been careful to remain outside the pound, which expression can only mean that they knew a pound had been created, and knowing that fact had kept outside, I should have no hesitation in holding them guilty as joint tortfeasors and of assisting the tenant in breaking the pound. In the present case, however, there is no such evidence; on the contrary, it is proved that the lorry drivers were willing men, and were helping in the removal, but fortunately for the defendants they did not go inside the pound, and, therefore, they cannot be said to have broken it, nor can they be said to have been parties to the pound-breach, because they had no notion that the restaurant was a pound. It seems to me the example given in the course of the argument is an apt analogy—that is to say, if a pound breaker were to hail a taxi-cab to the door of the pound and bring some of the goods out of the pound in a suitcase and ask the driver to place it in the taxi, and then order him to drive to a station, or some other address, could it be said that the taxi-driver was guilty of pound breaking? Assuredly not. In order to constitute the offence of pound breaking there must either be pound breaking in fact or some act knowingly done to assist somebody else to commit a pound-breach. The fallacy underlying the argument of counsel for the plaintiffs is that he confuses an innocent pound-breach, which does not excuse the breaker with an innocent taking away of goods after the pound-breach has been completed, and the goods are out of the pound. For these reasons I agree that this appeal fails and ought to be dismissed.

ROMER, L.J.—I agree. In my opinion, the pound-breach was completed when the goods reached the landing. Macnaghten, J., has found that the defendants' servants did no more than carry the goods down from the landing. Up to the time that the goods were placed on the landing the defendants' servants had not, in my opinion, taken any part, active or passive, in committing the offence of a pound-breach. The defendants cannot, in my opinion, be rendered any more liable for the pound-breach that was carried into effect than any person who was passing by the front door at the time the breach was being committed. For these reasons, without going into the other points on which I desire to add nothing to what has fallen from the other members of the court, I think that this appeal must be dismissed with costs.

Solicitors: *R. H. King & Co.*; *Hobson, MacMahon, & Cobbett.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re WALTERS' DEED OF GUARANTEE. WALTERS' "PALM" TOFFEE, LTD. *v.* WALTERS

[CHANCERY DIVISION (Maugham, J.), January 11, 1933]

[Reported [1933] Ch. 321; 102 L.T.Ch. 149; 148 L.T. 473; 49 T.L.R. 192; 77 Sol. Jo. 83]

Company—Dividend—Guarantee—Provision for immediate repayment to guarantor of sum paid by him—Validity.

The defendant entered into a deed of guarantee with the plaintiff company and a trustee for the preference shareholders of the company by which he guaranteed the preference dividends. Clause 7 of the guarantee provided that: "Any sum so paid by the guarantor shall be forthwith repaid to him on demand."

Held: cl. 7 purported to place the defendant in the position of a creditor who was entitled to rights against the company which were quite different from the right which a preference shareholder had to payment of dividends out of profits according to the company's articles of association and distinct from the rights of a preference shareholder in a winding-up, and, therefore, the clause was wholly ultra vires the company and void, but that was without prejudice to any claim by the defendant to be subrogated to the rights of the preference shareholders.

Trevor v. *Whitworth* (1) (1887), 12 App. Cas. 409, applied.

Notes. As to dividends of a company, see 6 HALSBURY'S LAWS (3rd Edn.) 396 et seq., and for cases see 9 DIGEST (Repl.) 641, 642.

Case referred to:

(1) *Trevor* v. *Whitworth* (1887), 12 App. Cas. 409; 57 L.J.Ch. 28; 57 L.T. 457; 36 W.R. 145; 3 T.L.R. 745; 32 Sol. Jo. 201; 9 Digest (Repl.) 97, *434*.

Summons.

By this summons the plaintiff company asked that the defendant's rights under cl. 7 of a deed of guarantee dated May 30, 1928, might be declared, and, in particular, that it might be determined whether he was entitled under it to repayment by the company of any sum paid by him under the deed or whether the provisions of cl. 7 were ultra vires and void. The deed of guarantee, which was duly executed by the company, was entered into between the company, the defendant, and a trustee for the preference shareholders of the company, and by it the defendant guaranteed the dividend on the company's preference shares for three years from

A the date thereof. Clause 7 provided that: "Any sum so paid by the guarantor shall be forthwith repaid to him by the company on demand."

F. K. Archer, K.C., and *Cecil Turner* for the plaintiff company, and also for the trustee of the preference shareholders, who was added as a party at the hearing.
W. F. Swords, K.C., and *E. J. Heckscher* for the defendant.

B **MAUGHAM, J.**, stated the facts and continued: The question arises whether cl. 7 of the deed of guarantee dated May 30, 1928, is binding on the company. Its effect is that the instant any sum is paid by the defendant to the trustee for the preference shareholders, the defendant is authorised to commence an action for repayment of the sum as if he were a creditor of the company entitled to rank in the same position as any other creditor. The capital of the company might thereby C be reduced otherwise than by expenditure on the objects defined by the memorandum. In my opinion, such a provision must be inconsistent with the principles in *Trevor* v. *Whitworth* (1) (12 App. Cas. at pp. 415, 423), in which it was held that a claim against a company in liquidation by a former shareholder for the balance of the price of shares which he had sold to the company and which the company had purported to buy under its articles, failed because the company had no power D under the Companies Acts to buy its own shares, or to make, without the sanction of the court, any payment in reduction of capital not being expenditure upon and reasonably incidental to the objects of the company. Clause 7 is not, in my opinion, dealing with any question of subrogation. It purports to place the defendant in the position of a creditor who is entitled to rights against the company quite different from the right which a preference shareholder had to payment of E dividends out of profits according to the company's articles of association, and distinct from the right of a preference shareholder in a winding-up.

In my opinion, therefore, cl. 7 is wholly ultra vires and void. On the other hand, preference shareholders are not entitled to be paid twice over any part of dividends which the defendant has provided for distribution among them. I, therefore, declare that cl. 7 is ultra vires and void, and that this declaration is without F prejudice to any claim of the defendant to be subrogated to the rights of preference shareholders of the company as to payments which may be made in regard to preference dividends for the period of three years from May 30, 1928, or in respect of any rights of preference shareholders in a winding-up.

Solicitors: *Samuel Price, Sons, & Robertson*; *Lucien Fior.*

[*Reported by* MISS B. A. BICKNELL, *Barrister-at-Law.*]

SUN LIFE ASSURANCE CO. OF CANADA *v.* W. H. SMITH & SON, LTD.

[COURT OF APPEAL (Scrutton, Lawrence and Greer, L.JJ.), November 23, 24, 1933]

[Reported 150 L.T. 211]

Libel—Defence—Innocent dissemination—Evidence to support plea—Absence of knowledge—Absence of negligence—Questions for jury.

The vendor of a newspaper, book, or periodical will not be responsible for a libel contained in it if he proves (i) that he did not know that the publication was one, not which did contain a libel, but which was likely to contain a libel, and (ii) that his absence of knowledge was not due to negligence in the conduct of his business. In a case where publication of a libel is alleged against such a vendor the jury should be asked (i) whether the defendant knew of the existence of the libel, and (ii) whether, if he had carried on his business properly, i.e., without negligence, he would have known of it.

Emmens v. *Pottle* (1) (1885), 16 Q.B.D. 354 applied.

A newspaper poster was displayed on which was printed in large letters the words: "More Grave Sun Life of Canada Disclosures," which were found by the jury at the trial to be libellous. The poster was displayed by the defendants, who were newsagents, at railway station bookstalls under a contract between them and the proprietors of the newspaper. The defendants gave evidence that at their head office newspaper poster contents bills arrived in such quantities and had to be dispatched to bookstalls with such speed that they had no time to open and consider them; the manager of a bookstall was granted no discretion whether or not he should display a poster if he thought it was libellous; there were district superintendents of bookstalls, but each had a large number of bookstalls to cover.

Held: there was no efficient supervision by the defendants of what was displayed at their bookstalls; if the manager of a bookstall had reasonable ground to believe that a poster contained a libel he should have been allowed to communicate that fact to the defendants; in those circumstances there was evidence on which a jury could find that there was negligence on the part of the defendants in not knowing that the poster contained libel.

Notes. As to dissemination of a libel and publication by an agent, see 20 HALSBURY'S LAWS (2nd Edn.) 443 et seq., and for cases see 32 DIGEST 81 et seq.

Cases referred to:

(1) *Emmens* v. *Pottle* (1885), 16 Q.B.D. 354; 55 L.J.Q.B. 51; 53 L.T. 808; 50 J.P. 228; 34 W.R. 116; 2 T.L.R. 115, C.A.; 32 Digest 81, *1120*.

(2) *Vizetelly* v. *Mudie's Select Library, Ltd.*, [1900] 2 Q.B. 170; 69 L.J.Q.B. 645; 16 T.L.R. 352, C.A.; 32 Digest 82, *1122*.

(3) *Bottomley* v. *Woolworth & Co., Ltd.* (1932), 48 T.L.R. 521; [1932] W.N. 115; 73 L.J.N.C. 412, C.A.; Digest Supp.

(4) *Mallon* v. *W. H. Smith & Son* (1893), 9 T.L.R. 621; 32 Digest 81, *1119*.

(5) *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Exch. 259; 36 L.J.Ex. 147; 16 L.T. 461; 15 W.R. 877, Ex. Ch.; 34 Digest 129, *987*.

(6) *Lloyd* v. *Grace Smith & Co.*, [1912] A.C. 716; 81 L.J.K.B. 1140; 107 L.T. 531; 28 T.L.R. 547; 56 Sol. Jo. 723; reversing [1911] 2 K.B. 489, C.A.; 34 Digest 129, *991*.

(7) *Limpus* v. *London General Omnibus Co.* (1862), 1 H. & C. 526; 32 L.J.Ex. 34; 7 L.T. 641; 27 J.P. 147; 11 W.R. 149; 9 Jur.N.S. 333; 158 E.R. 993, Ex. Ch.; 34 Digest 129, *989*.

Appeal from a verdict and judgment for £3,000 damages in favour of the plaintiffs, the Sun Life Assurance Co. of Canada, against the defendants, W. H. Smith & Son, Ltd., newsagents, in an action for damages for libel, contained in the issue

A of "The City Mid-Week" for July 13, 1932, and on a coloured poster on which was printed in large letters the words: "More Grave Sun Life of Canada Disclosures." The plaintiffs had also brought an action against the British International Press, Ltd., the publishers of "The City Mid-Week," and others, in which the jury returned a verdict for the plaintiffs, awarding them £19,000 damages.

In the action against W. H. Smith & Son, Ltd., which was tried before the Lord B Chief Justice and a special jury, the defendants pleaded that they acted without negligence and in the ordinary course of their business as proprietors and managers of bookstalls; that they did not know, nor ought they to have known, that the issue of "The City Mid-Week" or the poster in question contained any matter defamatory of the plaintiffs, nor did they know or have grounds for supposing that the issue of the newspaper or the poster was likely to contain libellous matter. On complaint, C paper and poster were withdrawn.

The arguments at the trial and on appeal turned almost entirely upon the effects of the exhibition of the poster by the defendants. The defendants had contracted to exhibit posters supplied by the publishers of the newspaper at twenty-four named stations. The defendants gave evidence that at their head office newspaper poster contents bills arrived in such quantities and had to be dispatched with such speed D that they had no time to open and consider them. The manager of a bookstall opened the parcels of papers and poster contents bills, and, where the defendants were under contract to do so, posted the latter in spaces on the bookstall. Mr. Seymour, secretary and managing director of the defendants, said that he did not know that this issue of "The City Mid-Week" contained any libel on the plaintiffs, and that neither he nor anyone at the head office knew that the posters contained E any reference to the company. The manager of a bookstall was granted no discretion whether he should withdraw a publication on the ground that it was libellous. There were district superintendents of bookstalls, but each had a large number of bookstalls to cover.

The Lord Chief Justice left the following questions to the jury, which they answered as stated: (i) Was the poster by itself libellous?—Yes. (ii) Were the F defendants innocent of any knowledge of the libel contained in (a) the newspaper or (b) the poster?—Yes. (iii) Was there anything in the circumstances in which the newspaper or the poster, or either of them, came to the defendants, or were disseminated by them, which ought to have led them to suppose that they, or either of them, contained a libel?—No. (iv) Was there any negligence on the part of the defendants in not knowing that the poster or the newspaper contained a libel?— G Yes. The jury assessed the damages at £3,000, and judgment was entered for the plaintiffs for that amount. The defendants appealed.

Sir William Jowitt, K.C., *Wilfrid Lewis* and *John Horridge* for the defendants.
Sir Patrick Hastings, K.C., *Harold Murphy* and *Clive Burt* for the plaintiffs were not called upon to argue.

H **SCRUTTON, L.J.**—This is an appeal by the defendants, W. H. Smith & Son, Ltd., from the judgment entered against them in a trial before the Lord Chief Justice and a special jury, when the special jury arrived at certain findings upon which the Lord Chief Justice entered judgment for the plaintiffs.

The plaintiffs were the Sun Life Assurance Co. of Canada, a company doing a very extensive business, and there appeared in the issue of a paper called "The I City Mid-Week," on July 13, 1932, an article attacking the Sun Life Assurance Co. of Canada, which was obviously, if not true, a libel on the company. No attempt has been made to justify this libel in this particular action, and, in an action by the assurance company against the publishers and others, the article was found to be a libel, with the result that the jury gave a verdict for £19,000 damages in favour of the plaintiffs. The two actions were at one time consolidated, but upon an application to the other branch of this court it was ordered that the two claims should be severed, the claim against W. H. Smith & Son, Ltd., for selling the paper and exhibiting the poster concerning it being severed from the claim

against the publishers and others. So that before the present action came for trial, A
the action against the publishers of the paper had been determined.

In the action against W. H. Smith & Son, Ltd., it was alleged that they had sold a paper containing a libel and had exhibited a poster relating to the paper, the poster in itself containing a libel. Certain questions were asked by the Lord Chief Justice of the jury, to which I will refer shortly, and the jury gave certain answers, and the question is whether, on those answers, the judgment entered by the Lord B
Chief Justice for the plaintiffs can be supported. The claim that the paper contains a libel, and the claim that the poster contains a libel, are two different questions, and the argument in this court, and, I think, the argument in the court below, has turned almost entirely upon the effect of the exhibition of the poster by W. H. Smith & Son, Ltd., for it has been now decided for a long time that while, if the defendant sells a book or paper containing a libel by itself, if nothing more is C
proved, it is a publication of the libel for which he is responsible, yet the defendant may free himself from liability by proving—and I put it quite shortly—(i) that he did not know that it contained a libel, and (ii) that it was not through his negligence that he did not know it contained a libel—that there was no negligence in the way of his carrying on his business. I thoroughly sympathise with the Lord Chief Justice's view when he was presented on this point with three questions D
which he was invited to ask, when he said:

> "Is it not sufficient to deal with the last paragraph of **Bowen**, L.J.'s judgment in *Emmens* v. *Pottle* (1), that case being the foundation of this law?"

Bowen, L.J., said (16 Q.B.D. at p. 358):

> "I by no means intend to say that the vendor of a newspaper will not be E
> responsible for a libel contained in it if he knows, or ought to know, that the paper is one which is likely to contain a libel"

—not "which does contain a libel," but "which is likely to contain a libel." I think it would probably be better if the questions for the jury in cases like that of *Emmens* v. *Pottle* (1), once the libel has been established, were restricted to (i) a question whether the defendant knew, and (ii) a question whether the defendant F
ought to have known, that is to say, whether there was negligence on the part of the defendant in carrying on his business in respect of the publication of the libel. But the first question, before any question arises of liability on the part of any particular publisher, is: Is the document a libel? Libel or no libel is for the jury, subject to this, that, if no reasonable jury, on the material before them, could find that the document is a libel, then the judge may intervene and decline to leave G
the question of libel or no libel to the jury.

This poster, sufficiently glaring in colour to attract the attention of anybody who was not colour-blind, was printed with large letters on it, "More Grave Sun Life of Canada Disclosures." The jury found that that was a libel. The question for the court is: "Is it capable of a libellous meaning, that is to say, could the jury reasonably have taken that view?" I think counsel for the defendants is rather H
constrained to agree that if it had been "More grave disclosures about the Sun Life of Canada," it would clearly have been within the province of the jury to find that it was a libel. The word "about" is omitted, and it is suggested that it is equally possible that this may mean: "More grave disclosures by the Sun Life of Canada." I can only say that the probabilities are enormously in favour of its meaning being taken by people who saw it to be: "More grave disclosures about I
the Sun Life of Canada," and from that point of view I think it was quite clearly within the legitimate province of the jury to find as they did in the answer to the first question put to them that the poster by itself was a libel.

Secondly, how did W. H. Smith & Son, Ltd., come to publish the poster, as they did, at twenty-four of their bookstalls? The answer is that there was a contract made between them and the proprietors of the paper to exhibit posters supplied by the proprietors at twenty-four named stations. W. H. Smith & Son, Ltd., gave evidence of their course of business, and I roughly summarise it in this way. They deal with a very large number of papers—daily, weekly and monthly. Every morning when the distribution is to begin there come into their head office an enormous number of parcels of papers and of contents bills. They have no time to read the papers. The contents bills, of which there are a very considerable number, arrive folded up in parcels, and they have no time to open them and consider each contents bill. The officials at the head office send off every morning by various methods of transit at top speed, parcels of papers and contents bills, in cases where they have been paid to exhibit contents bills, to their numerous bookstalls. At the bookstall there is a manager who is concerned with carrying on the business of the bookstall and supervising the business of the bookstall, and he or his assistant opens the parcel, puts the papers ready for sale, and, where the firm have a contract to do so, opens the contents bills and posts them in spaces on the bookstall. To open them and post them somebody must look at the contents bill; he must not post it upside down, and to find out whether it is upside down or whether it is not upside down he must look at the words, and, even assuming that the subordinate person who puts up the poster is not the sort of person you would go to for information whether a document is a libel or not, it is obviously the duty of the manager to look round at his bookstall and see that things are in order. Looking at a large placard like this, it is impossible that he should not see the words which are on it. Therefore, he is not like the head office, which never looks, and can hardly be bound to look at a paper to see what is in it or unfold a contents bill to see what is on that. He does see something which, at any rate in this case, would render him extremely suspicious whether it ought to be exhibited. The responsible witness, Mr. Seymour, called for W. H. Smith & Son, Ltd., said that they gave no discretion to their bookstall manager whether he should or should not exhibit posters which they send to him; they have not seen them themselves, but he has to exhibit what they send to him without any discretion. They have an official who is said to be superintendent of bookstalls, and who has in London a very large number, some 1,400, bookstalls which he is supposed to superintend. But there appears to me to be in the system of W. H. Smith & Son, Ltd., no efficient supervision of what they exhibit at their bookstalls for payment in the case of exhibition under the contract to which I have referred. It is obvious, without saying anything for the moment about the form of the questions asked of the jury, that, if it is a question for the jury whether a business carried on in this way is carried on negligently, there was evidence upon which the jury could answer the fourth question as they did—"Was there any negligence on the part of the defendants in not knowing that the poster or the newspaper contained a libel?" The jury may very well have thought: "It is true that you are not able in the rush of business at your head office to look at every newspaper and every poster, but when you send the posters to your responsible manager of a bookstall to display, if you cannot look at them yourself, it is obvious that you ought to give him instructions that if, on looking at the poster he is suspicious of the subject-matter which you have not seen, he should, at the least, at once communicate with you and not exhibit the poster until he has received your answer." It is an easy matter in London to telephone: "Poster of 'City Mid-Week' contains these words, shall I accept it?" and there should obviously be some responsible person at W. H. Smith & Son, Ltd., who could say at once: "Yes," or "No."

If trouble has arisen, but I do not think it has, it has arisen from the second and third questions which were asked the jury. The second question was: Were the defendants innocent of any knowledge of the libel in (a) the newspaper, or (b) the poster?" to which the jury answered "Yes." The exact bearing of that answer depends on who are "the defendants" spoken of in the question. Of course, the company as such has no knowledge: the knowledge of the company is only that of some of its servants or agents. If you limit the meaning of "the defendants" in the question to the defendants' directors, no doubt they had not the slightest knowledge of any libel contained in the newspaper or poster. If you limit the meaning of the word to those at the head office, who every morning are working at great speed to send out any number of papers and any number of posters, they also were innocent of any knowledge. But if the question referred to the knowledge of the persons who in fact posted up the posters in such a way that they must look at them and see what was on them, as the knowledge of the defendants, then that matter was not, so far as I can see, explained to the jury, and I think counsel for the plaintiffs was right in saying that the principle which he quoted from MR. BOWSTEAD'S DIGEST OF THE LAW OF AGENCY (8th Edn.), art. 109 at p. 365, is correct:

> "Where any fact or circumstance, material to any transaction, business, or matter in respect of which an agent is employed"

—stopping there for a moment, an agent here was employed for payment to post up, so as to publish, a poster; is it material to that transaction that he is asked to post up a libel?; obviously it is—"comes to his knowledge in the course of such employment"—that fact or circumstance did come to the knowledge of the manager of the bookstall in the course of his employment when he did what he was ordered to do, namely, post up these posters—"and is of such a nature that it is his duty to communicate it to his principal"—it seems to me clear that where a principal does not know that a publication is a libel and has not seen it, and the agent has reasonable ground to believe, on looking at it, that it is a libel, it is his duty to communicate that fact to his principal and to get further instructions—in that event

> "the principal is deemed to have notice thereof as from the time when he would have received such notice if the agent had performed his duty. . . ."

I deal with the second question asked of the jury by saying that, if by "the defendants" was meant the head office of the defendants, the question was rightly answered, but was irrelevant. If it was meant that all the servants of the defendants were innocent of any knowledge of any libel, it may be that the managers of the twenty-four bookstalls did not know it. But the burden of proving innocence was on the defendants, and none of the managers of the twenty-four bookstalls was called before the jury.

The third question is this: Was there anything in the circumstances in which the newspaper or the poster, or either of them, came to the defendants or were disseminated by them, which ought to have led them to suppose that they or either of them contained a libel? It is difficult to see the difference between that question and question No. (iv), and I quite agree with the criticism of the Lord Chief Justice and of counsel for the defendants on that matter. Question No. (ii) is directed to the question: Did the defendants know? and, as I have said, there should have been a direction as to who were meant by the words "the defendants," whether they are the principals, directors, or other and what servants of the company. But questions Nos. (iii) and (iv) are very much alike. The history of the questions seems to date from the decision in *Emmens* v. *Pottle* (1), because there is no trace of this doctrine, I think, before that decision. The questions then settled by WILLS, J., are practically the questions which were left to the jury in this case. The jury in that case, in answer to the questions put to them by WILLS, J., found:

> "(i) That the defendants did not, nor did either of them, know that the newspapers at the time they sold them contained libels on the plaintiff [that is knowledge]; (ii) that it was not by negligence on the defendants' part that they did not know there was any libel in the newspapers; [and] (iii) that the defendants did not know that the newspaper was of such a character that it was likely to contain libellous matter, nor ought they to have known so."

If there is a difference between the second and third questions it is: (i) Was it negligent that they did not know; and (ii) ought not they to have known that the paper was likely to contain a libel, though they did not know it did in fact contain a libel? The questions in *Emmens* v. *Pottle* (1) were asked in that way, and the Court of Appeal said that, if the defendant established an answer in the negative to both the matters there put to the jury, he succeeded in his defence.

In *Vizetelly* v. *Mudie's Select Library, Ltd.* (2) the libel was published, not by

A the vendors of a newspaper, but in books by the proprietors of a circulating library. The three judges in the Court of Appeal, who supported the finding of the jury that the defendants' circulating library had not proved their defence, appear to have given three different sets of reasons to explain why what had happened—the circulation and/or selling of the books—was in that case publication, but might, in other circumstances, not have been publication. VAUGHAN WILLIAMS, L.J., made the B distinction turn on this, that, if a defendant did not know and ought not to have known, he did not maliciously publish. That proposition involves an investigation into what is meant by the time-honoured words "malicious publication," when a plaintiff puts forward a claim for libel. A. L. SMITH, L.J., considered that the case turned on two particular facts: one, that the defendants took in "The Publishers' Circular" and "The Athenæum," but had not read them. Had they done C so they would have seen that the publishers of the book had requested that all copies of the book in question might be returned to them in order that they might cancel a page. The other fact was that in answer to a very skilful question in cross-examination, Mr. A. O. Mudie, one of the two managing directors, being asked: "Do you think it is cheaper to run an occasional risk of an action rather than to have a reader?" answered: "Yes." Those two matters, A. L. SMITH, L.J., D thought, would support the verdict of the jury in that case and make the defendants liable for publication. ROMER, L.J., simply stated as law the three questions in *Emmens* v. *Pottle* (1), but put question No. (iii) before question No. (ii).

In those circumstances, when *Bottomley* v. *Woolworth & Co., Ltd.* (3) came before this court, I think all the members of the court expressed some doubt as to what was the exact ground of the protection which was given to the defendants E who succeeded in proving a negative to the questions put to the jury in *Emmens* v. *Pottle* (1). In my view, the safest course for the trial judge, as I have said, is to follow BOWEN, L.J., who is a very good man to follow. The effect of his judgment in *Emmens* v. *Pottle* (1) was that the vendor of a newspaper will not be responsible for a libel contained in it, if he (i) does not know, and (ii) ought not to have known—that is to say, if he carried on his business carefully—that the F paper is one, not which did contain a libel, but which was likely to contain a libel. My own view is that it would be better in future if two questions are put to the jury on those lines: (i) whether the defendant knew, and (ii) whether he would have known if he had carried on his business properly.

If that is the law, and the way in which the defendants can establish that they are not liable, it seems to me that there was ample evidence in the case now before G the court upon which the jury might answer the fourth question in the way they did, namely, that there was negligence on the part of the defendants in not knowing that the poster or the newspaper contained a libel. If the defendants are compelled at their head office to send out papers and posters without knowing what is in them because of the mass and volume of their business, and so, not knowing whether a poster may contain a libel, direct the managers of their bookstalls, who H have an opportunity and would, in the course of business, look at the posters before they are posted, not to exercise any discretion or take any step to delay the posting if they think, looking at a poster, that it might be libellous, the jury may very well find that they are carrying on their business carelessly in that respect, with the result that liability will attach to them if, for payment, they exhibit a poster which does in fact contain a libel, as has been found in this case.

I The defendants relied on *Mallon* v. *W. H. Smith & Son* (4). That case was tried before CAVE, J., and a special jury, and the jury found for the defendants. No specific questions were asked of the jury. It appears from the facts that the plaintiff said that the posters were exhibited at three stalls of W. H. Smith & Son, Ltd., on Dec. 20, 1892. The defendants called witnesses from each stall to say that no such poster was exhibited at that date or for a long time before. But the plaintiff said:

> "I saw them, and I went and told the manager that the posters contained the libels, and they went on selling the papers."

That case was cited to us as an authority that bookstall managers, although they A knew or were told that the papers they were selling contained a libel, might go on selling them without making their employers liable. One does not know whether the jury simply found that there was no exhibition of the posters at the time complained of, or whether they did take the view that it was not negligent for the managers of the bookstalls to go on selling the papers when they were told that they contained a libel, but the findings of a jury do not bind the court. As this B use has been made of this case, I desire to say that, in my opinion, it is no authority for the proposition that when you are told that a publication contains a libel you may go on selling it and escape liability.

For these reasons I think, on the findings given by the jury, as I have explained them, the Lord Chief Justice was right in entering judgment for the plaintiffs, and the appeal must be dismissed with costs. C

LAWRENCE, L.J.—I agree. In my judgment, there was ample evidence to go to the jury on the question whether there was any negligence on the part of the defendants in not knowing that the poster or the newspaper contained a libel.

Under the system adopted by the defendants, they enter into a contract with publishers to exhibit posters at their various bookstalls for reward. They then D receive the posters, and, without looking at them, send them to the managers of their bookstalls with imperative instructions to exhibit them. They say they trust the publishers, who deliver the posters, that the posters do not contain anything libellous. The evidence given on the defendants' behalf at the trial was that, owing to the very large volume of business done by them they had no time or opportunity to look at any of the posters which they contract to exhibit. They E further said that it was not the duty of the manager of the bookstall to look at the posters in order to see whether there was anything libellous in them before he accepted them at his bookstall. They further said that, although they had a superintendent, it was not his duty to see that the posters exhibited at the bookstalls which he had to superintend contained libellous matter. It seems to me that in these circumstances it was plainly open to the jury to come to the conclusion that the system adopted by the defendants was faulty and that their conduct F was negligent. I confine what I have said to the exhibition of posters. With regard to the innocent dissemination of newspapers containing a libel, different considerations would arise. For these reasons I agree that the appeal fails and ought to be dismissed with costs.

G

GREER, L.J.—I agree that this appeal fails, for several reasons, one of which is quite sufficient. In my judgment, as soon as it was found by the jury that the poster contained statements which were defamatory of the plaintiffs and it was conceded that in the circumstances it must be assumed that a stall manager, who, on behalf of the defendants exhibited the poster, must have known its contents, then the liability of the defendants for his acts was established. It sometimes H operates very harshly on defendants to be responsible for what their agents do in the course of and within the scope of their employment, but if agents are acting in the course of their employment and within the scope of their employment, their principal is responsible for what they do. If, for example, a clerk behind the counter of a bank, whose duty it is to answer questions that are put to him by a customer, fraudulently answers one of those questions his principal is liable: *Barwick* v. *English Joint Stock Bank* (5) so decides. If a solicitor, being interested in I public affairs, leaves his business to be managed by a managing clerk and that managing clerk acts fraudulently in relation to a matter which is within the scope of the solicitor's business, then the principal, the solicitor, is responsible for his acts, and it would not be the slightest good for the master to say: "I told him not to do it; I told him he was not to be fraudulent; he was not employed by me to be fraudulent": *Lloyd* v. *Grace, Smith & Co.* (6). That would not make any difference; just as it made no difference in *Limpus* v. *London General Omnibus Co.*

A (7), where the driver was told not to race and in racing another bus caused an accident; his employer was liable notwithstanding the instructions not to race.

In the present case the instructions given to the manager amount to this: "We send you a number of posters. Whatever they are, whatever they contain, you have got to put them up. We give you a plan and we give you numbers as to where they are to be put up, and you must not exercise your own judgment at all. B You must put them up." How in those circumstances anybody can successfully contend in a court of justice that the defendants are not liable, having regard to the principles of law regarding the liability of a principal for the acts of his agent, I am unable to conceive. It is said in those circumstances the employers are the innocent disseminators of the libellous document. A company of course is, as a person, incapable either of being innocent or guilty, but has only a persona, for by C theory and in law it must act by an agent. When the question is as to a libel which has been disseminated or published to some member of the public by a company or an individual whose business it is to exhibit documents similar to that which contained the libel in question, then you have to consider: Was the dissemination innocent?, and, if a company leaves it to one of its salesmen to sell a paper, or to one of its salesmen to exhibit on his stall an invitation to buy the D paper, it is just as much responsible for the state of mind the agent has when he disseminates the defamatory matter as if it was there itself as a person exhibiting the poster or selling the paper, as the case may be.

The point was put by counsel for the plaintiffs in the course of his argument in this way, and I think it is unanswerable: "Suppose that the defendant was a man of small means, not a large company of newsagents, like W. H. Smith & Son, Ltd., E could anyone be heard to say that if such a person had one bookstall and had an assistant running it and that assistant put up a poster containing a libel, the proprietor would not be liable because his assistant did the act and not the proprietor himself?" I think that observation applies just as much in the case of a large company like W. H. Smith & Son, Ltd., as it does in that of a small man only having one stall managed by his manager. That, in my judgment, would be F sufficient to justify judgment in this case being held to have been properly entered against the defendants on the finding of the jury, the jury having found that the poster was libellous, and it being conceded that the man by whose orders the poster was exhibited and who must necessarily have seen its contents must be taken to have known the contents. I think those facts were sufficient to justify a judgment for the plaintiffs without the answer to the fourth question.

G With regard to the second question asked of the jury, it seems to me that the jury must have been directing their attention in their answer not to the question whether the bookstall manager knew that the document contained a libel, but whether the servants of the defendants at the head office had notice of any circumstances that ought to have led them to suppose that it contained a libel. As I understood the argument before us, it involved a concession that the stall manager H must have known that the document contained the words which the jury have found to be a libel.

With regard to the fourth question asked of the jury: Was there any negligence on the part of the defendants in not knowing that the poster or the newspaper contained a libel?, to which the answer was "Yes," I agree that there is no ground for disturbing that finding, and that that finding is enough to support the judgment I given by the learned judge. The effect of the evidence is that, by the system they have adopted, W. H. Smith & Son, Ltd., have made it next to impossible that they should exercise any care whatever in seeing whether posters they put up for reward for themselves contain defamatory statements against some other person. It seems to me to be a course of conduct that may be regarded as negligent, because "negligence" imports the neglect of a duty towards someone, and surely the people who issue and put up posters owe some duty to the public, to the people who read posters, and to the people about whom they are written. It is not sufficient for the defendants to say that it is inconvenient for them and difficult for them, having regard to their large business, to make any other arrangements than the arrangements which they have in fact made. If those arrangements result in a breach of the duty to exercise reasonable care towards persons who may be damaged by defamatory statements, then there is negligence within the rules which have been laid down with reference to the question of innocent dissemination.

For these reasons I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Bircham & Co.*; *Freshfields, Leese, & Munns.*

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

CROMWELL PROPERTY INVESTMENT CO., LTD. *v.* WESTERN

[CHANCERY DIVISION (Maugham, J.), November 15, 1933]

[Reported [1934] Ch. 322; 103 L.J.Ch. 168; 150 L.T. 335]

Mortgage—Redemption—Default in payment—Duration of further notice—Default capable of reasonable explanation.

If notice is given to pay off a mortgage and default is made in the payment of principal and interest in accordance with the proviso for redemption the mortgagor must in general give to the mortgagee a further six calendar months' notice of his intention to repay or pay him six months' interest in lieu of notice, but where a reasonable explanation of the default is given the mortgagee must accept a notice which is reasonable in the circumstances and cannot insist on a full six months' notice.

By a mortgage dated Oct. 15, 1931, mortgagors charged certain premises in favour of the mortgagees with the principal sum of £25,000 and interest. The mortgage contained the usual covenant to repay the sum of £25,000 six months from the date thereof, and a proviso for redemption. By cl. 5 (3) it was provided that, if the plaintiffs should pay interest on the said sum of £25,000 as therein provided and should observe and perform all the covenants and stipulations therein contained and on their part to be performed (other than the covenant for repayment of the principal), the mortgagees would not take any steps for enforcing payment of the said sum of £25,000 before 1936. In January, 1933, the mortgagors asked whether the mortgagees would agree to accept repayment of the mortgage. The mortgagees replied that they would accept their money provided they got three months' notice. Accordingly, the mortgagors gave notice of repayment on April 25, 1933. Owing to conveyancing difficulties with new mortgagees, of which the mortgagees were informed, the mortgagors could not obtain the money by April 25, and the mortgagees thereupon demanded a further six months' notice of repayment or interest in lieu thereof. On May 10 the mortgagors tendered to the mortgagees the aggregate principal sum owing on the security of the mortgage, interest to that date, and costs. The tender was refused.

Held: all that equity required in the circumstances was a reasonable notice, which was a three months' notice, and the plaintiffs must pay that amount of interest in lieu of notice.

Notes. As to enforcement of the equity of redemption, see 23 HALSBURY'S LAWS (2nd Edn.) 311 et seq., and for cases see 35 DIGEST 360 et seq.

A Cases referred to:

(1) *Fitzgerald's Trustee* v. *Mellersh*, [1892] 1 Ch. 385; 61 L.J.Ch. 231; 66 L.T. 178; 40 W.R. 251; 8 T.L.R. 237; 36 Sol. Jo. 216; 35 Digest 361, *1036*.

(2) *Re Moss, Levy* v. *Sewill* (1885), 31 Ch.D. 90; 55 L.J.Ch. 87; 54 L.T. 49; 34 W.R. 59; 35 Digest 362, *1041*.

(3) *Hix* v. *Ling*, unreported.

B **Witness Action.**

The following statement of facts is taken from his Lordship's judgment: By a mortgage dated Oct. 15, 1931, between the plaintiff company, of the one part, and the defendants, of the other part, the plaintiffs charged by way of legal mortgage the premises, Nos. 2 to 60, Clarendon Court, Sidmouth Road, Willesden, in the C county of Middlesex, in favour of the defendants with the principal sum of £25,000 with interest thereon at the rate of 5½ per cent. per annum. The mortgage contained a covenant by the plaintiffs to pay to the lenders the sum of £25,000 with interest on March 25, 1932, and after that date they were to pay interest at the rate of 5½ per cent. per annum. The proviso for redemption contained in cl. 3 was as follows:

D > "If the said sum of £25,000 shall be paid to the lenders on the 25th day of March next year with interest thereon in the meantime at the rate of 5½ per cent. per annum the lenders will at the request and cost of the company duly discharge this security."

Then followed certain covenants by the company, and in cl. 5 there were conditions limiting the power of the company to lease, and so forth. Sub-clause 3 of cl. 5 E was in these terms:

> "If the company shall pay the interest on the said sum of £25,000 at the rate of 5½ per cent. per annum within fourteen days after the several days on which the same shall fall due (as to which time shall be of the essence of the contract) and shall perform and observe all the covenants and stipulations herein contained and on the part of the company to be performed and observed other than F the covenant for repayment of the said principal sum of £25,000 then and in such case the lenders will not take any steps whatsoever for enforcing payment of the said sum of £25,000 or any part thereof before the 15th day of Oct., 1936. Provided always that for the purpose of the exercise of the statutory powers the said principal sum shall be deemed to be due on the 25th day of March next."

G On Aug. 11, 1932, the plaintiffs mortgaged some other premises in Clarendon Court to the defendants. The charge was for the sum of £24,000 with interest at 5½ per cent. per annum as before, and the same provisions were contained in it, mutatis mutandis, as those in the mortgage of Oct. 15, 1931. The plaintiffs remained in possession of the premises, as was anticipated at the time of the H mortgage.

On Jan. 19, 1933, the plaintiffs wrote and inquired whether, in the event of their being able to arrange another mortgage, the defendants would accept repayment of the two mortgages in question, with interest to the date of repayment. On Jan. 20 the defendants replied that they would be prepared to accept their money providing they got a reasonable notice. On Jan. 21 the plaintiffs wrote I asking as follows:

> "We note that you are willing to accept your money providing you get reasonable notice. May we inquire on what date you would be willing to accept the money? We suggest that, if we were to repay you on the next quarter day, March 25, 1933, this might be a convenient arrangement from every point of view."

The defendants replied on Jan. 23:

> "We are prepared to accept three months' notice from the date you write and tell us that the amount will be paid off."

On Jan. 24 the plaintiffs replied:

> "We herewith give you three months' notice of our intention to repay this mortgage on April 25, 1933."

There was some further correspondence with reference to the repayment, and on March 17 the solicitors for the plaintiffs wrote to the defendants' solicitors saying that their clients were arranging for a new mortgage on the property and that the intending mortgagees' solicitors were desirous of inspecting the deeds, and they requested the solicitors for the defendants, W. R. Bennett & Co., to be good enough to produce the deeds. On March 18 W. R. Bennett & Co. wrote to say that they were doing so, and on March 20, 1933, it was arranged for the inspection to take place on March 21. Except, possibly, for some telephone messages, there was then silence between the parties for four weeks, until April 19, 1933, when W. R. Bennett & Co., on behalf of the defendants, wrote to the plaintiff company's solicitors stating that the amount which had to be paid on the 25th in order to redeem the mortgages was £49,171 13s. 4d. They showed how that sum was made up, and stated that their costs would have to be paid, and they added: "If you will let us have a definite appointment to complete we will let you have a note of our costs." They enclosed an income tax voucher which they required to be signed, and finally they remarked:

> "We shall be glad if you will kindly telephone us to-morrow, Thursday, morning and confirm that you desire us to have the statutory receipts executed by our clients."

On April 20, 1933, there was a telephonic communication between the two conveyancing clerks of the two firms, W. R. Bennett & Co., who were acting for the mortgagees, and Wedlake, Letts, & Birds, who were acting for the mortgagors. The clerk of Wedlake, Letts, & Birds stated to the clerk who was representing W. R. Bennett & Co., that, instead of statutory receipts being executed, which would have been a very quick way of dealing with the matter, the intending new mortgagee, as to whom W. R. Bennett & Co. had information by reason of the letter dealing with the inspection of titled deeds, required transfers of the two mortgages and proposed to have a consolidating mortgage. As a result there were some documents to peruse and settle, and documents which, of course, had to be submitted to W. R. Bennett & Co. for approval on behalf of their clients, and the documents would then have to be sent back for engrossing and execution, and, finally, at the settlement there would have to be an execution of those transfers, and in exchange the sum of £49,171 13s. 4d., together with any other sums that were required, would have to be handed across the table. The clerk to the plaintiffs' solicitors remarked that they could not do all that was necessary in the time at their disposal, and gave the defendants' solicitors quite clearly to understand that the completion would not take place on April 25. The clerk of W. R. Bennett & Co., acting for the defendants, gave no warning as to the effect of such delay, but he did not waive completion on that day if a waiver were required; he acknowledged what he was told, and he passed it on to his principals, and they, no doubt, passed it on to their clients. Between April 20 and 25 it appears that, in effect, nothing took place except presumably that Wedlake, Letts, & Birds were getting the necessary documents ready and were intending to send them on for approval to W. R. Bennett & Co.

On April 25 at the close of the day, the member of the firm of W. R. Bennett & Co. in charge of the matter, wrote to the plaintiffs' solicitors:

> "Referring to our conversation over the telephone on the 20th inst., we have been expecting to hear further from you with reference to this matter. Will you please let us know the present position? You will, of course, appreciate that as the mortgages have not been redeemed to-day in accordance with the notice given, six months' interest in lieu of notice will have to be paid on completion.—Yours faithfully, W. R. BENNETT & Co."

A The reply to that by Wedlake, Letts, & Birds on April 26 was as follows. They say:

> "We have now received from the new mortgagee's solicitors draft transfers of mortgage which we enclose herewith for approval on behalf of your clients. . . . We are much surprised at the second paragraph of your letter. We have never had the point raised before and it is, of course, impossible to ensure that a B matter will be completed on the actual date that the notice expires. Our clients are, of course, prepared to pay interest up to the date the mortgage is actually transferred."

W. R. Bennett & Co. did not agree with this view. On May 10 the company's solicitors tendered to the defendants' solicitors the sum of £49,254, 14s. 8d. in respect of the principal and interest due on both mortgages. The tender was C refused. The plaintiff company subsequently paid a sum of £1,010 12s. 6d., representing six months' interest in lieu of notice (less tax), into a deposit account standing in the joint names of the plaintiffs' and defendants' solicitors to abide the issue of the action, and redemption was completed on May 18, 1933.

The plaintiffs in this action sought, first, a declaration that they were entitled to redeem the two mortgages dated, respectively, Oct. 15, 1931, and Aug. 11, 1932, D upon payment to the defendants of the aggregate principal sum of £49,000 thereby secured, together with mortgagees' solicitor's costs, and together with interest on the said principal sum up to April 25, 1933 (the date of the expiration of the notice to redeem), and together with further interest from April 25, 1933, up to May 10, 1933 (the date on which tender was made by the plaintiffs to the defendants of the said principal costs and interest and refused by the defendants), without being E bound to give to the defendants further notice of six months as from April 25, 1933, to redeem the said mortgages or to pay to the defendants six months' interest in lieu of notice, and further and secondly, a declaration that the sum of £1,010 12s. 6d. standing on deposit and representing such six months' interest belonged to the company, and should be released to it together with any deposit interest.

F *J. M. Gover, K.C.*, and *Ronald R. Fermoy* for the plaintiff company.
F. R. Evershed, K.C., and *G. P. Slade* for the defendants.

MAUGHAM, J., summarised the effect of the mortgages and the course of the negotiations of the parties for fixing the date for the payment off of the mortgages and continued: I would observe that there is no statement by the defendants that G reasonable notice was only required if they got such notice at once, nor that they would accept three months' notice only if that notice was complied with within a week. In these days I think it a true observation to make that you can get suitable investments in far less than six months' time and, although I do not intend to interfere with what I believe to be the strict rule in equity with regard to giving in certain events six months' notice, or paying six months' interest in lieu of notice, H I would express the opinion that the term is rather a harsh one and it might be the legislature might think fit to alter the rule.

The claim is that the plaintiffs are bound to pay six months' interest in lieu of notice because of the delay in being ready for completion at the date fixed at the end of the three months' notice which was given with the acquiescence of the mortgagees, the defendants. I confess I think that is not a step which this court I can approve. It does not seem to me to be in the least right to make such a claim in the circumstances of the case. But, of course, I have to deal with the matter in accordance with the recognised principles of the court of equity, and I shall now proceed to consider the arguments that have been put forward on the questions which are involved.

The first point that is raised by counsel for the plaintiffs depends upon cl. 5 (3). The contention is that, inasmuch as the defendants were precluded from taking any steps whatever for enforcing payment provided the interest was paid within fourteen days, there was in fact at the date when the mortgagors desired to pay off the mortgages no default whatever, and, accordingly, that there was no rule in equity which compelled the mortgagors to give six months' notice or any notice to the defendants. On that I have been through practically all the authorities which bear on the matter. There is some interest, I think, attaching to the earliest of those authorities although it is only in a book called Cases with Opinions. It is stated on the title page to be Cases with Opinions of Eminent Counsel in Matters of Law, Equity and Conveyancing, and in the second volume, at p. 51, there is the opinion of an eminent counsel, who was modern in the year 1791, upon certain points respecting the payment of money secured by mortgage. He points out that

> "a mortgagee may call in his mortgage money when he pleases, and may require it to be paid at as short a warning as he pleases"

—that is subject to modern limitations. Then, after having explained the effect of the law, he goes on to say:

> "But the mortgagor is not in the same situation: he cannot compel the mortgagee to take his money at a moment's warning: he must give the mortgagee six months' notice to recover it; or, which is the same thing, pay him six months' interest in advance; because the day of redemption at law being passed, he has lost his estate at law, and can be let in to redeem by a court of equity only; and a court of equity will not assist unless he will do equity; and the court holds that it is equitable that the mortgagor shall give six months' notice of paying in the money, to enable the mortgagee to provide another place for it; so that it is incumbent on a mortgagor to give notice."

That statement has been referred to in one or two cases and in one or two textbooks, and there is a number of other authorities which bear upon the point; but the next one to which I shall refer is the decision of Chitty, J., a master in this branch of the law, in *Fitzgerald's Trustee* v. *Mellersh* (1). He states the rule to be found in Coote on Mortgages (9th Edn.), p. 732, and he states the rule as in Fisher, and concludes that, where the loan is a permanent one, the rule that the mortgagor must give six calendar months' notice to pay off is one which applies in every case where the mortgagor has made default in payment of the money according to the proviso in the mortgage deed.

It may be right that I should state the proposition as it appears in Fisher and Lightwood's Law of Mortgage (7th Edn.), p. 611, by Mr. J. M. Lightwood:

> "After default, the mortgagee is generally entitled to notice before his security is discharged by payment; the reason is said to be that the mortgagor, having lost his estate at law, and being only entitled to redeem in equity, must do equity by allowing a reasonable opportunity for the mortgagee to find a new security for his money; for which six months is treated as the proper time. But if the mortgagee demands his money, or (with the qualifications mentioned below) takes proceedings to realise his security—which amounts to a demand—notice will be unnecessary whether the period for payment has arrived or not, and it is the same where the mortgagee has taken possession, this also being in effect a separate demand for payment."

I think the rule, therefore, must be taken as a settled rule of practice that after default has been made in payment of the principal and interest in accordance with the proviso for redemption, the mortgagor must in general give to the mortgagee six calendar months' notice.

Counsel for the company contends that cl. 5 (3) in the mortgages is sufficient to qualify the proviso for redemption, so that there is no default by the company and no notice need be given. In my opinion, the rule has been that if the principal and interest is not paid at the date mentioned in the proviso for redemption the notice must be given, and I do not consider that I am justified in disregarding the form of the proviso for redemption on the ground that in substance the effect of it is widely modified by cl. 5 (3) in the mortgages. It seems to me that the two

A things can co-exist together; that the covenant for payment is to pay six months after date, and the proviso for redemption is if redemption takes place at that date; while there is a restriction placed upon the power of the mortgagee so that on his side he is not able to take any steps for enforcing payment until a later day. The two things co-exist, and are intended to co-exist, because the mortgagor is intended to be entitled to pay off at an earlier date, with interest if necessary—that is to say, B interest for the ordinary period of six months if the case is one where that can properly be demanded, and unless something has not taken place to alter the right. In my opinion, therefore, the first point taken on behalf of the plaintiff fails.

The second point in effect amounts to this, that the rule is not an inflexible one, and that, notice having been given to pay off, there is no obligation to give another six months' notice to the mortgagee because the precise date named in the first C notice has passed by without payment. Here, I think, it is necessary to make a distinction arising from the facts. It seems to me reasonably clear that if a mortgagor gives notice after default in payment in accordance with the time fixed in the proviso for redemption and fails to make payment at the expiration of his six months' notice, or any less notice which the mortgagee has agreed to accept, and nothing more happens, the mortgagee is entitled to treat the notice as a D nullity since the failure to pay may result from an inability to find the money, and since in the case I have put, he has no guarantee whatever that in a few days the sum will be forthcoming. Accordingly, as a general rule, I accept as correct the observation or the dictum of PEARSON, J., in *Re Moss, Levy* v. *Sewill* (2) (31 Ch.D. at p. 94), and I accept also the statement in a book, once of great authority, POWELL ON MORTGAGES (6th Edn.), vol. 2 at p. 934, to this effect:

E

> "But then notice of paying off the mortgage must have been given to the mortgagee at least six calendar months before, and the money must have been tendered on the day of the determination of that notice; for where the mortgagor omitted to tender the money on the very day on which the notice expired, and, in consequence thereof the mortgagee refused the tender, the payment of the interest was held by LORD HARDWICKE not to be thereby suspended; for F that by the omission of the mortgagor the mortgagee was become entitled to a further notice of six calendar months, at the expiration of which a strict tender must be made."

The book refers to *Hix* v. *Ling* (3), before LORD HARDWICKE, which is not, as I understand it, anywhere reported.

G As I have said, if notice is given and is not complied with, and there is no explanation—nothing to lead the mortgagee to suppose that some accident has caused a slight delay—it is reasonable to hold the view that a fresh notice, or a fresh payment of interest in lieu of notice is requisite. I do not hold the view that in such a case there is a definite rule, whatever the facts may be, that another six months' notice is requisite. A fortiori, I do not hold that view in the present H case where the mortgagees had stated that they were willing to accept a reasonable notice, which they afterwards defined as a three months' notice. To my mind, all that equity requires in such a case is a reasonable notice, and in coming to that conclusion in the present case I think some weight should be given to the fact that, having said they would accept a reasonable notice, and the solicitors for the mortgagees having written the letter of April 19, 1933, and having been told that, owing I to an alteration in the conveyancing forms which were being adopted, there would be a delay, no warning was given to the solicitors for the mortgagors that, if the sum was not paid or tendered on the exact date, six months' further interest in lieu of notice would be required. As I have said, I think that equity in such a case requires only a reasonable notice.

If the case had been one where the solicitors for the plaintiffs had explained rather more clearly the position they were in and had fixed a date, we will say a week from April 25, as the date when the money could be expected and a fortiori if they had added: "If you will not accept notice to pay off on that day, being a short extension of the agreed day, we will make you a tender," I should then have A been prepared to hold that the defendants were entitled to no more than interest up to the date fixed for the payment off of the mortgage. It is, however, true to say here that after the telephone message of April 20, there is not only a silence till April 25, but even on April 26, when the draft transfers of the mortgages are forwarded to W. R. Bennett & Co., there is no definite statement of the date when the money will be forthcoming. All that is said is: B

> "We are informed that it is the intention of the new mortgagees to take transfers of the existing mortgages and also a consolidating mortgage."

I return to the question what was a reasonable notice which they might properly have required in the events which I have stated in some detail. To my mind, the maximum notice which it was fair for them to ask on April 20 or 25—on the 20th, C when they were told that owing to the change in the conveyancing forms adopted it was not convenient to complete on the 25th; or on April 25, when at the close of the day Mr. Emanuel signed his letter on behalf of W. R. Bennett & Co.—was three months' notice. I do not take the view that, having regard to the silence of Wedlake, Letts, & Birds in fixing a date, they were entitled to nothing more than interest up to the date of payment; but I think on the whole of the case, bearing D in mind the mortgagees' offer to take a reasonable notice in the first instance and to accept a three months' notice and the facts that I have stated which arose when the solicitors for the mortgagors pointed out that they required a little more time, it would be wholly inequitable for the defendants to require more than a three months' payment of interest in lieu of notice.

I would observe that the position as between mortgagor and mortgagee after E notice has been given is wholly different from that which arises in the first instance when no notice has been given. On the one hand, you have mortgagors, who, after giving notice, if they are honest men—and the mortgagors are honest people here—will have the money available to redeem at the expiration of the notice or will be able to produce the money within a day or two, so that the mortgagees will know what to do in the meantime as regards re-investing their money. Accordingly, F they are not in the position in which they would be where a mortgagor without notice wishes to redeem, in which case the mortgagees might have their money lying in a bank earning, perhaps, a nominal sum by way of interest. The mortgagor gives notice that he intends to pay off the mortgage six months hence, and, in the meanwhile, the mortgagee's investment is bringing him in the full rate of interest. From the moment notice is given the position of the mortgagee is G that he is considering what investments he will make and he is ready to make those investments when the mortgagor pays his money. In these circumstances I do not accept the position that a few days' delay in completion justified the mortgagee in asking for a completely new notice as if he had never heard at all of any intention on the part of the mortgagor to pay off the mortgage.

However, my conclusion on the whole case is that it would have been reasonable H to require a three months' notice, and that is the amount of interest in lieu of notice which I think the plaintiffs must pay to the defendants.

Action dismissed with costs.

Solicitors: *Wedlake, Letts, & Birds*; *W. R. Bennett & Co.*

[*Reported by* MISS B. A. BICKNELL, *Barrister-at-Law.*] I

VAILE BROS. *v.* HOBSON, LTD.

[KING'S BENCH DIVISION (Talbot and Macnaghten, JJ.), April 4, 12, 1933]

[Reported 149 L.T. 283]

Contract—Breach—Defence—Negligence of plaintiff—Need to prove breach of duty owed by plaintiff to defendant.

In an action to recover damages for breach of contract the defendant cannot rely on the fact that the damage was caused or increased by the negligence of the plaintiff, unless that negligence is the breach of a duty owed by the plaintiff to the defendant.

Where, therefore, the owners of a motor lorry claimed damages for breach of a contract to repair the carburettor, alleging that, owing to the defective state of the carburettor, the lorry had been damaged, and the repairers contended that the owners had failed to connect the engine switch of the lorry, and that, if that had been done, the damage could have been prevented or minimised,

Held: the owners of the lorry owed no duty to the repairers to connect the engine switch, and, therefore, the repairers could not rely on the failure to do so in defence to the action.

Notes. The common law rule that contributory negligence was a complete defence to an action for negligence was abolished by the Law Reform (Contributory Negligence) Act, 1945, which provides for apportionment of loss according to the share in the responsibility for the damage.

As to apportionment of liability, see HALSBURY'S LAWS (2nd Edn.), Supp., notes under vol. 23, para. 963 et seq., and cases there cited. For Law Reform (Contributory Negligence) Act, 1945, see 17 HALSBURY'S STATUTES (2nd Edn.) 12.

Cases referred to:

(1) *Hadley* v. *Baxendale* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 17 Digest (Repl.) 91, *99*.

(2) *British Columbia Electric Rail. Co., Ltd.* v. *Loach*, [1916] 1 A.C. 719; 85 L.J.P.C. 23; 113 L.T. 946; 36 Digest (Repl.) 182, *981*.

(3) *Becker* v. *Medd* (1897), 13 T.L.R. 313, C.A.; 36 Digest (Repl.) 13, *53*.

Appeal by plaintiffs from Lambeth County Court.

The plaintiffs brought an action to recover damages from the defendants for breach of a contract to repair, and negligence in repairing, the carburettor of a motor lorry. They alleged that, in breach of the contract, the defendants failed to use reasonable care and skill in repairing and adjusting the carburettor, whereby one of the control rods became detached, causing the throttle to open fully and the engine to race, with the result that the flywheel broke into pieces and the lorry was damaged. The defendants contended that the damage was caused by the plaintiffs' negligence in that they permitted the lorry to be driven with the engine switch disconnected. The learned judge found that the facts alleged by both parties were proved, and that, if the engine switch had been connected, the driver could have stopped the engine promptly and the damage have been prevented. He held that the failure to connect the engine switch was contributory negligence by the plaintiffs, and he gave judgment for the defendants.

The plaintiffs appealed. On the appeal the defendants admitted that the judgment could not be supported, but contended that the plaintiffs were only entitled to nominal damages, on the grounds (i) that it was the duty of the plaintiffs to mitigate their damage, and that, if they had not failed to connect the engine switch, the extent of the accident could have been minimised and the damage sustained would have been merely nominal, and (ii) that the damage sustained was not such as might reasonably have been supposed to be in the contemplation of the parties at the time of contracting, and was, therefore, too remote.

Sidebottom for the plaintiffs.
F. W. Wallace for the defendants.

TALBOT, J.—This was an action by the plaintiffs, owners of a motor lorry, for breach of contract by the defendants in returning in a defective condition a carburettor sent by the plaintiffs to the defendants for overhaul, with the result that the control rod became separated from the carburettor, the engine raced, the flywheel was shattered and damage to the lorry which has been agreed at £125 ensued. The only defence material to the appeal is that the plaintiffs permitted the lorry to be driven with the switch disconnected so that the driver could not stop the engine promptly. The judge found this as a fact; treating it as contributory negligence of the plaintiffs, held that it disentitled them from recovering; and gave judgment for the defendants. It is not disputed, and is so found by the judge, that the defendants' breach of contract in fact caused the damage on which the claim is based; what is said is that the damage would or might have been prevented if the plaintiffs' lorry had been used in a proper state. We are of opinion that this is no answer to the action. It was admitted by counsel for the defendants that the judgment for them could not be supported, and that the plaintiffs were entitled to nominal damages, but he contended that they were entitled to no more.

Counsel for the defendants relied on two arguments. First (quoting *Hadley* v. *Baxendale* (1)), he said that in an action for breach of contract no damages can be recovered beyond such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it; that the defendants, when they contracted (as they must be taken to have done) to put the carburettor in proper condition, never contemplated that it would be used in a lorry with a disconnected engine switch, and, therefore, are not liable for damage which would not have occurred had the carburettor been used in a properly equipped lorry. *Hadley* v. *Baxendale* (1) was an action against a carrier for delay in delivering a broken mill shaft whereby the plaintiffs' engineer was unable to supply a new shaft, the plaintiffs' mill was stopped, and the plaintiffs lost profits. The jury awarded damages which included this loss of profits. The court laid down, as the proper damage for breach of contract, such as may be reasonably considered as arising naturally according to the ordinary course of things from the breach itself, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. The damage in the present case falls within the first branch of this well-known pronouncement, and there is no need to resort to the second, which merely restricts the cases in which a plaintiff can recover damages which are not the direct, but a collateral or incidental, result of the breach of contract. To use this, as the argument for the defendants did, in support of the proposition that a man who has supplied a defective carburettor is not liable for the direct result of the defect, because if the lorry had been better equipped the driver could or might have prevented the result, or made it less serious, appears to me to be wholly unsound. The true analogy to the second branch of the rule in *Hadley* v. *Baxendale* (1), if applied to the case before us, would be if (e.g.) damages had been claimed for loss of market for the goods carried in the lorry due to a breakdown of it caused by the defective carburettor.

The second argument was based on the rule that it is a plaintiff's duty to minimise the loss caused by a breach of contract. This duty arises in a case of this kind only when the plaintiff had a reasonable opportunity of remedying or mitigating the consequences of the breach of which he complains and neglected to use it. The rule about minimising damages has no application to this case in which all that can be said is that, if the lorry had been perfectly equipped, the mischief might have been arrested before it became so serious. To get over this difficulty counsel for the defendants resorted to *British Columbia Electric Rail. Co., Ltd.* v. *Loach* (2), in which, contributory negligence by the plaintiff having been proved in an action for damage by collision, it was held that the deciding cause of the collision was the negligent act of the defendants, a railway company, in sending out one of their electric cars without sufficient brakes and thereby making it impossible for the car to avoid running into the plaintiff's wagon which had been negligently driven on to a level crossing. There the company owed a duty to all users of the road which crossed their railway not to put on the railway a car which was dangerous for want of adequate brakes. Here the plaintiffs owed no duty whatever to the defendants as to the construction or equipment of their lorry: see *Becker* v. *Medd* (3). Their action is based solely on a breach of contract followed by its direct physical result, and no question of contributory negligence arises.

During the argument a case was put to counsel which appears to us on further consideration to be almost exactly analogous. If a man is employed to put the foot-brake of a motor car in proper repair and he returns it in a defective state so that the car cannot be stopped by means of it and damage results, is it a defence that, if the car had had an efficient hand-brake, it would have been stopped and no harm done? In other words, can the defendant say: "If you had had a properly equipped car it would not have mattered that I sent you a defective foot-brake, and, therefore, you can only recover nominal damages"? We think that this answers itself. In our opinion, there is no defence to the action. The appeal must be allowed and judgment entered for the plaintiffs in the county court for the agreed damages with costs here and below.

MACNAGHTEN, J., agreed.

Solicitors: *Thompson, Near & Co.*; *Watson, Sons, & Room.*

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

Re RIDGE. HANCOCK *v.* DUTTON

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), April 5, 1933]

[Reported 149 L.T. 266]

Will—Description of donees by relationship—"Nephews and nieces"—Great-nephew wrongly described as nephew—Exclusion of greatnephew from term "nephew."

By cl. 3 of her will dated Oct. 28, 1925, a testatrix provided: "I give free of duty to my nephew Clifford Rich, the infant child of my late niece [A.G.R.], the sum of £1,000." By cl. 4, the testatrix gave her residuary estate on trust that "my trustees shall divide the same equally between all or any my nephews and nieces living at my death who being male attain the age of twenty-one years or being female attain that age or marry." It appeared from the evidence that A.G.R., a niece of the testatrix, gave birth to a son on Oct. 9, 1925, and died shortly afterwards. The son was named Kenneth Higham Rich and A.G.R. had no other child. On May 22, 1932, the testatrix died. On questions as to the effect of cl. 3 and cl. 4 of the will,

Held: (i) Kenneth Higham Rich was sufficiently identified as the person intended to benefit under cl. 3.

(ii) the misdescription contained in cl. 3 of the child of A.G.R. as a nephew of the testatrix did not justify the extension of the primary meaning of the word "nephews" in cl. 4 so as to include a greatnephew of the testatrix, and, therefore, Kenneth Higham Rich was not entitled to participate in the residuary estate.

James v. *Smith* (1) (1844), 14 Sim. 214, distinguished.

Notes. As to the description of beneficiaries by relationship, see 34 Halsbury's Laws (2nd Edn.) 296–298, para. 348; and for cases on the subject see 44 Digest 822–825, *6729–6758*.

Cases referred to:

(1) *James* v. *Smith* (1844), 14 Sim. 214; 13 L.J.Ch. 376; 3 L.T.O.S. 297; 8 Jur. 594; 60 E.R. 339; 44 Digest 824, *6747*.

(2) *Re Cozens, Miles* v. *Wilson*, [1903] 1 Ch. 138; 72 L.J.Ch. 39; 87 L.T. 581; 51 W.R. 220; 47 Sol. Jo. 50; 44 Digest 549, *3674*.

(3) *Re Blower's Trusts* (1871), 6 Ch. App. 351; 42 L.J.Ch. 24; 25 L.T. 181; 19 W.R. 666, L.JJ.; 44 Digest 824, *6753*.

(4) *Re Jodrell, Jodrell* v. *Seale* (1890), 44 Ch.D. 590; 59 L.J.Ch. 538; 63 L.T. 15; 38 W.R. 721, C.A.; affirmed sub nom. *Seale-Hayne* v. *Jodrell*, [1891] A.C. 304; 61 L.J.Ch. 70; 65 L.T. 57, H.L.; 44 Digest 821, *6720*.

(5) *Wells* v. *Wells* (1874), L.R. 18 Eq. 504; 43 L.J.Ch. 681; 31 L.T. 16; 22 W.R. 893; 44 Digest 823, *6736*.

(6) *Shelley* v. *Bryer* (1821), Jac. 207; 37 E.R. 827; 44 Digest 824, *6746*.

(7) *Smith* v. *Lidiard* (1857), 3 K. & J. 252; 69 E.R. 1102; 44 Digest 822, *6729*.

(8) *Re Green, Bath* v. *Cannon*, [1914] 1 Ch. 134; 83 L.J.Ch. 248; 110 L.T. 58; 58 Sol. Jo. 185; 44 Digest 823, *6740*.

(9) *Re Winn, Burgess* v. *Winn* (1916), 86 L.J.Ch. 124; 115 L.T. 698; 61 Sol. Jo. 99; 44 Digest 823, *6741*.

(10) *Merrill* v. *Morton* (1881), 17 Ch.D. 382; 50 L.J.Ch. 249; 43 L.T. 750; sub nom. *Re Foster, Merrill* v. *Morton*, 29 W.R. 394; 44 Digest 823, *6737*.

(11) *Re Whiston, Whiston* v. *Woolley*, [1924] 1 Ch. 122; 93 L.J.Ch. 113; 130 L.T. 437; 68 Sol. Jo. 116, C.A.; 44 Digest 513, *3324*.

Appeal by residuary legatees under the will of the testatrix from an order of Sir Courthope Wilson, V.-C., dated Oct. 24, 1932.

The following was the judgment of Sir Courthope Wilson, V.-C.: Two questions arise with regard to this will. The first one arises on cl. 3 which provides:

> "I give free of duty to my nephew Clifford Rich the infant child of my late niece Annie Gertrude Rich the sum of £1,000."

Evidence (which was perfectly legitimate for that purpose) has been filed to show what nephews and nieces the testatrix had, and it is clear from that evidence that Annie Gertrude Rich was her niece, and Annie Gertrude Rich died shortly after the birth of her child, which was born on Oct. 9, 1925, and at the date of the will the child had not been christened. There is no child of the testatrix's late niece Annie Gertrude Rich except the defendant Kenneth Higham Rich, and the only thing that is wrong is that his name is given as Clifford Rich instead of Kenneth Higham Rich. In my opinion he satisfies all the essentials of the description in cl. 3 except the use of the wrong Christian name. Therefore I hold that he is entitled to the legacy of £1,000 under cl. 3 of the will.

The first part of cl. 4 contains provisions which are not material to this application. At the end of cl. 4 the residuary gift is expressed in this way:

> "Upon trust that my trustees shall divide the same equally between all or any my nephews and nieces living at my death who being male attain the age of twenty-one years or being female attain that age or marry."

The question is whether, by reason of the fact that Kenneth Higham Rich, who was in fact a greatnephew and not a nephew, is described as a nephew by the testatrix, by virtue of that dictionary which she has provided, the gift to the residuary legatees must include all the greatnephews and greatnieces as well as the nephews and nieces of the testatrix. In *Re Cozens, Miles* v. *Wilson* (2) SWINFEN EADY, J., makes a statement as to what was the rule applicable in such a case ([1903] 1 Ch. at p. 142):

> "I am of opinion that both the propositions contended for were too widely stated. There is not any hard-and-fast rule that a gift to nieces does not include a greatniece, where in another part of the same will a greatniece is described as a niece; nor, on the other hand, is there any hard-and-fast rule that whenever a greatniece has once been referred to in a will as a niece the expression 'niece' must in all other parts of the will be taken to include greatnieces."

In *Re Blower's Trust* (3) MELLISH, L.J., says (L.R. 6 Ch. at p. 355):

> "There is really no difficulty about the rule of construction which is to be applied to this will. It is clear that the words 'nephews and nieces' primâ facie mean the children of brothers and sisters: but it is certainly not an uncommon thing in ordinary life for persons to call their greatnephews and greatnieces 'nephews' and 'nieces,' and if there is anything in the language of the testator which shows that he has used 'nephews and nieces' in the more general sense, then the court will give that construction to his words."

I have looked at the last edition of THEOBALD ON WILLS, and at p. 349 I find that the cases are classified in this way:

> "Nephews and nieces mean primâ facie the children of brothers and sisters, including those of the half-blood. The meaning of the word will not be enlarged where the gift is to each of the present nieces of A., who had only one niece of the first degree living at the date of the will. The fact that the gift is to 'Nephews, descendants of my brothers,' will not enlarge the class. The fact that a greatniece or a wife's niece has been previously called a niece will not without more enlarge the meaning of the word."

Then there is a series of cases, most of which have been cited. Then, under a separate heading on p. 350, it is stated:

> "And if the testator expressly defines a niece as 'my niece, daughter of my nephew,' nieces and nephews will include grandnephews and grandnieces."

The authority for that is *James* v. *Smith* (1). The words there are:

> "I give to my niece Mary Maltus, spinster, daughter of my nephew Thomas Maltus, £30. To Anthony Lock and Mary Lock, son and daughter of my late niece, Mary Lock, deceased, £30 each."

The learned judge says (14 Sim. at p. 216):

> "Then in a subsequent part of her will she says: 'I give to my said niece, Mary Maltus' (whom she had previously described as the daughter of one of her nephews), and 'to my said niece, Mary Lock,' whom she had before described as the daughter of one of her nieces. So that, in three instances, she has described persons as nieces who, in fact, were the children of a nephew and a niece. Consequently she has shown, unequivocally, that she meant the child of a nephew or a niece, as well as a nephew or a niece."

Counsel's criticism on that case is that there there were three instances where it was done, and in the present case there is only one instance where it is done, but in this present case there are not only the words "my nephew Clifford Rich," but "my nephew Clifford Rich, the infant child of my late niece Annie Gertrude Rich," showing quite clearly that she recognised the degree of relationship of this child; she recognised that he was the child of her late niece, and yet she deliberately calls him "my nephew." In the face of that I am bound to hold, when she gives the residue to "my nephews and nieces," that she means not only her nephews and nieces, but includes also the children of her nephews and nieces. I must make a declaration accordingly, that the defendant Kenneth Higham Rich is entitled to the legacy of £1,000 given by cl. 3, and the residue of the estate is divisible, not only amongst the testatrix's nephews and nieces but amongst her greatnephews and greatnieces living at the date of the death.

The residuary legatee appealed.

Wilfrid Greene, K.C., and *F. R. Evershed, K.C.*, for residuary legatees (nephews and nieces of the testatrix).

Charles Romer for the plaintiff, an executor.

Sir Gerald Hurst, K.C., and *C. E. Abbott* for the infant defendant, Kenneth Higham Rich.

Miss E. Hesling for the infant defendant, Marion Joan Hancock (a greatniece of the testatrix).

LORD HANWORTH, M.R.—This appeal must be allowed. It raises the question what is the proper construction of the will made by the testatrix which is dated Oct. 28, 1925. On May 22, 1932, the testatrix died. In the month of October, 1925, the month in which she made her will, her niece Annie Gertrude Rich had a child, a boy, born on Oct. 9, 1925. On Oct. 16, 1925, unhappily, the mother died, but the little boy lived. At that time it appears or seems that the name "Clifford" was mentioned in connection with him, but, as a matter of fact, his names when he came to be baptised were Kenneth Higham Rich. The question we have to consider is whether or not the greatnieces and greatnephews of the testatrix are included in the will, the terms of which I will deal with in a moment, because of cl. 3 and the manner in which it deals with or gives a legacy to this little infant child, as he was then, Clifford Rich, or as he is now known as Kenneth Higham Rich.

It appears that there were eight nieces of this testatrix and five of them have children, in all eleven, four boys and seven girls. She had, at the time of her death, I think, three nephews and five nieces. Under cl. 3 of her will she gives in these terms a legacy to this little infant who had just been born:

> "I give free of duty to my nephew Clifford Rich, the infant child of my late niece Annie Gertrude Rich, the sum of £1,000."

This little child was the greatnephew of the testatrix and not the nephew. The learned Vice-Chancellor has held that legacy good on the ground that the child is sufficiently identified, the child of the testatrix's late niece Annie Gertrude Rich; and, although he is described in cl. 3 as "Clifford Rich," there has been no difficulty in identifying that child as the one indicated in cl. 3 as being the infant child of the niece who died on Oct. 16. But in cl. 4 she directs that, after payment of her debts, her property both real and personal is to be held on trust

> "that my trustees shall divide the same equally between all or any my nephews and nieces living at my death who being male attain the age of twenty-one years or being female attain that age or marry."

There would, therefore, on her death be a distribution among the nephews and nieces. But it was successfully contended before the Vice-Chancellor that by reason of the terms used in cl. 3, and having regard to the nephews and nieces who are referred to in cl. 4, the clause must be expanded so as to introduce and include the greatnephews and the greatnieces.

We have had our attention called to a certain number of cases. The case on which the learned Vice-Chancellor came to the conclusion that he did is *James* v. *Smith* (1), and there, in view of the terms of the will, it was held that the greatnephews and greatnieces were introduced by what may be called the interpretation clause included in the will, for in that clause she had referred to those who were greatnieces as nieces; and it was determined by the Vice-Chancellor that the interpretation then to be put on the word "nephew" or "niece" was those who take in a lower degree as greatnephews or greatnieces. The terms of the will have been conned over very carefully in the course of the argument. It is dangerous to argue from particular terms of a particular will to another will with different terms.

Certain definite rules have been laid down, and perhaps it is worth while referring to the observations made by LORD HALSBURY in *Re Jodrell, Jodrell* v. *Seale* (4), affirmed sub nom. *Seale-Hayne* v. *Jodrell*. There LORD HALSBURY points out (44 Ch.D. at p. 605) the danger of looking at a number of wills, and he says that he is overwhelmed with authorities about what particular judges have thought about other instruments, and he calls attention to the broad principle that one must give the ordinary meaning and interpretation to words and must look at the whole of the instrument. In other words, he emphasises the rule which had been referred to in *Re Cozens, Miles* v. *Wilson* (2), and neatly stated there by SWINFEN EADY, J. ([1903] 1 Ch. at p. 143):

> "The true rule is to determine by the language and context of each will, including the consideration of the whole instrument and any evidence properly admissible, the meaning of the expressions contained in it, and the persons who are entitled to share in the benefits thereby conferred."

In *Wells* v. *Wells* (5) reference is made to another rule which is of general application; in the words of SIR GEORGE JESSEL, one has to look at the primary sense, unless there is something in the context to give the words a different meaning. Going back to the older case of *Shelley* v. *Bryer* (6), decided in 1821, SIR THOMAS PLUMER, M.R., said:

> "It appears by the cases that where there are, or may be at the time when the distribution is to take place, persons answering the description, the court is not at liberty to include any not within the terms. Thus it being clear upon the will, the onus is thrown on those who desire to extend the construction."

In the present case the terms of the will are "all or any my nephews and nieces living at my death . . ." The terms of the will are clear, and the onus is thus thrown on those who desire to extend the construction; and we have heard the representatives of the greatnephews and the greatnieces on whom the onus lies of establishing that the extended construction is the right one.

What is it that ought to prevail with the court to give a more extended construction to these simple words "nephews and nieces"? There is nothing else to be found in the will except cl. 3. When one examines cl. 3, I find but little assistance towards the interpretations suggested and certainly not sufficient to discharge the onus which lies on those who assert that there has been an extension of the clause:

> "I give free of duty to my nephew Clifford Rich the infant child of my late niece Annie Gertrude Rich."

It will be observed that although he is called the nephew, he is indicated as the infant child of another niece, Annie Gertrude, and the word "nephew" there introduced does not seem to accord with or to be an interpretation which could bring that child into parity with the nephews and nieces who are referred to in cl. 4. It may well be that as in *Smith* v. *Lidiard* (7) (3 K. & J. at p. 256) the word "nephew" was introduced not as intended either to enlarge the class or as a definite description of her relationship to them, but a description by terms of affection.

The case before SARGANT, J., *Re Green, Bath* v. *Cannon* (8), contains some helpful observations. He says this ([1914] 1 Ch. at p. 138):

> "Although a testator by using words in a particular sense may create his own dictionary, I am not prepared to say that the single use of a word inaccurately in one passage means that that word is used equally inaccurately when it occurs again later on. In the earlier part of the will the use of the word "nephew" is only partly inaccurate, since the first-named of the three trustees was the testatrix's own nephew, and it may be that this weakens the case for considering that the word was misused again in the later part of the will. On the other hand, there is some ground for saying that the coupling of the nephew by blood with the nephews by affinity strengthens the argument for holding that the testatrix intended to comprehend in the same language her own relatives and her relatives by affinity. On the whole, I do not think there

> is here quite enough in the earlier misuse of the word to lead me to attribute the same extended meaning to words otherwise clear in themselves."

Those comments of the learned judge in that case seem to me founded on common sense. I do not find that the word "nephew" used in cl. 3 is used by way of interpretation or that cl. 3 is made a dictionary; for I think it is quite possible and indeed right to attribute to the use of the word "nephew" in that clause that it is a term of affection; and I find it very difficult to suppose from the word used, and with the alternative description as the "infant child of my late niece Annie Gertrude Rich," anything to attribute to the testatrix by that use any intention to widen the class which is contained in cl. 4. If the class were so widened it is quite obvious that some curious results would follow by placing the grandnephews and grandnieces on an equality with their parents and others who were the nephews and nieces. It appears to me that the present case is not governed by *James* v. *Smith* (1). There are sufficient variations from that to prevent its being authority which governs the words in the present will. I find myself unable to agree with the view adopted by the learned Vice-Chancellor. For these reasons the appeal must be allowed.

LAWRENCE, L.J.—I agree. A great number of cases have been cited to this court as having a bearing on the construction of this will. But the only canon of construction which I have been able to deduce from those cases is that the expression "nephews and nieces" primâ facie means children of brothers and sisters. Of course it is obvious that that primâ facie meaning may be extended if it is manifest from the particular words of the will that that expression is intended to include greatnephews and greatnieces, and many of the authorities furnish examples of cases in which the court has so extended that primâ facie meaning. The only question to be decided in the present case is whether on the wording of this particular will the testatrix has made it manifest that in her residuary bequest she intended her greatnephews and greatnieces to share with the children of her brothers and sisters. On the wording of this will it would take a great deal to persuade me that the testatrix intended that a certain number of her greatnephews and greatnieces (that is to say, those who were born in her lifetime to the exclusion of those born afterwards) should take an equal share with their parents in her residuary estate; particularly as the testatrix provided for her only greatnephew who had then recently lost his mother (a niece of the testatrix) by giving him a legacy of £1,000. But, of course, a testatrix is entitled to be capricious, and there is no reason why she should not, if so minded, make a provision which might not commend itself to other people. What the court has to do here is to see whether the testatrix has clearly indicated that she intended greatnephews and greatnieces to share in her residuary estate under the terms of "nephews and nieces."

Sir Gerald Hurst has argued that the wording of this will is so closely analogous to the wording of the will in *James* v. *Smith* (1) that this court is bound to give the same interpretation to the expression "nephews and nieces" in the present case as was given in *James* v. *Smith* (1). I do not agree with that contention. The will in *James* v. *Smith* (1) was differently framed and differently expressed from the will in the present case. One material difference is referred to by SIR LANCELOT SHADWELL, V.-C., in his judgment in *James* v. *Smith* (1), namely, that in three places greatnieces were referred to as "nieces," and it is to be observed that one instance occurred before the gift of the residue, and the other two instances occurred after the expression "nephews and nieces" had been used in the gift of the residue. But it is not the function of the court to construe one will by the terms of another which is differently expressed. We have to see whether in the will before us the testatrix has clearly shown her intention to displace the primâ facie meaning of the words in question.

When this will is looked at as a whole, as the court ought to look at it, it seems to me to negative the idea that the testatrix intended "nephews and nieces" to include greatnephews and greatnieces. It is quite true that she described her greatnephew as her "nephew," taking pains, however, to show that, as a matter of fact, he was her greatnephew by describing him as a son of her deceased niece; but she makes a special provision for him, he being an infant of tender years at the date of the making of her will. It seems to me that this special provision for her greatnephew was made because he would not share in the residue which she directed to be distributed amongst her nephews and nieces.

Several of the cases that have been cited show that the court is not bound to construe a residuary gift in favour of nephews and nieces as extending to greatnephews and greatnieces because a greatnephew or a greatniece has in the earlier part of the will been referred to as a "nephew" or a "niece," and it is obvious that no such canon of construction can be laid down. A mere misdescription in one part of the will does not necessarily imply that the same misdescription must be applied in other parts of the will; though, it is no doubt some, but by no means conclusive, indication when a testatrix calls a greatnephew a "nephew" that she means that word to be applied in the same sense in other parts of her will. It is sufficient in this connection to refer to a case which was decided by Eve, J., namely, *Re Winn, Burgess* v. *Winn* (9). There the learned judge pointed out (115 L.T. at p. 700):

> "There are, as it appears to me, two direct authorities on the very point. Each of the learned judges who decided *Smith* v. *Lidiard* (7) and *Wells* v. *Wells* (5) expressed a clear and unqualified opinion that the mere fact that the testator had in the earlier part of his will attached to a legatee what was in fact a misdescription did not operate to give to the residuary bequest a meaning which would have included in that gift the person so misdescribed in the earlier part of the will."

And I would add a fortiori other persons who had not been misdescribed. That is only expressing what I have endeavoured to express in somewhat different language, namely, that the court is not bound to give a construction to a residuary clause in a will which it does not bear merely because the testatrix or testator has misdescribed a certain legatee in the earlier part of the will.

Sir Gerald Hurst contended that there is a "dictionary principle" in favour of the decision come to by the Vice-Chancellor. I decline to hold that there is any so-called "dictionary principle" in the sense in which that term has been used by Sir Gerald. What is really meant by saying that the testator has made his own dictionary is that on the construction of the particular will as a whole the testator has shown an intention that a certain expression should bear a certain meaning. That is not a principle; it is merely construing the will according to the true meaning of the language employed by the testator to express his intention. The governing canon of construction is that the court's function is to ascertain from the expressed words of the will what is the true intention of the testator.

A somewhat more difficult question remains, whether, the testatrix having described her greatnephew as a "nephew," that greatnephew is not included in the expression "nephews and nieces" contained in the residuary bequest. That question in my judgment is covered by the decision of Sargant, J., in *Re Green, Bath* v. *Cannon* (8). The learned judge there said ([1914] 1 Ch. at p. 138):

> "Vice-Chancellor Wood, in *Smith* v. *Lidiard* (7), found it a more difficult question to decide whether persons, who, in a previous part of the will, were named and described as nieces, but who were only nieces of the husband of the testatrix, should be excluded from the residuary gift to 'nephews and nieces.' But he did so exclude them, as did Vice-Chancellor Malins in *Merrill* v. *Morton* (10), although he did so, it is true, because he felt bound to do so on the authorities. However, I feel unable even here to admit those two persons. It would be a greater anomaly to include them and then to stop short than it would be to admit all nephews and nieces. If I unlocked the first door and admitted the two, I must unlock the second door and admit all."

The reasoning of Sargant, J., in that case applies to the present case. In my opinion, the Vice-Chancellor erred in following cases decided on other wills, and in not having sufficient regard to the terms of the present will.

GREER, L.J.—I have come to the same conclusion; and it is only because we are differing from the judgment of the learned judge, to whose judgment I attach great importance, that I desire to add a few words.

The problem to be decided in this case is what the testatrix meant by the residuary devise when she used the words "nephews and nieces." The tendency in all the cases appears to me to be that one ought not to depart from the natural meaning of the words unless the testator has said something in his will to show that the words are being used in some special sense. I do not regard the cases that have been decided as laying down any rule of law except that which was laid down by LORD HALSBURY in *Re Jodrell, Jodrell* v. *Seale* (4), which is that we must look at the will we have to determine and not interpret the words of the will by reference to interpretations that other judges have put on other wills which are not in the same words. I would also like to call attention to the decision of SWINFEN EADY, J., in *Re Cozens, Miles* v. *Wilson* (2) as indicating the way in which we ought to look at these problems that are presented when the construction of the words in the will has to be determined by the court. He cites the speech of LORD HALSBURY. LORD HERSCHELL, in the House of Lords in *Re Jodrell* (4), used these words ([1891] A.C. at p. 306):

> "A word which is used commonly in the English language in several senses must be interpreted according to that which, having regard to the context and the whole of the provisions of the document which you have to construe, appears to be the sense in which the testator has used it."

SWINFEN EADY, J., states his own view in these words ([1903] 1 Ch. at p. 143):

> "The true rule is to determine by the language and context of each will, including the consideration of the whole instrument and any evidence properly admissible, the meaning of the expressions contained in it, and the persons who are entitled to share in the benefits thereby conferred."

By the residuary devise in this will, subject to the payment of funeral and testamentary expenses, the testatrix gives her residue

> "Upon trust that my trustees shall divide the same equally between all or any my nephews and nieces living at my death."

If one looks at those words alone it is absolutely clear that the words mean nephews and nieces in the ordinary sense in which those words are used in the English language: sons and daughters of brothers or sisters, and if another meaning is to be attached to them one must find somewhere in the will what is called a dictionary whereby one can draw the conclusion that the testatrix did not mean what she says but meant to put on the words of her will a special meaning; and the effort is made to find a dictionary in cl. 3 of the will, which is in these terms:

> "I give free of duty to my nephew Clifford Rich the infant child of my late niece Annie Gertrude Rich the sum of £1,000."

So far from inducing me to give a special meaning to the residuary devise to the nephews, that seems to indicate to me that she was in this clause providing for that person whom she described as "the infant child of my late niece Annie Gertrude Rich," and refers affectionately to as her nephew, providing for him because his mother was dead; she would take no part of the residuary devise, and therefore the testatrix designated to put that individual in some kind of position of benefit which would put him more or less in the same position as if he were one of the children of somebody who took part of the residuary devise. It does not seem to me to indicate in the least degree that when she was dealing with her residuary property and providing for her nephews and nieces living at her death, she meant to benefit any persons except those who really were, in the true sense of the word, her nephews and nieces at her death.

A Great reliance was placed in the argument, very naturally, on the case to which the learned Vice-Chancellor attached importance, *James* v. *Smith* (1). Even if one is bound to treat *James* v. *Smith* (1) as applicable to a case in which the words used in a will are identical with the words used in *James* v. *Smith* (1), I find that the words in this will are not identical with the words used in *James* v. *Smith* (1); because in *James* v. *Smith* (1) not only were two of the greatnieces referred to in B the early part of the will when they were given their legacies, as "nieces," but in the later part of the will they were again referred to as "my said nieces," that latter reference, to my mind, being an indication that it could be said that she had adopted a special meaning to the word "nieces," because in the latter part of her will she has referred to them again as "my said nieces," though they were not in fact her nieces at all, but only her greatnieces. That is my view of the terms of the C will in the present case, and I therefore agree this appeal must be allowed.

After discussion, the court, whose attention was called to *Re Whiston, Whiston* v. *Woolley* (11), where Sargant, J., suggested that though some beneficiaries had not appealed, the benefit of the appeal result ought to go to them, decided nevertheless that two nieces who had not been formerly appellants ought to have their time for leave to appeal extended. On April 10, none of the respondents objecting, D the order was postdated and extended to the two nieces who appealed.

Appeal allowed.

Solicitors: *Pritchard, Englefield & Co.*; *Gregory, Rowcliffe & Co.*, for *J. A. Hancock, Manchester*; *Jeason & Topham*, Blackpool; *J. A. Hancock.*

[*Reported by* Geoffrey P. Langworthy, Esq., *Barrister-at-Law.*]

E

F

H. M. F. HUMPHREY, LTD. *v.* BAXTER, HOARE & CO., LTD.

[King's Bench Division (Roche, J.), July 6, 1933]

G [Reported 149 L.T. 603; 77 Sol. Jo. 540]

Bailment—Storage—Condition excluding liability—Damage to goods in warehouse—Warehousing contract between warehouseman and sellers—Liability of warehouseman to buyers.

Sellers of goods ex wharf deposited them in the defendants' warehouse under a contract which contained the following exceptions clause: "The [defendants] H shall not be liable for loss, detention, damage or injury of or to the goods or property howsoever and whensoever caused and of what kind soever. In particular and without prejudice to the foregoing the [defendants] shall not be liable for consequences . . . of any act neglect or default of the [defendants] or [their] servants or for others for whom [they] might be responsible." The sellers passed the goods to the buyers by a delivery note which the buyers I endorsed: "Please hold to our sub-orders and oblige." The buyers left the goods in the warehouse for some six months at the end of which the goods were found to be damaged. In an action by the buyers against the defendants in which it was alleged that the damage to the goods was due to the defendants' negligence,

Held: although the buyers were not a party to the warehousing contract between the sellers and the defendants they took the goods on the terms of that contract and were, accordingly, bound by it, and, therefore, the defendants were protected from liability by the exceptions clause.

Notes. As to the obligations of a bailee, see 2 Halsbury's Laws (3rd Edn.) 114 et seq., and for cases see 3 Digest 115–117.

Case referred to:

(1) *Gibaud* v. *Great Eastern Rail. Co.*, [1921] 2 K.B. 426; 90 L.J.K.B. 535; 125 L.T. 76; 37 T.L.R. 422; 65 Sol. Jo. 454, C.A.; 8 Digest (Repl.) 141, *906*.

Action in the Commercial List tried by Roche, J.

In April, 1931, the plaintiffs bought from Arcos, Ltd., 30 tons of Caucasian nuts at £76 per ton, ex wharf, London. The nuts arrived in London a few days later as part of a larger cargo, and were deposited by Arcos, Ltd., in the defendants' warehouse under a contract of bailment which contained the following exceptions clause:

> "The company [i.e., the defendants] shall not be liable for loss, detention, damage or injury of or to the goods or property howsoever and whensoever caused and of what kind soever. In particular and without prejudice to the foregoing the company shall not be liable for consequences . . . of any act neglect or default of the company or its servants or for others for whom it might be responsible. . . ."

On May 31 the plaintiffs paid Arcos, Ltd., for the goods, and Arcos, Ltd., thereupon gave the plaintiffs a delivery note for them. The plaintiffs left the nuts in the defendants' warehouse for some six months, at the end of which period it was found that they had become mildewed and damaged, and were, to a large extent, unsaleable. They thereupon started this action in which they claimed damages, alleging negligence in the storage of the nuts. The defendants denied the alleged negligence, and they also relied on the exceptions clause set out above. To this the plaintiffs replied that that clause formed part of the contract between Arcos, Ltd., and the defendants, to which the plaintiffs were not parties, and by which they were not bound, and they said that the legal effect of what had taken place was that there had been a novation, and that a new contract of bailment had come into existence between them and the defendants which did not contain any provision exempting the defendants from liability for negligence. The defendants contended that the plaintiffs were assignees of the contract between them and Arcos, Ltd., and were bound by its terms.

Serjeant Sullivan, K.C., and *E. G. Palmer* for the plaintiffs.

Trapnell, K.C., and *H. L. Parker* for the defendants.

ROCHE, J.—This is a claim by goods owners against wharfingers for negligence in carrying out the warehousing of certain goods. The goods were nuts in the form of kernels free of their shells, imported from Russia in 1931. The plaintiffs bought certain parcels of these kernels from Arcos, Ltd. Arcos, Ltd., arranged for the landing of the hazel nut kernels from the steamship at the defendants' wharf and for their warehousing in the defendants' warehouse. Arcos, Ltd., sold the parcel of hazel nuts to the plaintiffs ex warehouse. The goods were landed in April, and in the month of October they were found to be defective. The claim is based on the allegation that the defendants neglected, or but for their neglect would have known of, the damp condition of the warehouse, and

> "allowed the goods to remain in the warehouse, whereby the same became affected by mildew and large portions of the same became damaged and unmerchantable."

It has been agreed that I should first of all determine the question of liability, and later, if necessary, determine the question of the amount of damage. The defence is that the warehouse was not damp in the manner alleged and there was no defect in the storage such as is relied on; and, further, as a separate defence, it is said that the goods were warehoused under a clause which excused the defendants from liability even if the damage was caused in the manner the plaintiffs allege. That latter defence is, in my view, available, and protects the defendants, and it might be unnecessary to determine the first point. But as it has been fully debated before me, and as I have heard a considerable amount of evidence, I think I ought to pronounce my judgment on that also.

The goods consisted of two qualities—extra quality and No. 1 quality. There was very little difference between these two qualities, and none in price. The damage which is complained of was all sustained by extra quality goods. That is a matter of considerable importance. What I find happened was this. The extra quality was stowed in a warehouse known as 212; No. 1 quality in what is known as 215, or the old currant floor. The case made is that though both these qualities and descriptions of nuts were found to be damaged or defective in October, the responsibility of the defendants is confined to the damage to the extra quality in No. 212. That is based on an allegation that 212 was actually damp in the sense that there was damp on the walls and damp on the roof, and that the damp made its way on to the bags. No. 215, the old currant floor, is not alleged to have had damp upon any part of the roof or walls, but it is said that there were signs of life, maggots, or weevils, and it is not alleged that the defendants are responsible for that. I am satisfied that there was no real distinction in the damage in these two places.

[His Lordship reviewed the evidence, and found as a matter of fact that neither of the warehouses were unfit places for the storage of the goods, and that the allegations as to dampness were disproved. He continued :] As a matter of contract my finding is as follows. Arcos, Ltd., warehoused these goods well knowing, as their representative admitted, that there were clauses attached to every document they received from the defendants, and also that the landing book contained clauses. The representative said that he did not read them because he did not think he was making a definite contract. That will not do, as I understand the matter. It is clear that if a man knows there are clauses and those clauses are reasonably brought to his attention, it is his concern if he does not read them. The clause in question is very wide and sweeping. If parties like to accept such a clause it is a matter for them. It is a clause excusing the defendants from

> "loss, detention, damage or injury of or to the property howsoever and whensoever caused and of what kind soever."

Of the cases, the last material one cited to me was *Gibaud* v. *Great Eastern Rail. Co.* (1), and I particularly refer to the passage from SCRUTTON, L.J.'s judgment ([1921] 2 K.B. at p. 82) as an authority for the proposition that these wide words are sufficient protection against a claim such as this. But the matter does not rest there, because the defendants went on to excuse themselves from responsibility or liability

> "for any act neglect or default of the company or its servants or others for whom it might be responsible."

It cannot be contended that if these terms or conditions form part of the contract between the parties to this action the protection is not sufficient to excuse the defendants from liability. As I have said, Arcos, Ltd., knew the warehousing contract contained a clause. They did not choose to read it, or make themselves acquainted with its contents. That is their lookout. The question is whether the plaintiffs are bound by the same contract. In my judgment, they are. The method of business was that the goods were passed over to them by delivery note. That delivery note was endorsed by the plaintiffs: "Please hold to our sub-orders, and oblige." It is contended quite plainly and precisely by counsel for the plaintiffs that in these circumstances that is what may be described as an open contract without any condition made upon acceptance of that endorsement by the defendants. In my view, that is not the case. The plaintiffs took the goods on the warehousing conditions under which they had been warehoused in the first instance. I find it difficult to see how this business could be conducted on any other view than that. Endorsements and acceptances of endorsements, which are relied on in commerce as passing the goods easily from hand to hand, would have to be so

qualified and extended as to make business difficult, if not impossible. I have A
further to bear in mind that the plaintiffs were doing business in these matters at this time and previously with the defendants, and were receiving documents—invoices, letters and so forth—all of which bore this same clause, which is not so minute and illegible as these clauses sometimes are.

In these circumstances I am satisfied that the plaintiffs took the goods under a
warehousing contract which contained the clause I have read, which clause excused B
the defendants from responsibility for the matters alleged against them. On this ground, in addition to those with which I have previously dealt, the defendants are entitled to succeed.

Solicitors: *Carter & Bell*; *Keene, Marsland, Bryden, & Besant.*

[*Reported by* V. R. Aronson, Esq., *Barrister-at-Law.*] C

D

Re DORMAN, LONG & CO., LTD.
Re SOUTH DURHAM STEEL AND IRON CO., LTD.

E

[Chancery Division (Maugham, J.), November 22, 23, 24, 28, 29, 30, 1933]

[Reported [1934] Ch. 635; 103 L.J.Ch. 316; 151 L.T. 347; 78 Sol. Jo. 12]

Company—Scheme of arrangement—Grounds on which court will sanction—Requirements as to contents of explanatory statements issued by directors—
Voting—Proxy—Validity of general form—Need to lodge before meeting—Use F
by directors—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 153 (1), (2).

In determining whether a scheme of arrangement should be sanctioned under s. 153 (2) of the Companies Act, 1929 [now s. 206 (2) of the Companies Act, 1948], the court, to have jurisdiction to deal with the matter, must first ascertain that the resolutions of the shareholders and stockholders agreeing to
the scheme have been passed by the majority, in number and value, prescribed G
by the subsection at a meeting or meetings duly convened and held. The court must then determine whether the proposed scheme is such that an honest and intelligent member of the class concerned, acting in respect of his interest, might reasonably approve of it.

Especially in the case of large companies where only a small portion of the
members can attend meetings it is essential that the court, in determining H
whether or not the necessary resolutions have been duly passed, should see that explanatory circulars sent out by the board are perfectly fair, and, so far as possible, give all the information reasonably necessary to enable the recipients to decide how to vote.

Section 153 (2) of the Act of 1929 [s. 206 (2) of the Act of 1948] gave a
general right of voting by proxy, and that statutory right could not be affected I
by Practice Notes or Directions issued or given by the court. The power to summon a meeting involves a power to fix the date of the meeting and nominate the chairman. It may also involve a power to direct and settle a form of notice to be sent out at the expense of the company by the persons who are asking the court to summon a meeting under s. 153 (1), but it does not involve a power to prescribe an exclusive form of proxy. A general form of proxy can be used, i.e., a proxy by which a shareholder or stockholder appoints another member of the class to represent him at the meeting, to listen to all that is

said on both sides, and then to vote as he may think proper having regard to what has been said.

Proxies may be used at a meeting whether or not they have been lodged before the meeting.

Directors who, pursuant to an order of the court, hold a meeting and get proxies for and against the proposed scheme, have no option whether or not they will use them. No discretion is given in the matter. The directors are bound to use them save in the absence of the proxy-holder, or all the proxy-holders, named.

Observations on the contents of an explanatory statement sent to debenture stockholders by directors putting forward a scheme, and its failure (i) to disclose that trustees for the debenture holders, who recommended the scheme, had a very strong interest in its being adopted, and (ii) to give full particulars of a re-valuation of assets; and also on provisions in the scheme for compensation on a generous scale to those members of the board who were not to obtain employment in the amalgamated company which would result from the adoption of the scheme and for remuneration at an increased rate to be given to some of the directors who were going to be employed in the future.

Notes. The Companies Act, 1929, was repealed by the Companies Act, 1948, s. 153 (1) and (2) of the Act of 1929 being re-enacted in s. 206 (1) and (2) of the Act of 1948. As to proxies see now s. 136 of the Act of 1948.

Referred to: *Re Imperial Chemical Industries, Ltd.*, [1936] 2 All E.R. 463; *Re Old Silkstone Collieries, Ltd.*, [1954] 1 All E.R. 68.

As to schemes of arrangement, see 6 Halsbury's Laws (3rd Edn.) 764 et seq., and for cases see 10 Digest (Repl.) 1126 et seq. For Companies Act, 1948, see 3 Halsbury's Statutes (2nd Edn.) 452.

Cases referred to:

(1) *Re Alabama, New Orleans, Texas and Pacific Junction Rail Co.*, [1891] 1 Ch. 213; 60 L.J.Ch. 221; 64 L.T. 127; 7 T.L.R. 171; 2 Meg. 377, C.A.; 10 Digest (Repl.) 803, *5213*.

(2) *Re English, Scottish and Australian Chartered Bank*, [1893] 3 Ch. 385; 62 L.J.Ch. 825; 69 L.T. 268; 42 W.R. 4; 9 T.L.R. 581; 37 Sol. Jo. 648; 2 R. 574, C.A.; 9 Digest (Repl.) 613, *4071*.

(3) *Re Magadi Soda Co.*, [1925] W.N. 50; 94 L.J.Ch. 217; 41 T.L.R. 297; 69 Sol. Jo. 365; [1925] B. & C.R. 70; 10 Digest (Repl.) 1135, *7898*.

Petitions presented under ss. 153 and 154 of the Companies Act, 1929.

By the first petition Dorman, Long & Co., Ltd. (hereinafter called "Dorman Long") sought the confirmation of the court to a reduction of capital from £11,248,146 to £1,750,678, and also the sanction of the court to a scheme of arrangement for the acquisition by Dorman Long of the business and assets of the South Durham Steel and Iron Co., Ltd. By the second petition the South Durham Steel and Iron Co., Ltd. (hereinafter called "South Durham") sought the sanction of the court to the amalgamation of its business with Dorman Long.

Dorman Long was incorporated under the Companies Acts, 1882 to 1886, in the year 1889. Its capital at the date of the petition was £11,248,146, divided into 883,918 6 per cent. cumulative preference shares of £1 each, 2,052,746 8 per cent. preferred ordinary shares of £1 each, and 8,311,482 ordinary shares of £1 each, all issued and fully paid up. The company had also issued £400,000 4 per cent. first mortgage perpetual debenture stock (hereinafter called the "4 per cent. debenture stock"), secured by a trust deed dated May 28, 1900, which was a specific charge on certain freehold premises and a floating charge on all Dorman Long's other property and undertaking with certain exceptions. The proposed scheme of arrangement did not touch these debentures. There was also outstanding £5,135,944 5½ per cent. first mortgage redeemable debenture stock (hereinafter called the "5½ per cent. debenture stock"), repayable at par on May 1, 1963, or earlier, by operation of a sinking fund at any time after May 1, 1943, at 102 per cent. The 5½ per cent. debenture stock was secured by a trust deed made July 26, 1923, between Dorman Long and Barclays Bank, Ltd., under which Barclays Bank, Ltd., was the trustee and the stockholders had a specific charge on the company's freehold and leasehold properties and a floating charge upon its undertaking and other property with certain exceptions, subject to the prior charge in favour of the 4 per cent. debenture stockholders.

At the date when the petition came before the court Dorman Long was in a serious financial position. It was being financed by four banking companies, to whom it owed the aggregate sum of approximately £2,420,000, that sum being secured only to the extent of £1,715,000. Barclays Bank, Ltd., was one of the four banks financing Dorman Long, and the share of the indebtedness due to Barclays Bank amounted at that date to £1,411,000. The interest on the 5½ per cent. debenture stock was in arrear.

The South Durham company was incorporated in 1898. At the date of the petition its capital was £1,250,000, divided into 300,000 preference shares of £1 each, 350,000 ordinary shares of £1 each, all issued and fully paid up, and 600,000 "B" ordinary shares of £1 each, 587,820 of which were issued and fully paid up. There was outstanding at this date £300,000 4½ per cent. perpetual debenture stock, secured by a trust deed dated May 1, 1900, under which the stock was a specific charge on the hereditaments and premises of the company and a floating charge on its undertaking. At the date of the petition South Durham owned 980,516 shares in the capital of Cargo Fleet Iron Co., Ltd., being 98 per cent. of such capital. This latter company had at the date of the petition certain debentures outstanding which were redeemable upon terms at the company's option. At the date of the petition South Durham was, notwithstanding the depression in the steel and iron trade, in a flourishing condition.

With a view to the unified control of practically the whole of the iron and steel industries of the Tees-side area of the north-east coast, on June 15, 1933, a provisional agreement was entered into between Dorman Long and South Durham for the acquisition by Dorman Long of the whole of the undertaking and assets of South Durham, including the 98 per cent. of the share capital of Cargo Fleet Iron Co., Ltd., then held by the latter company. The scheme was conditional, first, upon its acceptance by the debenture stockholders and shareholders of Dorman Long; secondly, on its acceptance by the debenture stockholders and shareholders of South Durham; and thirdly, on the sanction of the court being obtained before December 31, 1933.

The scheme of arrangement proposed by Dorman Long was shortly as follows. The capital of the company was to be reduced from £11,248,146 to £1,750,678 divided into 919,530 preferred ordinary shares of £1 each and 831,148 deferred ordinary shares of £1 each, to be kept by the then shareholders. The capital was then to be restored to £11,248,146 by the creation, first, of £1,985,784 6 per cent. non-cumulative preference shares ranking both as to capital and dividend in priority to the preferred ordinary shares; secondly, of 2,323,284 preferred ordinary shares of £1 each to be issued under the scheme for amalgamation to the shareholders of South Durham, to the 5½ per cent. redeemable debenture holders of Dorman Long and to Dorman Long's bankers; thirdly, one management share and 5,188,399 shares not to be immediately issued.

The scheme provided for the reorganisation of Dorman Long's debenture issue and indebtedness to the banks as follows: £2,567,972 of the £5,135,944 5½ per cent. debenture stock was to be surrendered, the holders being given in exchange for each £100 of such stock, thirty 6 per cent. preference shares and thirty preferred ordinary shares of £1 each in Dorman Long's reorganised capital. Of the surrendered stock, 650,000 was to be re-issued as "A" 5½ per cent. redeemable stock, of this 643,910 was to be issued in part payment for South Durham's undertaking. The balance of the surrendered debenture stock was to be cancelled. The remainder of the 5½ per cent. debenture stock, retained by the stockholders, was to be converted into "B" stock with interest contingent on profits and not cumulative for a certain period.

Interest on the debenture stock was to be cancelled from Nov. 1, 1932, to the date of the coming into operation of the scheme. The debenture stockholders were also to waive their right to repayment in 1963 and to consent to the cancellation of the existing sinking fund arrangement. At the same time £2,500,000 5 per cent. redeemable prior lien stock was to be created, charged both on Dorman Long's assets and on the assets to be acquired as a result of the amalgamation with South Durham. Such lien stock was to rank in priority to the "A" and "B" 5½ per cent. debenture stocks.

The indebtedness to the banks was to be dealt with by issuing 145,000 preference and 145,000 ordinary shares in the reorganised capital of Dorman Long at par to satisfy £290,000 of the debt due to the bankers. The rest of the indebtedness, except for the sum of £150,000 and amounts owing on certain special accounts, was, up to £1,650,000, to carry interest at 3 per cent. for three years and subsequently at 4 per cent. payable out of profits estimated in the manner provided by the scheme. The result (in effect) of this scheme was that about £700,000 of the indebtedness to the bankers was left unprovided for and might be called in at any time.

Subject to Dorman Long's scheme and the South Durham scheme being sanctioned, Messrs. N. M. Rothschild & Sons had agreed to subscribe for the 5 per cent. redeemable prior lien stock on terms producing £2,007,000, of this sum £1,287,930 was to be used for distribution to the debenture stockholders and shareholders of South Durham and as a loan to Cargo Fleet Iron Co., Ltd., to pay off its debenture stock. The scheme further provided for the one management share to be vested in a stockholders' committee, conferring on them a controlling voting power until Dorman Long had made the first payment to the sinking fund established under the scheme.

Under South Durham's scheme, on the transfer of its undertaking to Dorman Long, £110 in cash was to be paid to the debenture stockholders for each £100 of South Durham's debenture stock held by them. South Durham's preference, ordinary and "B" ordinary shareholders were to receive for their shares in the case of the former a cash payment and debentures, and in the case of the latter various shares in Dorman Long's reorganised capital. Cargo Fleet Iron Co.'s debenture stock was to be paid off at a premium.

On June 19, 1933, the court made an order directing Dorman Long to convene meetings of its 5½ per cent. debenture stockholders, cumulative preference shareholders, preferred ordinary shareholders, and ordinary shareholders. A further order was made directing South Durham to convene separate meetings of its debenture stockholders, preference and ordinary shareholders, and "B" ordinary shareholders. In each case the meetings were convened "for the purpose of considering and, if thought fit, approving, with or without modification," the respective schemes. The orders further directed that a print of the scheme, and a properly stamped form of proxy in the form settled in chambers, should be sent to the debenture holders and the various classes of shareholders.

On July 3, 1933, Dorman Long sent out notices of the meetings ordered by the court to its debenture stockholders and shareholders, together with proxies in the form settled in chambers, and voting cards. The notices were accompanied by a circular signed by the company's secretary. This circular, after setting out the company's difficulties, continued:

> "The whole of the assets have, therefore, been re-valued upon the basis of their earning power; and this re-valuation has been confirmed by the well-known valuer, P. Michael Faraday, and by Mr. John E. James. . . . The directors have consulted representatives of the insurance companies and investment trust companies, who are substantial holders of the 5½ per cent. debenture stocks and share of your company, and they consider that the only alternative to the scheme now submitted is the appointment of a receiver. The terms of

> the scheme have been referred to the trustees of the stockholders, who, after making a careful investigation of the whole position, recommend the proposals for the approval of the stockholders. . . . The bankers of the company have agreed that upon the scheme coming into operation they will accept the allotment credited as fully paid up, of 145,000 6 per cent. preference shares and 145,000 preferred ordinary shares of £1 each in the reorganised capital of the company in satisfaction of £290,000 of the company's indebtedness to them, and will permit the balance of such indebtedness (exclusive of certain sums) to remain outstanding up to but not exceeding £1,650,000, with the benefit of certain securities at present deposited with or on behalf of the bankers. Interest will be payable on the amount outstanding at the rate of 3 per cent. per annum for the remainder of the financial year then current, and for the next two financial years, and thereafter at the rate of 4 per cent. per annum. The bank interest will only be payable out of profit available as defined in the scheme, and will be non-cumulative until the interest on the 5½ per cent. debenture stock becomes fixed. One-half of the profits available after payment of bank interest will be used to repay the bankers, but the company will not in any year be required to repay more than 5 per cent. per annum of the original amount permitted to remain outstanding."

Four forms of proxy for the debenture stockholders and the three classes of shareholders were sent with the notice of the meetings and the above circular. The proxies began by stating that the stockholder or shareholder, as the case might be, appointed the chairman, Charles Mitchell, or, failing him, the Hon. Roland Dudley Kitson, or, failing him, Arthur Dorman, as proxy

> "to act for —— at the meeting . . . to be held on July 27, 1933, . . . for the purpose of considering and, if thought fit, approving, with or without modification, the proposed schemes of arrangement referred to in the notice convening the meeting, and . . . to vote for and in [my] name —— the said scheme either with or without modification as [my] proxy may approve."

Opposite the blank immediately before the words "the said scheme" was a marginal note:

> "If for, insert 'for'; if against, insert 'against' and strike out the words after 'scheme' and initial such alteration."

The proxy had the following note at the foot:

> "This proxy must be signed and lodged with the secretary at the registered office of the company . . . not later than six o'clock in the afternoon of the 25th day of July, 1933."

Along the margin of each voting card was written in red ink:

> "If you are voting as proxy for other holder(s), please write the name of holder(s) on the back of this card."

On June 30, 1933, notice of the meetings ordered by the court, and proxies in the form settled in chambers, were sent out to the debenture stockholders and shareholders of South Durham. A circular was also enclosed signed by the secretary stating inter alia as follows:

> "The basis upon which the negotiations for the amalgamation . . . have proceeded has been, not on the book figures of the assets as appearing in the balance-sheets, but on the earning power of the assets to be acquired under the scheme. A re-valuation of the company's assets was, accordingly, made on the above basis by Messrs. Peat, Marwick, Mitchell & Co., and their figures have been confirmed by Mr. Faraday, the well-known valuer, and Mr. John F. James. . . . Your board have investigated and considered the scheme in its entirety, and are prepared as large debenture holders or shareholders to accept the terms offered; and taking all the circumstances into consideration, and having regard to the great probability of the coming change in independent

> A conduct of the industry, and the favour with which suitable amalgamations are viewed politically and financially, recommend their fellow stockholders and fellow shareholders to accept it. . . ."

The circular went on to give particulars of the re-constitution of Dorman Long's board of directors and of the arrangement by which certain of South Durham's B directors were to join that board. It also contained particulars of a scheme for compensation for loss of office for those directors who were not to join the reconstituted board and of the remuneration of those who continued in office. The circular continued:

> "It is urgently requested . . . that if you are unable to attend personally you C will complete and sign the respective proxies for debenture stock or shares which you may hold and return to the company . . . so that they may arrive not later than twelve o'clock noon on Saturday, July 15 next. Your particular attention is invited to the instructions set out in the proxies as to their due completion."

Forms of proxy, also in the form settled in chambers and similar to those sent D out with the notices convening Dorman Long's meeting, accompanied the notice of the South Durham's meetings, but in this the date of the meeting was to be July 19, 1933, and the proxies had to be lodged not later than twelve o'clock noon on July 15.

Both schemes roused considerable opposition. The leader of the opposition in the case of the South Durham scheme was Mr. Hyde, a shareholder both in South E Durham and in the Cargo Fleet Iron Co., Ltd. On July 3, 1933, he sent a letter to the shareholders of both companies asking them not to sign proxies in favour of the amalgamation, which he stated was not in the best interests of the companies. He sent a second letter to the shareholders on July 10, 1933, with further particulars of the reasons for his opposition to the scheme and enclosing proxy forms for the various classes of shareholders.

F On July 19, 1933, meetings of the debenture stockholders and of the various classes of shareholders of South Durham were held. At the meeting of the preference shareholders the chairman rejected certain proxies, including 270 representing £41,319 of shares purporting to appoint Mr. Hyde as proxy. Similarly, at the ordinary shareholders' meeting, the chairman rejected as invalid 502 proxies representing £60,246 of shares, and, at the meeting of "B" ordinary shareholders, G he rejected 544 proxies representing £43,302, in each case appointing Mr. Hyde or Mr. Carter as proxy. In each case the chairman gave as the ground of such rejection the fact that the proxies in question were not in the form settled in chambers as they expressly directed Mr. Hyde or Mr. Carter as proxy to vote against the scheme. In his report of Aug. 8, 1933, the chairman stated that, if these proxies were properly excluded, the scheme was carried by the requisite H statutory majority. If the rejected proxies were admitted, there was a majority in number, but not the three-fourths majority in value, for the scheme.

A committee of 5½ per cent. debenture stockholders of Dorman Long, who opposed the company's scheme, sent out after July 19, 1933, a circular to all holders of £200 of debenture stock or more, asking them to vote against the scheme. About half the stockholders on the register were thus circularised. Mr. A. R. I Linsley was the leader of this opposition.

The meetings of the debenture stockholders and shareholders of Dorman Long were held on July 27, 1933, Mr. C. Mitchell, of Dorman Long, being in the chair. Mr. Linsley attended the meeting and spoke. He subsequently made an affidavit criticising the conduct of the meeting of debenture stockholders. The learned judge found as a fact that the meeting had been fairly conducted. At this meeting 4,237 persons, representing £2,902,811, voted in person or by proxy. Of these 167 were present in person, holding £152,492 of stock. Those present voted by cards on which was the red ink note referred to above, and there was some confusion as

to the proper method of filling up these cards. On Aug. 10, 1933, Mr. Mitchell, A
as chairman, reported that at the meeting of the debenture stockholders, and the meetings of all classes of shareholders, resolutions approving the scheme without modification were passed.

Both petitions came on for hearing on Nov. 22, 1933. The Dorman Long petition, which was heard first, was opposed by certain of the 5½ per cent. debenture stockholders on the grounds that the scheme was unfair to them, that there B
were irregularities in the meetings at which the various resolutions confirming the scheme had been passed, and that certain proxies which ought to have been admitted had been wrongly rejected. The chairman of Dorman Long gave evidence denying that there had been any irregularities in the conduct of the meetings. The South Durham petition, which was heard at the same time, was opposed by Mr. Hyde, representing dissenting shareholders. C

The Companies Act, 1929, s. 153, provided:

> "(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the court may, on the application in a summary way of the company or any creditor or member of the company, or, in the case of D
> a company being wound-up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs.
>
> "(2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree E
> to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in course of being wound-up, on the liquidator and contributories of the company."

F

Wilfrid A. Greene, *K.C.*, *W. P. Spens*, *K.C.*, and *D. Ll. Jenkins* for Dorman Long.

H. A. H. Christie for opposing 5½ per cent. debenture holders.

F. Ashe Lincoln for a group of debenture holders of Dorman Long.

Wilfrid A. Greene, *K.C.*, *W. P. Spens*, *K.C.*, and *D. Ll. Jenkins* in reply.

Wilfrid A. Greene, *K.C.*, *W. P. Spens*, *K.C.*, and *W. Gordon Brown* for South G
Durham.

Fergus D. Morton, *K.C.*, and *M. L. Gedge* for Mr. Hyde.

Roger Turnbull for Boughton Estates, Ltd., mineral lessors of South Durham.

MAUGHAM, J.—There are two petitions before me, the first relating to Dorman, Long & Co., Ltd., and the second relating to the South Durham Steel H
and Iron Co., Ltd. Each of them is presented under s. 153 of the Companies Act, 1929.

I will first state my view as to the function of the court in determining whether the compromise or arrangement should be sanctioned by the court. It is plain that the duties of the court are twofold. The first is to see that the resolutions are passed by the statutory majority in value and number, in accordance with I
s. 153 (2), at a meeting or meetings duly convened and held. Upon that depends the jurisdiction of the court to confirm the scheme. The other duty is in the nature of a discretionary power, and it has been the subject of two decisions in the Court of Appeal, the first being *Re Alabama, New Orleans, Texas, and Pacific Junction Rail Co.* (1), and the second *Re English, Scottish, and Australian Chartered Bank* (2). In the first of these cases it is true that LINDLEY, L.J., observed:

> "The court must look at the scheme and see . . . whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an

A objection to it as that any reasonable man might say that he could not approve of it."

I think that those phrases, which were contained in a judgment which had not been reserved, do not represent exactly what the lord justice intended. I prefer, as representing the view of the Court of Appeal, the language in the statement of B BOWEN, L.J., that

> "a reasonable compromise must be a compromise which can, by reasonable people conversant with the subject, be regarded as beneficial to those on both sides who are making it,"

and he added, to explain that:

> ". . . I have no doubt at all that it would be improper for the court to allow C an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such."

FRY, L.J., said:

> ". . . the court . . . must be satisfied that the proposal was at least so far fair D and reasonable, as that an intelligent and honest man, who is a member of that class, and acting alone in respect of his interest as such a member, might approve of it."

In *Re English, Scottish, and Australian Chartered Bank* (2) LINDLEY, L.J., does not seem to have had his attention drawn to the fact that what he had said in *Re Alabama, New Orleans, Texas, and Pacific Junction Rail. Co.* (1) was not quite E the same as what BOWEN, L.J., and FRY, L.J., had said, but he plainly approved of what BOWEN, L.J., and FRY, L.J., had said, for he so stated, and he quoted what FRY, L.J., had said in the previous case. He also said this:

> "If the creditors are acting on sufficient information, and with time to consider what they are about, and are acting honestly, they are, I apprehend, much F better judges of what is to their commercial advantage than the court can be. . . . While, therefore, I protest that the court are not merely to register their decisions, but to see that they have been properly convened, and have been properly consulted, and have considered the matter from a proper point of view . . . the court ought to be slow to differ from them."

In my opinion, then, so far as this second duty is concerned, what I have to see G is whether the proposal is such that an intelligent and honest man, a member of the class concerned, and acting in respect of his interest, might reasonably approve of it. The schemes before me are attacked on both grounds. It is said that the resolutions have not been duly passed, and that the court in considering the nature of the schemes ought to come to the conclusion that a reasonable business man would not approve of them.

H I now turn to consider with regard to *Dorman, Long's Case* the question whether the resolutions have been duly passed. I observe by way of preliminary that huge sums are involved. Large sums are often involved in the schemes of arrangement which come before this court for confirmation, and the court has found it necessary to protect shareholders and creditors alike in connection with such schemes. It may be observed that when the Joint Stock Companies Arrangement Act, 1870, was passed, in I the majority of cases all the persons concerned with an arrangement could go to the meeting, listen to what was said, and vote for or against the arrangement according to the views which they were persuaded to take. In these days, in many of the cases that come before me, only a fraction of the persons who are concerned can get into the room where the meeting is proposed to be held, and in the great majority of cases the proxies given to the directors before the meeting begins have in effect settled the question of the voting once for all. It is, perhaps, not unfair to say that in nearly every big case not more than 5 per cent. of the interests involved are present in person at the meeting. It is for that reason the court takes the view that it is essential to see that the explanatory circulars sent out by the board of the company are perfectly fair and, as far as possible, give all the information reasonably necessary to enable the recipients to determine how to vote. I am assuming, of course, that, following the usual procedure, explanatory circulars are sent out, because I may observe there is nothing in the Act to render them essential.

In a sense, in all these cases, the dice are loaded in favour of the views of the directors. The notices and circulars are sent out at the cost of the company, the board have had plenty of time to prepare the circulars, all the facts of the case are known to them, proxy forms are made out in favour of certain named directors, and, although it is true that the words "for" or "against" may be inserted in the modern proxy form, the recipients of the circulars very often are in doubt whether the persons named as proxies are bound to put in votes by proxy with which they are not in agreement. If we contrast with that position the position of a class of objectors, it is to be observed that a member of the class who receives a notice of a meeting and a circular from the directors is generally alone, he has no funds with which to fight the case, and he has no information, except sometimes that information which has been contained in reports and balance-sheets, which have probably long ago been relegated to the wastepaper basket. In any case, he has a minimum of information, his personal interest in the matter may be exceedingly small, probably he knows few persons in the same position as himself, and if he manages to get into touch with them they together have to raise funds for the purposes of an opposition which is often an expensive matter; they have then to get the names and addresses of the members of the class who are concerned, and to frame and send out a circular representing their views. Very often there is scarcely sufficient time for those purposes between the moment when the notice of the meeting reaches objectors by post and the date of the meeting. Proxies sent out by the directors can easily be lodged forty-eight hours before the meeting. It is quite plain that opponents may find it most difficult, after they have come together and have raised the necessary funds, and have agreed on a circular and have sent out their notices, to lodge such proxies as they may have been able to obtain forty-eight hours before the meeting.

In my opinion, the court ought to bear in mind these considerations when it has before it, as it often has, a case where the whole matter is really determined by the proxies that have been given before the meeting is held. They should also be borne in mind in relation to the important point, and one of far-reaching importance in many cases besides this one, as to the power of members of the class to vote by proxy. Section 153 simply says that a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting may agree to a compromise or arrangement. It is wholly silent as to the nature of the instrument appointing the proxy. We all know that there are two forms in use. There is a general proxy which may appoint a person to vote as he may think fit, and there is a special proxy which may be a proxy to vote for or against, as the case may be, a particular resolution. In what I am going to say in reference to proxies and proxy forms I am confining my observations to the cases before me, namely, to the cases where the companies are not in winding-up, where there is no rule of court applicable to the matter, and where neither the articles of association of the company nor the provisions of the trust deed to secure debentures have any application. It may be pointed out that in 1870 a proxy was simply an agent to vote; no deed was necessary for the appointment of such an agent, he could be appointed in writing in any form which sufficiently denoted the name of the person who was to vote and the person who appointed him; and then I think the matter was left at large, except, perhaps, to this extent, that, having regard to the nature of the meetings contemplated, it seems to be a reasonable inference that the instrument must be one in writing. The power of the court in terms is simply "to summon the meetings in such manner as the court may direct."

A I have now to consider certain authorities. *Re English, Scottish, and Australian Chartered Bank* (2), to which I have already referred, is one in which the Court of Appeal had to consider whether certain novel forms of order, which involved proxies being given in London by persons living in Australia, were invalid. VAUGHAN WILLIAMS, J., who had himself, I think, invented the order, observed:

> B ". . . I think that the court has an inherent power to direct the mode in which meetings shall be held, and the mode in which proxies shall be evidenced, and to determine all such questions as whether it is necessary that the proxy shall be produced at the meeting."

When the matter, however, went to the Court of Appeal it is to be observed that LINDLEY, LOPES, and A. L. SMITH, L.JJ., I may say, pointedly abstained from C taking that view. It was a case where the company had been ordered to be wound up in this country, and all three of the lord justices expressly stated that in their opinion the authority of the court to make this kind of order was derived from s. 91 of the Companies Act, 1862, which was the Act then in force. Section 91 [now reproduced as s. 346 (1) of the Companies Act, 1948] provides:

> "The court may, as to all matters relating to the winding-up of a company, D have regard to the wishes of the creditors or contributories of the company, as proved to it by any sufficient evidence, and may, if it thinks fit, for the purpose of ascertaining those wishes, direct meetings of the creditors or contributories to be called, held, and conducted in such manner as the court directs, and may appoint a person to act as chairman of any such meeting and to report the result thereof to the court."

E The Court of Appeal considered that that provision, read in conjunction with the Joint Stock Companies Arrangement Act, 1870, justified the court in making an order providing for special forms of proxies.

There are two Practice Notes which further have to be considered. One is to be found in [1896] W.N. 56, where VAUGHAN WILLIAMS, J., directed that

> F "proxy papers to be used at meetings to consider schemes of arrangement under the Act of 1870 [i.e., the Joint Stock Companies Arrangement Act] should follow the office form settled by the judge, which empowers the proxy
>
> > 'to vote for me and in my name [blank] the said scheme, either with or without modification, as my proxy may approve,' "

G and contains opposite the blank a marginal note as follows:

> "if for, insert 'for,' if against, insert 'against' and strike out the words after 'scheme' and initial such alterations."

Plainly that is a direction in reference to companies in winding-up because the Joint Stock Companies Arrangement Act, 1870, referred only to those cases. A good many years later, in [1910] W.N. 154, SWINFEN EADY, J., directed that:

> H "In order to insure the issue of proper forms of proxies for meetings ordered to be summoned under s. 120 of the Companies (Consolidation) Act, 1908 [now s. 206 of the Act of 1948], the order directing the meeting to be summoned should invariably provide that
>
> > 'the proxies are to be in the form officially authorised by VAUGHAN WILLIAMS, I J., in the previous Practice Direction ([1896] W.N. 56) or in such other form as may be settled in chambers.' "

It is impossible from that to be sure whether the judge was intending his remarks to be confined to cases where the company was in compulsory or voluntary winding-up or whether he thought it was a proper direction to give in all cases. Section 120 of the Companies (Consolidation) Act, 1908, provided that the power to approve a scheme could be exercised whether or not the company was in winding-up.

I do not find that either in the order of the court directing meetings to be summoned, or in the form of proxies settled in chambers following the Practice Notes that I have referred to, there is anything to preclude a member of the class from A making use of such proper proxies, general or special, as he may be advised. In my opinion, s. 153 gives a general right of voting by proxy, and the decision of Eve, J., in *Re Magadi Soda Co.* (3), confined as it is to a case where the company was in winding-up, in no way leads me to doubt the conclusion on this point at which I have arrived. It is not open to the court by Practice Notes—which have no statutory force and very little judicial force, as they are directions given without B argument—to preclude people who are given a statutory right to vote by proxy from so exercising their vote. The power to summon a meeting involves a power to fix the date of the meeting, the chairman, and the form of the notice. It may also involve a power to direct and settle a form of notice to be sent out at the expense of the company by the people who are asking the court to summon a meeting under the section. It does not, in my opinion, either expressly or by C implication, direct that no other proxy form can be used. It should be added that some of the class may desire to approve the scheme, subject to a specific modification. I do not see why they should be precluded from doing that by a form of proxy which specifies the modification which they desire. It is true that in the proxy form as settled by the court there is a reference to a possible modification, and in that case the directors or other persons to whom the proxies are to be given D will apparently be entitled to use their own judgment in the matter, and that may be precisely the thing which the person giving the proxy does not desire. I may mention as an illustration that the scheme may, as one of the schemes before me does, give compensation to directors for what is called loss of office. I can conceive members of the class wishing to vote in favour of the scheme only if it omitted that provision. In order to do that, if they cannot attend the meeting themselves, E they must make out a special form of proxy.

A somewhat different question arises as to the time at which lodgment of the proxies should have been made. It is not necessary for me to decide whether, when the office form of proxy is used, it must be lodged within the time mentioned in the note on the proxy or it will be bad, though I may mention that I see grave objection to the view that if lodged too late it will be bad. I can at least see no F sufficient ground for holding that the notes on the form settled in chambers, which, so far as I can see, are not notes made with any judicial authority, preclude other forms from being used if first presented at the meeting itself. As I have already said, I can see no objection to a general form of proxy being used; that is to say, a proxy by which a person appoints another member of the class to represent him or her at the meeting, to listen to all that is said on both sides, and then to vote G as he or she may think proper having regard to what was said. I have no doubt that that was constantly done in the old days when the Act of 1870 was in force. I am not prepared, for example, to hold that a wife may not appoint her husband on her behalf to go to the meeting to listen to what is said and to vote accordingly. Further, it does not seem to me that there is any sufficient ground for holding that a member of the class may not use a proxy form with the printed word "against" H or the printed word "for" filled up before the proxy form is handed to him. Section 153 affords, I think, no justification for such a view. On the other hand, I agree that when the directors are sending out a proxy form pursuant to a direction of the court, and at the expense of the company, it is highly expedient that they should not fill up the form, but should leave it to be filled up by the creditors or the shareholders who are concerned. I

I only have to mention finally with regard to this question of proxies an argument from convenience. It is said that it will be in the highest degree inconvenient if the persons in charge of a meeting are not able to ascertain before the meeting commences what number of proxies have been lodged for or against the resolution. That is an argument at best, I think, of an exceedingly weak character. One does not deprive people of their rights merely because there may be difficulty and inconvenience in determining immediately after the meeting whether a resolution has been passed or not. In this particular case I think the argument has no weight at all. I can quite understand that in cases where a company is a going concern and where there is a series of resolutions presented to the shareholders it may be very convenient, or even necessary, that the result of one resolution should be definitely determined at once, and that it may also be so in regard to some meetings of a company in liquidation. In a case like the present one, where the question is whether members of a class intend to vote for or against a scheme, I can see no real reason why the proxies should be lodged in time to enable the chairman before the meeting commences to know the result of the meeting, and I can see the disadvantages of such a course. Sitting here I have come across several cases where members of the class have come to a meeting and have been told by the chairman that whatever they say, and however they vote, he has in his pocket sufficient proxies to carry the resolution; and in many cases, my belief is that members of the class have then gone away without voting at all, so that the court has no reliable evidence as to the strength of the opposition. In my opinion, proper proxies may be used at the meeting whether lodged before it or not.

There has been a good deal of discussion in the *Dorman, Long Case* on the question whether the meetings were properly held under the chairmanship of Mr. Mitchell, and whether in any case the resolutions ought not for that reason to be regarded as not having been properly passed. The evidence was conflicting. The voting was by cards, which I do not think were in a satisfactory form, and the chairman left the meeting before the cards had been counted. That, I think, is a matter of very little importance. It is more serious to consider the contention that he left the meeting without explaining to the various people to whom cards had been given how to fill them up. It is true it is suggested that anybody who could read would be very well able to fill up the cards in the light of the instructions that were given upon the cards; but it is, however, to be noted that the chairman himself did not comply with the instructions on the card, and according to the argument at one time put forward the whole of the votes given by the directors in favour of the scheme ought to be rejected. I did not accept that argument, and perhaps I ought to say at once that I think directors, who, pursuant to the order of the court, get proxies for or against the scheme, have no option whether or not they will use them. My opinion is that as the result of the court's order they are bound to use them. No discretion is vested in them in that matter, and the people who give them are entitled to assume that the proxies will be used. It is true it would be difficult to allow the proxies to have force if none of the persons named as proxy-holders attended the meeting. There is an old authority that you can only vote by proxy if you are a member of the class concerned, and with that authority I do not intend to interfere, but the persons named are persons as regards whom the registrar has been satisfied that one or other of them will be present. Subject to that one possible event of none of them being there, the proxies must be used. However, this question as to how the meeting was conducted does not seem to me to lead to any result, since it appears that, in the event, the great majority of the persons who had given proxies were taken to have voted at the meeting; nor do I think, having regard to what I am going to say on the other matters which are involved in the Dorman Long petition, that it is in the least useful to consider whether on any of the grounds alleged, the meeting itself was not properly conducted; but to avoid misconception I will add that I am quite satisfied, after having seen him in the box, that the chairman intended to conduct, and did his best to conduct, the meeting in a perfectly fair and proper manner.

I now pass to an important question—namely, the question in relation to the explanatory circular sent out by the directors. I think I have already observed that there is no obligation under the Act to send out such a circular at all. Perhaps I may remark in passing that that is an additional reason for coming to the conclusion that a member of a class has a right to appoint a general proxy, because, if no explanatory circular is sent, he may be quite unable to understand or form an opinion as to which way he should vote in the matter without attending the meeting, which in a case such as I have here, is an impossible course since there are

9,000 stockholders of this particular class. Of course, there is not a room in the Cannon Street Hotel, where the meetings were held, and probably there is not a room in London, where they could attend and vote. The practice being to send out an explanatory circular in such a case, it is, in my opinion, the duty of the court very carefully to scrutinise the circular when the matters involved are matters of considerable difficulty and doubt. In a case of great complexity it is true that not every relevant fact can be stated. I apprehend that if the circular were to assume such a length as to state all the relevant facts in the Dorman Long petition, it would be so lengthy as to defeat its own object. That is not to say, however, that the creditors or the members of the class concerned ought not to expect such a statement of all the main facts as will enable them to exercise their judgment on the proposed scheme. I am prepared to believe that there are cases where even this is impracticable, but I hesitate to accept the view that if it is impracticable, s. 153 cannot be applied. I am not sure that it is the only alternative, but there is one obvious alternative in such a case, and that is to let the class concerned appoint one or more persons on their behalf to investigate and consider the matter and report to them. If that were done, the explanatory circular might consist merely of the report of the committee so appointed. The present case (I am dealing with Dorman, Long & Co.) is one of singular complexity. It involves in the first place a reduction of capital to the amount of £9,497,468. Then it involves an amalgamation—I am using the popular phrase here—of the undertaking of the company with the undertaking of the South Durham Steel and Iron Co., Ltd., an amalgamation in relation to which the court is asked to exercise certain powers under s. 154 of the Act. It involves a drastic alteration of the rights of the 5½ per cent. debenture stockholders, holders of over £5,000,000 in debentures, and, as if those difficulties were not enough, we have the remarkable feature that Dorman Long owed last week no less than £2,420,000 odd to the four banking companies who had been financing it, that very large sum being secured to the extent of only £1,715,000 odd. Another circumstance is that Dorman Long cannot pay the interest due to their 5½ per cent. debenture stockholders, while, on the other hand, the South Durham, notwithstanding the unexampled depression in the steel and iron trade, is in a flourishing condition at the present time.

Before dealing with the petition itself, I may say that, in my opinion, it has been clearly established that the position of the shareholders may fairly be described as desperate. The total share capital is £11,248,146, and that is proposed to be reduced to £1,750,678 by cancellation of lost capital. That alone is sufficiently serious, but the more vital point is that the company at present is commercially insolvent in that it cannot pay its debts as they become due. The position is that the banks may at any time refuse facilities to the company, and, on the other hand, any one of the holders of the 5½ per cent. debenture stock may apply for a receiver. Those facts are not in dispute, and they have to be borne in mind in considering some of the arguments which have been addressed to me. It should be added that there are 883,918 6 per cent. cumulative preference shares of £1 each carrying the right to a cumulative preference dividend and priority with regard to a return of capital but without any further right of participation; there are 2,052,746 8 per cent. preferred ordinary shares of £1 each, carrying the right to a fixed non-cumulative preferential dividend at the rate of 8 per cent. per annum and ranking pari passu with the ordinary shares as regards return of capital and participation in the surplus assets on a winding-up; and, finally, there are 8,311,482 ordinary shares of £1 each. So much for the share capital. There are 4 per cent. first mortgage perpetual debentures to an amount of £400,000 with a first specific charge on the freehold premises mentioned in a certain trust deed and a floating charge upon all other property and the undertaking of the company with certain exceptions. Their rights are not affected by the scheme. Then we come to the 5½ per cent. first mortgage debenture stock, that amounts to £5,135,944 5½ per cent. first mortgage debenture stock secured by a trust deed dated July 26, 1923, under which Barclays Bank, Ltd., are the trustees and, stating it very

A shortly, the stockholders have a specific charge, subject to the specific charge securing the 4 per cent. first mortgage debenture stock and a floating charge upon the undertaking and other property of the company with certain exceptions, subject as to part of such property to the floating charge given to the first mortgage debenture stock.

As everybody knows, the company since its incorporation in 1889 has carried B on business as the owner of coal and ironstone mines, blasting furnaces, steel works, constructional works, and a number of other plants, and it has a controlling interest in a number of companies, including Redpath, Brown & Co., who have large interests, and other concerns. For the purpose of economy of time I propose to treat myself as having read the paragraphs of the petition, which state, and I think state fairly, the position of the company and its operations as the result of the C very serious depression in the coal, steel, iron, and allied trades, and the depreciation in consequence of the fixed assets of the company. Paragraph 16 states:

> "With a view to the unified control of practically the whole of the iron and steel industries of the Tees-side area of the north-east coast a provisional agreement dated June 15, 1933, was entered into between the company and D the South Durham Steel and Iron Co., Ltd., for the acquisition by the company of the whole of the undertaking and assets of the South Durham Steel and Iron Co., Ltd. These assets include upwards of 98 per cent. of the share capital of Cargo Fleet Iron Co., Ltd."

The paragraph adds this:

> "It is confidently expected that by bringing the assets and properties of the E two companies under unified control the earning power of the combined companies will be greatly improved."

That was not, I think, seriously challenged before me, and I believe it to be true.

There was an order of the court directing meetings to be summoned, and proxy forms, as I have already said, were settled, and a circular was sent out under date July 3, 1933, by the directors. This circular has been the subject of serious F criticism by counsel for opposing debenture holders. I may say here that the resolution as put before the holders of the debenture stock was one which, if passed at all, was passed by a very narrow majority. The other classes concerned carried the resolution put before them by very large majorities. There has been no opposition on their behalf, although I have received a number of letters from the holders of these classes of stock, as to which I would say I have carefully considered what G they have urged. I am, however, perfectly convinced that, so far as the shareholders are concerned, the resolutions were not only carried with the requisite majorities, but that the schemes, so far as they were concerned, were beyond all doubt such as reasonable members of the class would approve.

The position with regard to the whole of the 5½ per cent. first mortgage debenture stock is, however, a very different one, and it requires a good deal of consideration. H Not less than 1,095 holders of that stock, holding admittedly £707,313 of stock, voted in person or by proxy against the scheme, and an additional holding of £24,520 would have defeated that particular resolution. It is said that, if proper proxies had been admitted, the resolution, so far as the debenture stockholders were concerned, would have been defeated. It is evident that the voting on this particular resolution was very close, and, for that and the other reasons I have I mentioned, I think it is necessary for the court very carefully to consider and examine the scheme. The nature of the sacrifices which the debenture stockholders are asked to consent to is, I think, fairly stated in the circular, and I shall regard myself as having read those paragraphs. The debenture stockholders are asked to agree to the surrender and cancellation of 10s. out of each £1 nominal amount of stock held by them, and to accept in respect of the stock so surrendered thirty 6 per cent. preference shares of £1 each, and thirty preferred ordinary shares of £1 each in the capital of the company, all credited as fully paid. Here I must mention one of the necessities of the case: a large amount of further capital is required for the purpose of the amalgamation and for the purpose of clearing up the difficulties in which Dorman Long are placed, and for that purpose it is proposed to create £2,500,000 worth of prior lien stock charged on the assets to be acquired as the result of the amalgamation and to issue the greater part of the stock, I think £2,250,000 worth of it, at once. The arrears of interest due on the debenture stock are to be cancelled; they are to waive their right to repayment on May 1, 1963, and they approve of the cancellation of the sinking fund obligation and the creation of a new fund to redeem the stock in thirty-seven years. Further than that, it is to be observed that there is being issued to the shareholders in the South Durham 5½ per cent. debenture stock so surrendered by the present holders, but the stock so surrendered is to be called "A" first mortgage debenture stock, and it is to be a fixed interest-bearing stock. On the other hand, the stock not surrendered is to be called "B" first redeemable stock; on that interest is to be non-cumulative and payable only out of profits to be ascertained as provided by the scheme, and if such interest is paid at the full rate at the end of three consecutive financial years, the interest is to cease to be dependent on the profits. After that the stock is to rank, pari passu, as regards interest and the repayment out of the surplus assets.

I have anxiously considered the terms of the circular, and have weighed the arguments which have been presented to me. In my opinion, the circular was not sufficient in the particular circumstances of this case, and it was in one important respect misleading. The most serious matter, in my opinion, is the reference to the trustees for the stockholders. It is in these terms:

> "The terms of the scheme have been referred to the trustees for the stockholders who, after making a careful investigation of the whole position, recommend the proposals for the approval of the stockholders."

The truth of the matter is that there were four banks who had been financing the company, Barclays Bank, the National Provincial Bank, the Midland Bank, and Williams Deacon's Bank. Of those, Barclays Bank were the trustees. They were owed a week ago a sum of £1,411,000 odd, and, as a result of a provisional agreement entered into by the company, partly referred to and explained in the circular under the heading of "Bankers," they are beyond all doubt getting great advantages if the scheme goes through. In my opinion, it was quite wrong to say that the scheme had been referred to the trustees for the stockholders who, after making a careful investigation, "recommend the proposals for the approval of the stockholders," without telling them or reminding them, if they already knew, that Barclays Bank were the trustees, and that they had the strongest interest in recommending the scheme from their own point of view as bankers. This court has known and has referred for hundreds of years to the difficult position of trustees who have an interest that conflicts with their duty. It is idle, I think, to suggest that it is possible for a bank which is owed about one-and-a-half million pounds, only part of it secured, to act impartially in considering such a scheme as that which is now proposed; yet, in my opinion, the ordinary reader of the clause which I have read would necessarily draw the inference that the independent trustees had, after a careful investigation of the whole position, come to the conclusion that the reader should vote for it and that it might properly be approved, or ought to be approved, by the stockholders. It is true that there is the clause in the trust deed, cl. 46, which permits Barclays Bank to act as bankers for the company and to make advances and do other things in that capacity. I must express the opinion which I have already expressed during the argument, that that is a most undesirable clause. It is one which I myself would never have approved, nor, I believe, would the stockholders if they had been told it was to be inserted or had any idea as to how it might operate. This question as to the duties of trustees is not a technical matter at all. The greater the complexity of a proposed scheme under which shareholders or debenture stockholders are asked to make sacrifices, the more necessary it is for them to have the assistance of independent trustees

A and the more useful such advice is likely to be. There is another great case, which I think has not finally left our courts, in which a sum of £10,000,000 or so has been lost, and I know well that the views of the trustees in that case were of great assistance in enabling the court to make certain orders which it was asked to make. I think it is most unfortunate that in the present case it has been impossible for the debenture stockholders to have the opinion of a really indepen-
B dent trustee to guide them in the matter which is before them.

That is not, however, the only matter in which I think the circular from the point of view of the debenture holders is open to serious criticism. In my opinion, it was not right, in asking the debenture holders to give up so large a portion of their security, to omit from the circular a statement of the results of the new valuation which it is stated had been made on the basis of the earning power of the
C company, the statement being that

> "the re-valuation has been confirmed by the well-known valuer, Mr. P. Michael Faraday, and by Mr. John E. James, the chairman of the Lancashire Steel Corpn., Ltd."

In my opinion, the valuation having been made, the amount of it should have been
D stated. No figures whatever are given. It is quite true that the valuation by itself, being a valuation of the assets of the company as a going concern, is one which ought not to suggest that that sum is realisable on a forced sale of the assets. I think the circular might well, after having given the figure, have stated reasons for thinking that it could not be properly relied upon in the event of a liquidation, but it is a matter on which, in my opinion, the debenture holders were entitled to
E be informed.

There is one other matter and that is with reference to the position of the banks. Something is said as to the position of the banks in the circular. In my opinion, the two paragraphs where the position of the banks is explained are not wholly satisfactory, inasmuch as I think it is impossible for a reader to judge how far the scheme is for the benefit of the four banks and what sacrifices they are making in
F accepting 290,000 preference and preferred ordinary shares without a statement of the total amount due to them. £290,000 is a large sum, but it is small compared with £2,420,000. Nor, I think, can a reader tell how far the position of the banks is being altered to the advantage of the company when he is told that £1,650,000 is to remain as a sort of outstanding balance of indebtedness at a rate of interest which is not to exceed 4 per cent., unless the reader is also told that there will
G remain some £700,000 or so, which can be called in at once if the banks think fit to do so. In saying that I do not wish to suggest in the very faintest way that these banks are likely to use their powers to bring down the amalgamated company; anybody who knows anything about business concerns will be quite convinced to the contrary. Nor do I want to suggest that the bankers have driven a hard bargain or have done anything unfair even if such a matter were within my know-
H ledge. Banks are commercial enterprises and they are entitled to do the best they can for the benefit of their own shareholders in negotiating a scheme such as was presented to them by Dorman, Long & Co. In this connection I have to deal with the claim put forward by counsel for opposing debenture holders that this scheme is a scheme for the benefit of Barclays Bank, Ltd. What that precisely means I do not know. It may mean that the interests of the stockholders have been dis-
I regarded, but I think that is probably higher than it could be put. It may mean that the banks have been unduly favoured in regard to the advantages and disadvantages which the various persons concerned suffer under the scheme. It does not seem to me that if that is the point of view it is a matter which can possibly be weighed in the judicial scale. I am satisfied to say that so far as the advantages obtained by the banks are concerned, in my opinion those advantages are not such that an ordinary business man would not come to the conclusion that they did not in any way prevent him from approving the scheme.

The conclusion to which I have come with regard to the Dorman Long petition is that I cannot confirm the scheme for the reasons which I have given as to the A circular, even if it were made out—and I am not clear that it has been made out—that the requisite majority was obtained at the meeting to which the debenture stockholders were summoned. Having listened with the greatest care to all the criticisms made against the scheme, I have come to the conclusion that there is nothing in it which, if carefully explained, might not be approved by a business man acting reasonably in the matter. It is, however, for the stockholders to consider B whether they will or will not approve it. They must face the position, I think, that the alternative to this or some other scheme is the appointment of a receiver. Persons, some of whom, at least, will be commercial men, will have to consider whether there is any chance of a receiver carrying on successfully, regard being had to the enormous complication of the interests involved and to the exceedingly difficult commercial times in which we live. C

I have now to consider the question whether the petition ought to be dismissed or whether fresh meetings should be summoned. I have criticised the circular in plain language. On the other hand, I think I should say that, apart from that, I am perfectly satisfied that the scheme was put forward in good faith, and, as evidence of the good faith of the board, I would refer to the fact that the board hold very large holdings in debenture stock and shares amounting in nominal value D to over £250,000. Secondly, I attribute great weight to the circumstance that a number of persons representative of the insurance companies and investment trust companies, substantial holders of the 5½ per cent. debenture stock, have considered the scheme. Here there is what I hope is only a verbal criticism on the circular. The passage, somewhat curiously, abstains from saying that they recommend the scheme to the stockholders. All it says in words is that, after they had considered E it, they thought the only alternative was the appointment of a receiver. That phrase might be true, even if they objected very strongly to the scheme. But I hope I am right in taking the view that that is an accidental omission and that these gentlemen, who, as I have said, represent very large holdings, after prolonged discussion with the board, have come to the conclusion that the scheme is one which should be supported. I may add that the investment trust companies hold F over £600,000 worth of 5½ per cent. debenture stock, and the insurance companies hold £460,000 worth of like stock. That makes all together a very large holding.

A third matter might be added. There are some smaller objections to the scheme which I have pointed out in the course of the prolonged hearing of this case. They seem to me objections which might well weigh with a stockholder, and I understand that all of them can be, and some of them will be, met by a modification. G If that is so, the new circular, if there is such a circular, sent out to the stockholders, might well indicate that the modifications which have been discussed would be put forward and assented to on behalf of the board.

That, I think, concludes what I have to say in regard to the Dorman Long petition. I have deliberately abstained from expressing any opinion of my own whether the scheme is one which the stockholders should or should not support, H because, in my opinion, that is a matter which is not within the function of the court. It is for the stockholders, I repeat, to deal with the matter, and if I have taken so long in considering the general features of the case, it is because I should be unwilling to let the matter go back for further consideration if the scheme were such that ultimately the court would have to decline to approve it.

Perhaps I should add that I have no power, as I conceive it, to order a fresh I meeting, unless I am requested to do so. Nor have I, I think, any power to order a circular to be sent out at all. If I am asked to assent, in the case of the Dorman Long petition, to a fresh meeting being summoned, I should do so only on some sort of understanding that there was to be another explanatory circular issued to the members of that class.

I now come to deal with the South Durham petition, and, with regard to that, I think I can deal with it much more shortly than with the Dorman Long petition. It is a petition presented by a company incorporated in 1898, which up to the present time has been in a very prosperous condition. The issued capital is £1,237,820, divided into 6 per cent. cumulative preference shares and 6 per cent. ordinary shares and "B" ordinary shares, all of £1 each. The preference shares are 300,000 in number, the ordinary shares 350,000, and 587,820 "B" ordinary shares have been issued. There are £300,000 worth of 4½ per cent. perpetual debenture stock secured by a first charge repayable in the event of voluntary winding-up with a premium of 10 per cent.

Each of these two schemes is conditional upon the other scheme being sanctioned, and this one, therefore, takes effect only if the Dorman Long petition is sanctioned. I observe that it has to be confirmed by Dec. 31 next, which is an event which may be difficult now, and would perhaps necessitate, if the matter goes on, a further resolution.

The facts with reference to this petition are well stated in the petition, which I will treat myself as having read. The first question is whether the scheme has been passed at the meetings of the various classes of shareholders who were concerned. The debenture stockholders, according to the scheme, are to be repaid in cash with a 10 per cent. bonus, and it is not surprising that the opposition there was overcome by the numbers of those voting. There were three other classes, namely, the 300,000 preference shares, the 350,000 ordinary shares, and the 587,820 "B" ordinary shares. The vote was close on all those three resolutions, and upon the view I have expressed as to proxies, two of the resolutions, at least, were not passed by the requisite majorities; that is to say, the resolution by the holders of the 300,000 preference shares, and the resolution by the holders of the 350,000 ordinary shares.

The facts with regard to the voting, and the proxy forms which the chairman was advised to reject, are sufficiently set out in para. 21 of the petition. A number of proxies against the scheme were rejected by the chairman for the reason that, as printed, they expressly directed Mr. Arthur Hyde, the leader of part of the opposition, to vote against the scheme, and did not, as did the form settled in Chambers for sending out by the board, leave it to the person giving the proxy to direct whether his proxy shall vote for the scheme with or without modification, or against the scheme. Upon grounds already indicated I think those proxies were good and ought to have been admitted. They were all lodged within forty-eight hours before the date of the meeting.

I am urged, upon that finding, to dismiss this petition. Having regard to all the circumstances of the case, to the circumstance that the other petition is one on which, as I have said, I am willing to direct other meetings to be summoned, that the interests involved are exceedingly great and widespread, that the joint undertaking is one of vast magnitude, and that many thousands of workmen are employed in the works of the two companies, I do not think it would be right for me to take the easy and simple course of dismissing this petition. The matter has been fully argued, and, for the benefit of the various persons concerned, I think I should express my opinion, for what it is worth, on the matters which do not go simply to the question whether the resolutions have met with success or not.

The leading part in the opposition was represented by counsel for Mr. Hyde, who sent out a circular asking for proxies against the scheme and giving his reasons against it. I think it is right to express my opinion that Mr. Hyde's circular was a reasonable one, its statements are substantially correct, and, therefore, very proper to be considered.

There are, I think, two questions to be considered, apart from the question as to the resolution, and I have already defined them in dealing with the Dorman Long scheme. Was the scheme fairly put before the shareholders, being the classes here concerned, and was it such a scheme as reasonable men of business might properly and reasonably approve?

I will deal with the second point first. I think there is great weight in the argument put before me on behalf of the company, that the amalgamation is the result of long negotiation by two wholly independent boards of directors, gentlemen against whom nothing can really be said, beyond this—that, under the schemes as A they stand, provision is made for their future remuneration and for compensation on liberal terms for those who do not obtain employment as a result of the amalgamation. The directors have testified that, in their opinion, the scheme is a fair one and beneficial to the company. I am content to believe that that is their true view. I think it is, perhaps, unfortunate that there are provisions for compensation to those members of the board who are not obtaining employment in the B amalgamated company, on a generous scale, and I should not be sorry to hear that, upon consideration, some modification is going to be made in those provisions.

With regard to the remuneration to be given to the directors who are going to be employed in the future, it is a true observation that, upon the scheme as it comes before me, some, at any rate, of those directors might be getting something more in future than they have been getting in the past. I am sure that that is C not the intention, and, if the matter is further considered, I hope it will be made clear that that is not going to be the case, and that if the scheme goes through, their remuneration is not going to be increased by reason of it.

I might leave the matter of the merits of the scheme there; but I think, having regard to the amount of evidence given before me, and to all the reports and counter-reports, the valuations and counter-valuations, which I have tried to under- D stand during the last week, I ought to say something in reference to the matters comprised therein.

It seems to me that the opponents of the scheme have not fully appreciated the true nature of the report of Messrs. Peat, Marwick, Mitchell & Co., dated Aug. 9, 1932, presented to the directors of the two boards. It is to some extent, I think, the fault of the South Durham board, who have referred to it in their explanatory E circular of June 30, 1933, as if the document in question were a valuation of the company's assets. In my view, having carefully considered the matter, I do not think that is a true description of the document, unless, indeed, it is explained as being a very special kind of valuation prepared with a view only to ascertaining the relative values of the assets of the two amalgamating companies. It has to be admitted, as pointed out in Mr. Morgan's critical examination of Messrs. Peat, F Marwick, Mitchell & Co.'s report, that the figures contained in it are largely only of the nature of estimates. I do not want it to be supposed that I accept all the views expressed by Messrs. Peat, Marwick, Mitchell & Co. in this report, and in the subsequent circulars on behalf of the company, or that I reject all the views expressed in Mr. Morgan's report on the other side. The opinion I have formed is this, and I think I ought to express it in the circumstances of the case. If the G matter is approached by debenture holders with a feeling that times are mending, and that the experience of the years 1931 and 1932 is not likely to be repeated, or, at any rate, not likely to be repeated for any length of time, the views presented by the board of the South Durham company are easily to be understood, and they are to be understood even if full allowance is made for the circumstance that, as things are, Dorman Long are in a very serious financial position, and that unless H this or some other scheme is adopted there must be a receiver to carry on its great undertaking. Certainly I am not going to take the view that people ought to approach this matter with a jaundiced eye as to the future. Business men, I think, are entitled to take a hopeful view, and they are not going to be persuaded by anything I say that that may be unwise.

The other points which have been exhaustively argued before me are all of them I points on which I think I may fairly come to the conclusion that the board of the company have acted reasonably and have done the best they can for the interests committed to their charge. Here, again, I think the fact that they have very large interests themselves in the matter is almost conclusive evidence of their good faith.

It may be right to observe that if the company desires to have further meetings, it would be proper to vary the form of the circular in some respects and to add some additional information. In particular, I think it would certainly be most desirable to insert in the circular, what must be almost common knowledge now, that the position of Dorman Long is such that unless there is this or some other scheme, they must face the appointment of a receiver. I can conceive that the directors of South Durham are not very anxious to put that in their circular, but it seems to me that is one of the very reasons why it should be put in, in order that the shareholders should have an opportunity of realising what they are asked to assent to. Further, though it is not a very important matter, I think it would be well if the reference to the re-valuation of the assets and to the confirmation by Messrs. Michael Faraday and John James was modified. I need not repeat what I have said with reference to the compensation clause, and I would add what I think, perhaps, I should have said in reference to the other scheme, namely, that both schemes are, of course, subject to modification. I have already expressed my opinion as to the so-called debenture-holders committee, which is a matter which would certainly require some modification, and with regard to the appointment of a wholly independent trustee for the 5½ per cent. debenture holders.

My opinion, therefore, is that if I am asked to do so, I ought to direct fresh meetings to be summoned on the present petition, but in this case I think I should have to direct meetings to be held probably of all the classes concerned. In the other case of Dorman Long, I think it would be right if I directed only a meeting of the 5½ per cent. debenture holders.

Solicitors: *Freshfields, Leese, & Munns*; *G. Houghton & Son*; *Lincoln & Lincoln*; *Johnson, Weatherall, Sturt, & Hardy*; *Crossman, Block & Co.*, for *J. H. Smith & Graham*, West Hartlepool; *Nicholl, Manisty & Co.*

[*Reported by* MISS B. A. BICKNELL, *Barrister-at-Law.*]

ANDREWS BROTHERS (BOURNEMOUTH), LTD. *v.* SINGER & CO., LTD.

[COURT OF APPEAL (Scrutton and Greer, L.JJ., and Eve, J.), October 4, 1933]

[Reported [1934] 1 K.B. 17; 103 L.J.K.B. 90; 150 L.T. 172; 50 T.L.R. 33]

Sale of Goods—Contract—Exclusion of "all conditions, warranties, and liabilities implied by statute, common law, or otherwise"—Agreement for sale of "new car"—Delivery of used car—Sale of Goods Act, 1893 (56 *&* 67 *Vict.*, *c.* 71), *s.* 13.

A contract "for the sale of new Singer cars" contained a clause (5) by which "all conditions, warranties and liabilities implied by statute, common law, or otherwise are excluded." The sellers delivered, and the buyers accepted, a car which was not a new car. In an action for damages for breach of contract in that the car delivered was not a new car, it was contended for the sellers that the condition that the car should correspond with the description "a new Singer car," which would otherwise be implied by s. 13 of the Sale of Goods Act, 1893, was excluded by cl. 5 and the buyers' claim was, therefore, barred.

Held: the buyers were entitled to damages because the contract was a contract for the sale of "new Singer cars"; the term "new Singer cars" was an express, and not an implied, term of the contract and, therefore, it was not excluded by cl. 5.

Notes. Considered: *Karsales (Harrow), Ltd.* v. *Wallis*, [1956] 2 All E.R. 866.

Referred to: *L'Estrange* v. *F. Grancob, Ltd.*, [1934] All E.R. Rep. 16; *Nicholson* A
and Venn v. *Smith Marriott* (1947), 177 L.T. 189.

As to the exclusion of the condition that goods sold by description shall comply with the description, see 29 HALSBURY'S LAWS (2nd Edn.) 62, para. 71, and for cases on the subject see 39 DIGEST 466, *910–916*. For the Sale of Goods Act, 1893, s. 13, see 22 HALSBURY'S STATUTES (2nd Edn.) 993.

B

Case referred to:

(1) *Wallis, Son, and Wells* v. *Pratt and Haynes*, [1911] A.C. 394; 80 L.J.K.B. 1058; 105 L.T. 146; 27 T.L.R. 431; 55 Sol. Jo. 496, H.L.; 39 Digest 477, *996*.

Appeal by the defendants from a judgment of GODDARD, J., awarding the plaintiffs £59 2s. 6d. damages for breach of contract. C

The plaintiffs, the buyers, were dealers in, and the defendants, the sellers, manufacturers of, motor cars. By an agreement dated Aug. 1, 1931, described as a "Main Dealers' Agreement," the sellers appointed the buyers their sole dealers "for the sale of new Singer cars" in a district defined in a schedule to the agreement until July 31, 1932, and the buyers agreed to purchase from the sellers 285 cars. By cl. 5: D

> "All cars sold by the company [the sellers] are subject to the terms of the warranty set out in Sched. No. 3 of this agreement, and all conditions, warranties, and liabilities implied by statute, common law, or otherwise are excluded."

The warranty set out in Sched. 3 was:

> "We warrant that in the manufacture of new vehicles we have taken all precautions which are usual and reasonable to secure excellence of materials and workmanship, and we undertake that if any defect is disclosed in any part of a new vehicle within twelve months of the date of delivery of such vehicle, we will (provided such defective part is returned to our works, carriage paid) examine the part alleged to be defective, and if, on such examination, the fault is due to defective materials or workmanship for which we are responsible, we will repair or replace the defective part free of charge. The foregoing warranty is limited to new vehicles manufactured by us and is in lieu of any warranty (or condition) implied by common law, statute, or otherwise as to the quality or fitness for their purpose of any goods manufactured, replaced, or repaired by us, every such implied warranty (or condition) being in all cases excluded, and our liability under the terms of this warranty is strictly limited to the replacement or repair and dispatch to the sender, carriage forward, of the part replaced or repaired. . . ." E F G

Under this agreement the buyers ordered from the sellers one 18 h.p. six-cylinder saloon car, and the sellers agreed to deliver it on March 9, 1932. The buyers took delivery of the car by their managing director, Mr. Piper, at the sellers' works at Birmingham. Mr. Piper noticed before he took delivery of the car that the H speedometer bore the reading 550 miles, and he found in the pocket of the car a parking ticket issued at Leicester. He asked no questions as to this, and the trial judge found that when he took delivery of the car he knew that it had run a considerable distance. The car was driven to Bournemouth by Car Deliveries, Ltd., with all proper care.

The buyers then brought their action for damages for breach of contract in that I the car delivered was not a new motor car, but had been used, and for consequent expenses and for repairs to the radiator. At the trial it was proved that before the order the sellers had sent the car from their Coventry works to Darlington—180 miles—and thence twenty miles to show a prospective purchaser and thence via Darlington and Coventry to Birmingham. If the car had been merely tested on the ground the speedometer would have shown only forty to fifty miles.

GODDARD, J., found that the car delivered was not "new," held that cl. 5 expressly applied only to "new vehicles" and so did not apply to exclude the con-

A dition implied by s. 13 of the Sale of Goods Act, 1893, in this case, and accordingly gave judgment for the buyers for £50 damages together with £4 15s. ancillary expenses, and £4 7s. 6d. for repairs to the radiator—in all, £59 2s. 6d.

The sellers appealed.

Pritt, K.C., and *R. A. Willes* for the sellers.

Monckton, K.C., and *Maitland Walker* for the buyers were not called upon to B argue.

Counsel for the sellers admitted in the appeal that the car delivered was not a new car, but contended that cl. 5 of the agreement barred the buyers' claim. That clause excluded implied conditions, and not only implied warranties, as did the clause in *Wallis, Son, and Wells* v. *Pratt and Haynes* (1). Under the agreement there was an express description of the car as a new car, and this was a sale C by description. Accordingly, under s. 13 of the Sale of Goods Act, 1893, there was an implied condition that the car should correspond with the description. But this implied condition was excluded from the contract by cl. 5.

By s. 13 of the Sale of Goods Act, 1893:

> "Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description. . . ."

D

SCRUTTON, L.J.—This is an appeal from a judgment of GODDARD, J., in an action by Andrews Bros. (Bournemouth), Ltd., who are called agents for motor manufacturers—a misleading term, inasmuch as they are really buyers from manufacturers of cars which they are going to sell—against the sellers, Singer & Co., Ltd., the manufacturers, alleging that the sellers have delivered to them under a E contract of sale a car which does not comply with the terms of the contract. The facts are fully set out in the course of the judgment of GODDARD, J., and it is sufficient very shortly to summarise what is the point involved.

The order which the buyers gave could have easily been complied with by delivering a new car, and should have been complied with by delivery of a new car. The history of the particular car that the sellers did tender to the buyers, F and which the buyers accepted, was as follows: another agent of the sellers had thought that he had a purchaser for a car of this description but the agent did not have such a car in stock, and so he asked the sellers to send up a car from their Coventry works to Darlington, a considerable distance of 180 miles, and, having got it there, the agent took it out to a purchaser some twenty miles off. The purchaser did not like it, and thereupon the agent returned the car to the sellers G at Birmingham, via Coventry, with the result that it had run over 400 miles, with the consequence no doubt that certain changes had taken place in the car. The buyers contracted to buy a new Singer car, and the sellers tendered this car to them. Apparently the buyers' representative suspected that the car had run a very considerable distance, but they took the car; apart from the terms of the contract they did nothing to abandon any claim for damages because it was not H a new car, which, in fact, it was not.

Before GODDARD, J., two points were argued, and a good deal of evidence was called. The buyers said: this car that you tendered to us was not a new car as that term is understood in the trade. The sellers said: as that term is understood in the trade, in fact, it was a new car. The learned judge, having heard the evidence, came to the conclusion that the car was not a new car, and in this court I his decision has not been questioned and I have, therefore, to say nothing about that point, but proceed on the assumption that the sellers, who were bound to supply a new car, did not supply a new car, but tendered a car which was not a new car.

The point which has been argued in this court is this: The sellers say: You, the buyers, our agents to purchase from us to sell to other people, bought under an agreement, and cl. 5 of that agreement is in these terms:

> "All cars sold by the company are subject to the terms of the warranty set out in Sched. No. 3 of this agreement,"

which is the ordinary warranty with which we are so familiar, an obligation to repair defects within a certain time if the defective material is returned to the sellers; the clause goes on:

> "and all conditions, warranties, and liabilities implied by statute, common law, or otherwise, are excluded."

The sellers contend that their obligation to supply a car complying with the description in the contract is a condition which is implied by statute, and consequently is excluded by cl. 5: therefore the buyers cannot bring an action against the sellers for supplying a car which was not a new car, but which the buyers have accepted. The clause itself is a sequel to *Wallis, Son, and Wells* v. *Pratt and Haynes* (1). In that case, which related to a sale of a particular kind of common English sainfoin, there was a clause in the contract:

> "Sellers give no warranty expressed or implied as to growth, description, or any other matters,"

and the sellers supplied under the contract not common English sainfoin, but quite a different and another seed, giant sainfoin. The purchasers, on discovering with what seed they had been supplied, sued for damages. The sellers replied: we gave no warranty expressed or implied as to description. The Court of Appeal, for reasons I need not go into, FLETCHER MOULTON, L.J., dissenting, took the view that that clause did exclude any liability, although the seed supplied was of a different description from that contracted to be supplied. The House of Lords adopted FLETCHER MOULTON, L.J.'s dissenting judgment in the Court of Appeal, and held that the undertaking that the goods tendered should comply with the description in the contract was not a warranty, but was a condition, and that the clause in question did not exclude a condition. Whereupon the legal advisers of the sellers or the sellers themselves, seem to have thought that all they had to do, in view of that decision, was to put in the word "condition"—"all conditions excluded"—and that then they would not be under any liability, even though they did supply goods which did not comply with the description. The question that has been argued in this case is whether they have succeeded. Can the sellers tender goods under this contract which do not comply with the description in the contract, and then say: whether you knew of that fact or not you cannot sue us for any breach of the contract?

The first question here is: Was this a contract for the sale of new Singer cars? I do not think that question was seriously contested. I find, from the terms used continually in the contract, that it relates to the sale of new Singer cars. At the end of the contract I find these words:

> "In the event of the dealer having purchased from the company during the period of this agreement 250 new cars of current season's models";

at the beginning of the contract I find these words: "the company hereby appoint the dealer their sole dealer for the sale of new Singer cars." That phrase appears in other parts of the contract, and I think the subject-matter of the contract was expressly stated to be new Singer cars.

The learned judge has found, and his view is not appealed against, that the car tendered by the sellers in this case was not a new Singer car. Now does cl. 5 apply to prevent the sellers from being liable for damages for having tendered and supplied to the buyers a car which is not within the express terms of the contract? The words of cl. 5 are:

> "All conditions, warranties, and liabilities implied by statute, common law, or otherwise are excluded."

There are well-known obligations in various classes of contracts which are not expressly mentioned in the contract, but which are implied; my brother GREER, L.J., mentioned a very good illustration when he said, in the course of the argument:

A
> "Where an agent contracts on behalf of A. he warrants that he has authority to make that contract on behalf of A., although there is no such warranty expressed in the contract."

Now counsel for the sellers said in argument: I rely on s. 13 of the Sale of Goods Act, 1893, which is in these terms:

B
> "Where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description . . .":

the statute contains the word "implied"—"an implied condition"—and it therefore follows that this particular condition comes within the words of cl. 5 of the contract, "implied by statute." In my opinion that is to put a very strained meaning on the word "implied" in the statute. Where you are selling goods expressly C described, and which do not comply with the express description, it is inaccurate to say that there is an implied term; the term is expressed in the contract. To take another illustration put forward by GREER, L.J., in the course of the argument. The seller undertakes to supply a car of 1932 manufacture, and in fact supplies a car of 1930 manufacture. The term of the contract which is broken by the seller supplying a car which does not comply with the express description of what he had D contracted to sell is not an implied term, it is an express term. It would indeed be startling if cl. 5 of the contract allowed the seller to supply to a buyer an article which did not comply with the express description of the contract, and then, though the buyer did not know, and reasonably did not know, of that which prevented the article supplied from complying with the express term of the contract, to say: I am under no liability to you because there is here a condition implied by E statute, which is excluded by the contract.

There was here a breach of the express term of the contract that the car supplied should be a new car, and if a seller desires to protect himself from liability for breaking an express term of the contract he must do it by very much clearer language than that used in this contract. I do not think the language used in cl. 5 of this contract applies to a case where there has been a breach of the express F term of the contract by tendering an article which does not comply with the express term of the contract, i.e., a car which is not a new car.

For these reasons I think GODDARD, J., came to a correct conclusion in this case. The appeal fails, and must be dismissed with costs.

GREER, L.J.—I agree. There are in this appeal two facts that form a more G or less firm basis upon which the judgment can be founded: the first is, that it is not disputed, and cannot be disputed, that by the terms used in the contract, the sale of the car with which we have to deal was the sale of a new Singer car; and the second fact is that which was found by the learned trial judge, and is not now in dispute, namely, that the car which was delivered, and as to which damages are claimed, was not a new Singer car. It is said by the defendants, the sellers and manufacturers, that inasmuch as the car had been delivered and accepted, and the H time for rejection had passed, there was a clause in the contract which deprived the plaintiffs, the buyers, of any remedy. It is not suggested that they are deprived of the remedy because of any fraudulent pretence on their part, but only by the express terms of a clause in the contract. Under the contract it is provided by cl. 5:

I
> "All cars sold by the company are subject to the terms of the warranty set out in Sched. No. 3 of this agreement, and all conditions, warranties, and liabilities implied by statute, common law, or otherwise are excluded."

My Lord has pointed out that sellers who desired to protect themselves against liability for damages for breach of condition or warranty were probably alarmed by the decision in *Wallis, Son, and Wells* v. *Pratt and Haynes* (1), and it may be that the sellers in this case endeavoured to escape the effect of that decision by the language they have employed in cl. 5 of this contract. The clause in question in *Wallis's Case* (1) was in these terms:

> "Sellers give no warranty expressed or implied as to growth, description, or

> any other matters, and they shall not be held to guarantee or warrant the fitness for any particular purpose of any grain, seed, flour cake, or any other article sold by them, or its freedom from injurious quality or from latent defect.''

That clause failed to operate, according to the decision of the House of Lords, as a protection to the sellers because they had not put, in addition to the word ''warranty,'' the words ''or condition,'' and inasmuch as, where there is a contract for the sale of goods by description, there is by s. 13 of the Sale of Goods Act, 1893, an implied condition, not an implied warranty, that the goods shall correspond with the description, the sellers failed to gain the protection that they claimed they had got by the clause. In one respect the clause in that case was wider in its terms than cl. 5 of the contract in this case, because there the seller protected himself against any expressed warranty that there might be in the contract, and those who are responsible for the wording of cl. 5 of this contract, though they put in the word ''condition'' as well as the word ''warranty,'' unfortunately for themselves omitted the word ''express'' or ''expressed.'' The clause reads:

> ''All cars sold by the company are subject to the terms of the warranty set out in Sched. No. 3 of this agreement, and all conditions, warranties, and liabilities implied by statute, common law, or otherwise are excluded.''

To call the obligation of a vendor to deliver something which is the article sold and which must comply with the description of that which is contracted to be sold, an implied condition or warranty, has always seemed to me remarkable—an odd expression to use with regard to the description of an article sold. In cl. 13 of the Sale of Goods Act, 1893, the words ''implied condition'' are used. That section provides that:

> ''Where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description.''

The Sale of Goods Act, 1893, was intended to be a code for the purpose of removing all difficulties with regard to the interpretation of contracts of sale, as well as to provide for what might be determined to be the legal consequences of a contract of sale. It may be right to say that the descriptive terms of a contract, though they are express terms of that contract, are not expressly made conditions of the contract, and by using the term ''implied condition'' in s. 13 those responsible for the statute did not mean to say that the obligation to supply the thing described is not an express obligation of the contract; they merely meant to say that the express obligation of the contract is not a mere term or a mere warranty but is a condition of the contract by implication of the law.

The contract in this case is a contract for the sale of ''new Singer cars'' and the term ''new Singer cars'' is an express term of the contract, and not an implied term at all. Not only is that the case with regard to the meaning in the body of the contract, but when I look at the warranty which is to take the place of the conditions, warranties and liabilities implied by statute or common law which are excluded by cl. 5, I find that the warranty which is to apply to any goods delivered under this contract is a warranty which expressly relates to new vehicles, and which cannot be applied to cases where there is no new vehicle at all, because by its very terms it only applies to repairs to be done within twelve months after the delivery of such vehicle, that is to say after the delivery of a new Singer car. If I did not take the view I have expressed with regard to the effect of the contract, apart from the express warranty, I should be prepared to say that this express warranty, which is intended to take the place of the conditions, warranties and liabilities implied by statute, common law or otherwise, does in itself contain an undertaking that the goods which are to be delivered and in respect of which the warranty is to apply are to be new Singer cars.

For these reasons, I think the learned judge's judgment was right, and that this appeal ought to be dismissed with costs.

EVE, J.—I am of the same opinion, and I do not think I need add anything to what my Lords have said.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, for *Pridmore & Nelson*, Coventry; *Barnes & Butler*, for *J. W. Miller*, Pool.

[*Reported by* C. G. Moran, Esq., *Barrister-at-Law.*]

Re TEA TRADING CO., K. & C. POPOFF BROS.

[Chancery Division (Maugham, J.), February 20, March 6, 1933]

[Reported [1933] Ch. 647; 102 L.J.Ch. 224; 149 L.T. 138; 77 Sol. Jo. 215; [1933] B. & C.R. 120]

Company—Overseas company—Winding-up—Service of petition—Company dissolved in its country of origin—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 338 (1) (*d*)—*Companies* (*Winding Up*) *Rules*, 1929, *r.* 28.

Practice—Service—Substituted service—Limits of R.S.C., Or. 67, *r.* 6.

In 1902 a company incorporated in Russia opened a branch in London. In 1917, after the revolution in Russia, the company ceased to exist in Russia and subsequently it was found to be impossible to serve a winding-up petition on it in Russia, nor was there any member, officer, or servant of the company upon whom the petition could be served in this country.

Held: the words in r. 28 of the Winding-Up Rules, 1929 (which provides for the service of petitions), "registered office" and "principal or last-known principal place of business of the company" meant such office or such place within the jurisdiction, and service of the petition could properly be effected by leaving a copy thereat.

Per Maugham, J.: R.S.C., Or. 67, r. 6, applies only to cases where the document can be served personally as a matter of law, but cannot be promptly served personally as a matter of fact.

Dictum of Lord Coleridge, C.J., in *Field* v. *Bennett* (1) (1887), 56 L.J.Q.B. 89, applied.

Notes. Section 274 of the Companies (Consolidation) Act, 1908, has been replaced by s. 407 of the Companies Act, 1948, and s. 338 (1) (d) of the Act of 1929 by s. 399 (5) of the Act of 1948. Rule 28 of the Companies (Winding-up) Rules, 1929, has been replaced by r. 29 of the Rules of 1949.

Considered: *Banque des Marchandes de Moscou* (*Koupetschesky*) v. *Kindersley*, [1950] 2 All E.R. 105.

As to service of a winding-up petition and the winding-up of an unregistered company, see 6 Halsbury's Laws (3rd Edn.) 546–549, 799 et seq., and for cases see 10 Digest (Repl.) 1119 et seq. and 1304 et seq. For Companies Act, 1948, see 3 Halsbury's Statutes (2nd Edn.) 452. For Companies (Winding Up) Rules, 1949, see 4 Halsbury's Statutory Instruments.

Case referred to:

(1) *Field* v. *Bennett* (1886), 56 L.J.Q.B. 89.

Petition to wind-up the Tea Trading Co., K. & C. Popoff Bros., an unregistered company within the Companies Act, 1929.

The company had been originally incorporated in Russia with limited liability in

1885. Its principal place of business was Moscow, but it had power to open foreign A branches, and, in or about 1902, a branch was established in London. The company carried on business in London, and in December, 1917, after the Bolshevist revolution, the particulars required by s. 274 of the Companies (Consolidation) Act, 1908, were duly filed with the registrar, including a statement that the petitioner's husband was the person in the United Kingdom authorised to accept service on the company's behalf. The petitioner's husband was at all material B times the manager of the company's business in London. He died in 1922. The petitioner was his administratrix and claimed that the company was indebted to her in that capacity. She submitted that in the circumstances the company was an unregistered company, and under s. 338 (1) (d) of the Companies Act, 1929, ought to be wound-up. Section 338 (1) (d) provides that:

> "The circumstances in which an unregistered company may be wound-up are C as follows:—(i) If the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs; (ii) If the company is unable to pay its debts; (iii) If the court is of opinion that it is just and equitable that the company should be wound-up."

The petition stated that the company had incurred many debts in the United D Kingdom, where it had at all material times, and purported to have at the date of the petition, considerable assets. It appeared from the evidence that the company, in common with other Russian companies, had ceased to exist and that it was impossible to serve the petition upon it in Russia or elsewhere. In these circumstances the registrar had made an order substituting for service notice by advertisement, and advertisements had been inserted in the "London Gazette" and the E "Daily Telegraph." The registrar made this order under R.S.C., Or. 67, r. 6, which provides that:

> "Where personal service of any writ, notice . . . or other document, proceeding, or written communication is required by these rules or otherwise and it is made to appear to the court or a judge that prompt personal service cannot be effected, the court or judge may make such order for substituted or other F service, or for the substitution of notice for service by letter, public advertisement or otherwise, as may be just."

The question which arose was whether the petition had been duly served, or whether the proper method of serving the petition was under the Companies (Winding Up) Rules, 1929, r. 28, which provides that

> G "Every petition shall . . . be served upon the company at the registered office, if any, of the company, and if there is no registered office, then at the principal or last known principal place of business of the company, if any such can be found, by leaving a copy with any member, officer, or servant of the company there, or in case no such member, officer, or servant can be found there, then by leaving a copy at such registered office or principal place of business, or by H serving it on such member, officer, or servant of the company as the court may direct."

H. S. G. Buckmaster for the petitioner.
Stafford Crossman for the Crown.

MAUGHAM, J.—The point that arises here is of some general importance in I relation to Russian and other foreign companies which, having carried on business in this country pursuant to the provisions of the Companies Act, 1929, have now ceased to carry on business, the normal cause, in the case of Russian companies, their so ceasing to carry on business having been the legislation in Russia following the October Revolution of 1917.

The question that arises is how a petition to wind-up such a company, which is (or was) an unregistered company within the meaning of the Companies Acts, is to be made effective. The Act, in s. 338, obviously contemplates the winding-up of such an unregistered company, notwithstanding that it has been dissolved or has otherwise ceased to exist as a company under or by virtue of the law of the country in which it was incorporated. It must be wound-up on petition, and the petition must be served.

In the present case the company carried on business in London for a considerable period, and its last known principal place of business in London is known. There is, however, a difficulty about serving the person in this country authorised to accept service on the company's behalf. That person was at all material times the London manager of the company, but he died on April 19, 1922, and it is clear that a petition cannot be served on a dead man. The registrar made an order under which service on the company purports to have been effected by advertisement in the "London Gazette" and the "Daily Telegraph." In making that order I understand he relied on R.S.C., Or. 67, r. 6. I should not, of course, have interfered with his order in any way if it had been possible for the company to appear, and if it had appeared and had made no objection to the service, but, the petition being founded on the allegation that the company has ceased to exist, it seems to me I have got to see that there has been a proper service according to the rules which authorise such a petition to be served on a company that does not any longer exist.

In my opinion, Or. 67, r. 6, is limited, as LORD COLERIDGE, C.J., pointed out in *Field* v. *Bennett* (1), to cases where the writ itself or other document, including, in my view, this petition, can be served personally as a matter of law, but where it cannot in the circumstances be promptly served personally as a matter of fact. Here there can be no real ground for suggesting that the petition could be served personally on the company, for the reason that it is a non-existent entity. On the other hand, the Companies (Winding Up) Rules, 1929, in particular r. 28, seem to provide a method of serving a petition which will be effective as a compliance with the rules, and, so far as I can see, that is the best, if not the only, way of dealing with an unregistered company which has been dissolved or has otherwise ceased to exist. In my opinion it is reasonably clear that "registered office" in the rule means "registered office within the jurisdiction," and that "last known principal place of business" refers to the last known principal place of business of the company within the jurisdiction. The rule contemplates, first, that there will no longer be any business carried on by the company; secondly, that you can ascertain the last known principal place of business of the company within the jurisdiction; thirdly, that you will be unable to find (as, of course, you are unable in this case to find) any member, officer, or servant of the company; and, finally, that the service of such a petition will properly be effected by leaving a copy at the registered office or principal place of business. It seems to me that, if that is done, the petition will be duly served, and the court will then have jurisdiction under s. 338 of the Act. As I have already said, the section carries with it the implication that even a company that has wholly ceased to exist can be wound-up, and the rules under the Act provide the method by which that can be done. I think the better course will be to follow the provisions of r. 28 and to restore the petition.

March 6.—The petition having been restored to the list, his Lordship made the usual compulsory winding-up order, observing that the order would be without prejudice to any claim of the Crown to the company's assets as bona vacantia.

Solicitors: *Herbert Oppenheimer, Nathan, & Vandyk*; *Treasury Solicitor.*

[*Reported by* MISS B. A. BICKNELL, *Barrister-at-Law.*]

VANBERGEN *v.* ST. EDMUND'S PROPERTIES, LTD.

[Court of Appeal (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), March 13, 14, 1933]

[Reported [1933] 2 K.B. 223; 102 L.J.K.B. 369; 149 L.T. 182]

Contract—Consideration—Nudum pactum—Promise by debtor to pay creditor sum which debtor already bound to pay—No advantage to creditor independent of obtaining payment which otherwise might be difficult or delayed.

A promise to pay to a creditor a sum which the debtor is already bound to pay by law does not provide any consideration to support a valid contract.

On July 6, 1932, the plaintiff owed a sum of £208 6s. 3d. to the defendants, who, on that day, verbally agreed with him that if, on July 7, he paid into a bank at Eastbourne that sum in cash for the credit of the defendants' solicitors at the Law Courts branch of the bank of England, such payment would satisfy all sums which the plaintiff owed to the defendants and a bankruptcy notice which they had issued on June 24, 1932, would not be served on him. The money was paid in cash in accordance with this arrangement, but the defendants, not knowing, through the miscarriage of a letter, that it had been paid, thought they had the right to proceed, and served a bankruptcy notice on the plaintiff at his place of business. In an action by the plaintiff for breach of the agreement of July 6,

Held: the agreement conferred no benefit on the defendants independent of merely obtaining payment of the money due which might otherwise be difficult or delayed; its effect was a voluntary concession to the plaintiff, made entirely to oblige him and of no advantage to the defendants; and, therefore, it was made without consideration and was nudum pactum and unenforceable.

Notes. Referred to: *William Hill* (*Park Lane*), *Ltd.* v. *Rose*, [1948] 2 All E.R. 1107.

As to consideration for a contract, see 8 Halsbury's Laws (3rd Edn.) 113 et seq., and for cases see 12 Digest (Repl.) 196 et seq.

Cases referred to:

(1) *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre* (1883), 11 Q.B.D. 674; 52 L.J.Q.B. 488; 49 L.T. 249; 31 W.R. 668, C.A.; 9 Digest (Repl.) 695, *4582*.

(2) *Cumber* v. *Wane* (1721), 1 Stra. 426; 11 Mod. Rep. 342; 93 E.R. 613; 12 Digest (Repl.) 516, *3865*.

(3) *Foakes* v. *Beer* (1884), 9 App. Cas. 605; 54 L.J.Q.B. 130; 51 L.T. 833; 33 W.R. 233; 12 Digest (Repl.) 517, *3886*.

(4) *Bidder* v. *Bridges* (1887), 37 Ch.D. 406; 57 L.J.Ch. 300; 58 L.T. 656; 4 T.L.R. 86, C.A.; 12 Digest (Repl.) 529, *3992*.

Appeal by defendants against a verdict and judgment in an action tried before Macnaghten, J., and a special jury.

In June, 1932, the plaintiff, a trader, was indebted to the defendants in the sum of £208 in respect of costs under certain judgments and orders obtained against him by the defendants. On June 24, 1932, the defendants issued a bankruptcy notice against him for £148 odd, part of the above debt. On July 6 a verbal agreement was made between the plaintiff and the defendants acting by one Kennard, their solicitor, that, if the plaintiff would on July 7 pay into a bank at Eastbourne £208 in cash to the credit of the defendants' solicitors at the Law Courts branch of the Bank of England, that payment would satisfy all sums due and the bankruptcy notice would not be served. On July 7 the plaintiff made the payment as agreed and served the defendants' clerk with notice thereof, but on the following day the defendants, by a clerk of their solicitors, served the bankruptcy notice on the plaintiff in the presence of two of his business associates. The

A plaintiff claimed damages for breach of contract. The defendants, in addition to denying that the above agreement had ever been made, contended that, if the agreement had been made, there was no consideration to support it, and they denied that the plaintiff had suffered damage. The jury found the agreement had been made, and returned a verdict for the plaintiff, assessing the damages at £500. The defendants appealed.

B *S. O. Henn Collins, K.C.*, and *G. O. Slade* for the defendants.

A. S. Comyns Carr, K.C., and *B. L. A. O'Malley* for the plaintiff.

LORD HANWORTH, M.R.—This appeal must be allowed. It raises an interesting point which has been admirably presented to us by counsel on both sides. We have had the advantage, which is not often given to us, of going back into the old C cases and the old law, which are always interesting. The question that comes to be determined is whether an agreement which was found to exist by the jury can be allowed in law to be a valid agreement carrying with it a right on the part of the plaintiff to sue and to recover the damages which the jury attached to a breach of the agreement, namely £500.

The plaintiff in the action, Mr. Vanbergen, was the tenant of the defendants in D respect of some property which was let to him at a rent of £1,800 a year. The premises so let were unoccupied, for the plaintiff had failed to secure an undertenant for them, and from time to time as quarter by quarter went by when the rent became payable Mr. Vanbergen found himself in the unpleasant position of having to find the money which was due and payable in respect of the rent. In the result certain actions were brought successively against Mr. Vanbergen by the E present defendants. By June, 1932, payment had been made of the actual sums for which judgment had passed, but there remained outstanding a certain amount of costs in respect of several actions, and on June 16, 1932, the solicitors for the defendants wrote to the solicitors for Mr. Vanbergen as follows:

> "We have now completed the taxation of the plaintiffs' costs of the various actions, and there is payable by your client in respect of same £208 6s. 3d. F made up as follows: Costs of first action, £29 17s. 11d.; costs of counter-claim of first action, £140 8s. 5d.; costs of second action, £11 9s. 4d.; costs of third action, £26 10s. 7d.; total, £208 6s. 3d. We shall be obliged by your writing and obtaining from your client a cheque for this amount and trust to receive same not later than Monday next the 20th instant."

In reply to that, on the 18th, Mr. Hodgkinson writes to say that his client is away G for the week-end and hopes to be in a position to communicate about the middle of next week. On June 25, Messrs. Stanley Evans & Co., the defendants' solicitors, write:

> "We beg to remind you that a further £450 is now due from you for rent up to the 24th instant in respect of the above premises, and unless same is paid in the course of Tuesday next, the 28th instant, our instructions are to take H steps to recover same."

The money, £450, was paid, and on July 1 Messrs. Stanley Evans & Co. write:

> "We beg to acknowledge receipt of cheque for £461 5s., being £450, the quarter's rent in respect of the above property due on March 25 last, plus £11 5s., the costs of this action, leaving still due and owing the following I items: Costs of first action, £29 17s. 11d.; costs of counter-claim of the first action, £140 8s. 5d.; costs of second action, £11 9s. 4d.; costs of third action, £26 10s. 7d.; total £208 6s. 3d. In consideration of the present payment we will not take any steps to enforce the payment of the above-mentioned sum until the 7th instant."

On the 6th a letter was written by Mr. Vanbergen to the defendants in reference to this matter of the costs due, £208 6s. 3d.

> "On the matter of the costs due, I told Mr. Hodgkinson that I was unable to arrange for sufficient money to pay them, but I hope to pay you by Friday

> next, the 8th, and will do everything possible to be within the time you allow, A paying through the bank suggested as discussed this afternoon. I am sorry to delay you. These liabilities are putting me into grave inconvenience and trouble."

That refers to a discussion which had taken place that afternoon. It will be observed from the letter I read of July 1 that the creditors were holding their B hand until the 7th, but on the 6th a telephone conversation took place and it is in relation to what was agreed at that time that the basis of this action is founded.

It is said that an agreement was made by Mr. Kennard, the representative of Messrs. Stanley Evans & Co., whereby he agreed with Mr. Vanbergen that he should be given time to pay until Friday, July 8, and it was agreed that the money should be transmitted to the Law Courts branch of the Bank of England, where C the account of the solicitors was kept, and that it should be remitted by a payment which was to be made at Eastbourne, and that no steps would be taken in the meantime. It is not very clear what the agreement was, but when one applies one's commonsense to it it appears to be this: We have already agreed to give you, as an act of grace, a concession that we will not take any steps against you until July 7, but we will extend that time until July 8 if you will promise to pay cash D to us. That money must be paid by you and received by us on July 8. We will not take proceedings on the 8th; we will wait until twelve o'clock on that day and stay our hand. "Stay our hand" meant this. They had issued a bankruptcy notice in respect of a portion of the £208 then due, namely, for a sum of £140, and it was possible for them to serve the bankruptcy notice upon Mr. Vanbergen. What happened was that Mr. Vanbergen went down to Eastbourne; he was suc- E cessful in obtaining money with which to make the payment, and, in fact, he did pay the money which he had received—£208 6s. 3d.—on the afternoon of the 7th into the Midland Bank at Eastbourne for the purpose of it being immediately transmitted to the Law Courts branch of the Bank of England in London. It was paid in in cash, so that there could be no question of clearing a cheque or the like. He says that he wrote a letter on that day, a letter of which we have the draft, because F Messrs. Stanley Evans & Co. say that the letter—although we have a certificate of posting—never reached their place of business in London. That letter stated that they had made the payment, but Messrs. Stanley Evans & Co., not having received the letter, were unacquainted with the fact that compliance had been made with the terms which had been arranged on the 6th. Not knowing that the money had been paid in, Messrs. Stanley Evans & Co. thought they had the right thereupon G to remove the stay and to proceed. The consequence was that they sent a clerk who found Mr. Vanbergen at his place of business, and on Friday, the 8th, he served at 62, Basinghall Street, on Mr. Vanbergen, a bankruptcy notice, requiring the payment of the £140 8s. 5d. within the usual time-limit in a bankruptcy notice. At the time when that was served upon Mr. Vanbergen, Mr. Vanbergen and the server were in the office of Mr. Vanbergen together. Apparently, the door was H partly open and a certain Mr. Cole, who was paying a visit to Mr. Vanbergen at the time, was cognisant of what was taking place inside the office, and he heard the nature of the communication which was made by the server to Mr. Vanbergen. Mr. Cole gave evidence that it was of such an important nature that whereas before that time he would have been prepared to give Mr. Vanbergen credit up to £1,000—they were both in what is called the "soft goods" trade—after knowing I some difficulty had occurred in reference to which a bankruptcy notice had been issued, Mr. Cole was not prepared to deal with Mr. Vanbergen except upon the basis of cash. In consequence of this service of the notice no immediate step was taken by Mr. Vanbergen, but on July 15 Messrs. Stanley Evans & Co. wrote to him saying:

> "Referring to the bankruptcy notice served on you herein we have to-day ascertained that on the 8th inst. there was paid into our account at the Law Courts branch of the Bank of England the sum of £208 6s. 3d., whether in

> cash or by cheque we do not know. We received no advice of this payment from you or your solicitor, neither did our bankers advise us of it, and it was only to-day when we obtained our pass book from the bank that we knew of the payment into our account. We, therefore, enclose you formal receipt."

Without any notice or claim before action, on July 28 this action was commenced to establish a claim that the defendants had committed a breach of the agreement made on July 6, and the statement of claim stated that:

> "The defendants, by their solicitor, Mr. Kennard, verbally agreed with the plaintiff that if the plaintiff would on the 7th day of July, 1932, pay into any bank at Eastbourne the sum of £208 6s. 3d. in cash for the credit of Messrs. Stanley Evans & Co., the defendants' solicitors, at the Law Courts branch of the Bank of England, such payment would satisfy all sums which the plaintiff owed to the defendants, and the bankruptcy notice which they had issued on June 24, 1932, for £140 8s. 5d. would not be served on him. On July 7th, 1932, the plaintiff paid £208 6s. 3d. to the Midland Bank, Eastbourne, with instructions to remit such sum to the credit of the defendants' solicitors, Messrs. Stanley Evans & Co., at the Law Courts agency of the Bank of England, and by letter posted on such date advised the defendants' solicitors of such payment. On or about July 8, 1932, the plaintiff orally informed the defendants' solicitors' clerk of such payment, but in breach of the said agreement the defendants, by such solicitors' clerk, served the plaintiff with the said bankruptcy notice within the knowledge of two business associates of the plaintiff. By reason of the said breach of agreement, the plaintiff has suffered damage."

The action was tried before MACNAGHTEN, J., and a jury. The jury found in favour of the plaintiff that the damages for the breach of this agreement were £500. The learned judge gave a considered judgment, and ultimately entered judgment for the plaintiff for £500, and from that judgment the appeal is brought to this court.

It will be observed that the action is based solely upon this agreement. It is not framed in the form in which it might have been if the facts had justified it, namely, that there was a claim to be made for maliciously taking or initiating some proceedings which were found to be unfounded, analogous to what is to be found in *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre* (1), but the claim is based solely on this agreement. Some difficulties arise as to what are the damages which would flow from a breach of the agreement, and there are a good number of difficulties which seem to stand in the plaintiff's way. The defendants take the point that the nature of the agreement alleged and charged was such that it was one which is not enforceable in law, but was in effect nudum pactum, no more. The ground on which they take that point is that it is a well-established principle that a promise to pay a sum which the debtor is already bound to pay by law does not provide, what our law requires for the purpose of making a valid contract, any consideration to support the contract. The proposition has been stated in a number of ways. I am reading from the statement that is made in SMITH'S LEADING CASES (3rd Edn.), of which the editors were SIR HENRY KEATING and SIR JAMES SHAW WILLES:

> "The general doctrine in *Cumber* v. *Wane* (2), and the reason of all the exceptions and distinctions which have been engrafted on it, may perhaps be summed up as follows, namely, that a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being nudum pactum. But if there be any benefit, or even any legal possibility of benefit to the creditor thrown in, that additional weight will turn the scale and render the consideration sufficient to support the agreement."

That is dealing with the case where there is to be a smaller sum in lieu of an ascertained sum by agreement, but where there is an agreement to pay the sum due the same principle applies.

LORD SELBORNE, in *Foakes* v. *Beer* (3), the last case which investigated this principle of the law, deals with it in this way. The question that arose there was stated in the headnote: A

> "An agreement between judgment debtor and creditor, that in consideration of the debtor paying down part of the judgment debt and costs and on condition of his paying to the creditor or his nominee, the residue by instalments, the creditor will not take any proceedings on the judgment, is nudum pactum, being without consideration, and does not prevent the creditor after payment of the whole debt and costs from proceeding to enforce payment of the interest upon the judgment." B

The question was whether that was a valid agreement or nudum pactum, and it was held that it was merely nudum pactum, being made without consideration. Then LORD SELBORNE (9 App. Cas. at p. 613), in concluding his speech upon the point under consideration, said this: C

> "What is called 'any benefit, or even any legal possibility of benefit,' in Mr. Smith's notes to *Cumber* v. *Wane* (2), is not (as I conceive) that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length, or possibly become insolvent, but is some independent benefit actual or contingent, of a kind which might in law be a good and valuable consideration for any other sort of agreement not under seal." D

We have, therefore, to consider whether the agreement that was made here on July 6 was an agreement to do anything else than simply to pay on Friday, July 8, into the hand of the creditor the sum which was already ascertained and in respect of which there was not only the legal liability, but a duty enforceable by any mode of execution against the debtor. Was there any sort of advantage, any sort of independent benefit, actual or contingent, of a kind which might be a good and valuable consideration moving towards the creditor? E

I turn to the evidence which was given in the case, and here I am prepared to give the plaintiff the benefit of such an agreement as he may have proved. [His Lordship dealt with the evidence and continued:] What is the meaning of all that? It means that a concession was given by the creditors that the payment might be made up to twelve noon on Friday, the 8th. Inasmuch as their debtor was going to Eastbourne for his own purposes, for the service of his own business, they would concede that the money might be paid into and transmitted through a bank at Eastbourne, but so that it reached the Law Courts branch of the Bank of England in London before twelve noon on the 8th. That concession was made, both as to the extension of time and as to the place where the money could be paid in, namely, at Eastbourne, in transit to London, entirely to oblige the debtor. There was no advantage which the creditor could reap out of that mode of payment from Eastbourne. It was not equivalent to payment to a third person at the expense and for the advantage of the creditor; it was not a direction to make use of the money and the opportunity of a visit to Eastbourne to pay some person to whom the creditor owed money—it was not in that sense equivalent to a negotiable instrument which could be payable at a place where the creditor wanted the money to be paid, but the whole of these terms were a part of the concession given to the debtor, and I find it impossible to say that they fulfilled the qualification laid down by LORD SELBORNE, that it is F G H I

> "some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration for any other sort of agreement not under seal"

—a sort of benefit which the creditor may derive from getting the payment of money. MACNAGHTEN, J., in summing up, did put the question to the jury in rather a broad form, and we must take it, I think, that the jury so found:

> "Aye or no, are you satisfied that Mr. Kennard acting on behalf of these de-

> fendants entered into an agreement to give Mr. Vanbergen until twelve noon to pay this money, and agreed that it should be paid in the way in which it was paid, through a bank at Eastbourne sending the money to the Law Courts Branch of the Bank of England."

The jury say "Yes" to that, and that is the agreement, a concession entirely in favour of the debtor to which no advantage can be drawn or inferred in favour of the creditor. MACNAGHTEN, J., then deals with the question whether or not the action is maintainable on the ground of the principle of *Foakes* v. *Beer* (3), to which I have referred, and he says this:

> "It was an offer by Mr. Kennard which became a contract on the acceptance by Mr. Vanbergen of the terms offered by Mr. Kennard. Mr. Vanbergen went to Eastbourne, and, getting the money and paying it into the Law Courts branch of the Bank of England in the manner suggested, did thereby make binding the contract by Mr. Kennard that he would not serve the bankruptcy notice."

I cannot find out of the evidence any possible facts which support that view or which justify the inference. The words which I have read are plain that it was Mr. Vanbergen who said he was going down to Eastbourne, that he was going down as part of his business, and that he did not think he would be getting back after his business on Thursday in time to pay it on Thursday, and the concession arose out of the question whether or not the debtor could be back in town in time to bring it himself, because he frankly said he was trying to get a little more time over next week, and when he found that he, the creditor, was up against Eastbourne, and that the debtor had to go down to Eastbourne in any event, then the concession was given by the creditor. But the creditor himself reaped no advantage; there was nothing moving towards him which could be deemed to be a consideration, with the result that the case is one in which the contract is made, but one which remains unenforceable in law. We have to consider the matter from the point of view of law.

In the last case on which the plaintiff relied, *Bidder* v. *Bridges* (4) (37 Ch.D. at p. 417), COTTON, L.J., in his judgment said:

> "If there is anything which can be a new consideration and a new benefit to the person entitled to the larger sum that will do"

a new benefit to the person entitled. In this case, on the evidence that I have read, I can find no new benefit which enured to the creditor, and under those circumstances the arrangement made on July 6 is a nudum pactum and an action for damages for breach of contract cannot be founded upon it.

In these circumstances the appeal must be allowed and judgment must be entered for the defendants in the action with costs. The appeal is allowed with costs.

LAWRENCE, L.J.—I agree. The question in this case is whether there was any consideration for the agreement found by the jury to have been made between the plaintiff and the defendants, or whether that agreement was nudum pactum. In order to answer that question it is necessary to determine, first, what were the terms of the agreement, and, secondly, was there any consideration for it? Speaking for myself, I have had the greatest difficulty in this case in ascertaining the terms of the agreement. The question to the jury was put in general terms: "You find that the agreement alleged by the plaintiff was made?" The foreman of the jury: "Quite." The learned judge, on further consideration of the case, came to the conclusion that the jury, by that verdict, had found

> "that on July 6 Mr. Kennard made an offer that if on the following day the plaintiff obtained the money and paid it into a bank at Eastbourne with an instruction to remit it to the account of Messrs. Stanley Evans & Co. at the Law Courts branch of the Bank of England"

he would not serve the bankruptcy notice. That finding seems to me hardly to accord with what the jury were asked to find, or what they did in fact find, or what was pleaded in the statement of claim. The plea in the second paragraph of the statement of claim was

> "That on July 6, 1932, the defendants, by their solicitor, Mr. Kennard, verbally agreed with the plaintiff that if the plaintiff would on the 7th day of July, 1932, pay into any bank at Eastbourne the sum of £208 6s. 3d. in cash for the credit of Messrs. Stanley Evans & Co., the defendants' solicitors, at the Law Courts branch of the Bank of England, such payment would satisfy all sums which the plaintiff owed to the defendants, and the bankruptcy notice which they had issued on June 24, 1932, for £140 8*s*. 5*d*. would not be served on him."

In summing-up to the jury, the learned judge put the contract in different ways at the commencement of his summing-up and at the end. Early in the summing-up he put it to the jury in this way:

> "What Mr. Vanbergen says is that he explained that he was going to Eastbourne, where he would get the money, and that then Mr. Kennard wanted cash, and it was arranged that he should send the money to London by paying it into a bank there and remitting it to London to the Law Courts branch of the Bank of England."

At the end of the summing-up he states that the question for the jury is:

> "Aye or no, are you satisfied that Mr. Kennard, acting on behalf of these defendants, entered into an agreement to give Mr. Vanbergen until 12 noon to pay this money and agreed that it should be paid in the way in which it was paid, through a bank at Eastbourne, sending the money to the Law Courts branch of the Bank of England?"

All those different versions of the contract leave me in great doubt as to what the real terms were, and I think, in order to determine the construction of the agreement—for instance, the last version put by the learned judge to the jury—it is necessary to look at the evidence and to see what the facts were. My Lord has referred to the evidence, and, therefore, I do not propose to do so again, but I concur with him in coming to the definite conclusion that the effect of the agreement was to give a voluntary indulgence to the plaintiff by agreeing not to serve the bankruptcy notice for £140 until twelve o'clock on Friday, July 8, and on the plaintiff stating that he was not sure whether he would be coming back from Eastbourne on the Thursday, giving him the further indulgence by saying that the money would be accepted if he paid it into his bank with instructions to remit it to London so that it reached London on the Friday morning before twelve o'clock. Both these indulgences seem to me to have been purely voluntary indulgences given by the creditors to the debtor. At most, the indulgence given as to the payment of the money in Eastbourne was to give the debtor an option to pay either in the way in which the money ought properly to have been paid, or else if it suited his own convenience to pay it into his bank at Eastbourne. Of course, it is well settled that if the new agreement amounts to a bargain that the debtor should, at his own option, perform the duty as he ought to have done, or perform it in some other way, such an agreement cannot be binding without some new consideration.

In those circumstances, it follows from what I have said that, in my opinion, on the second question whether there was a consideration for this contract, as I interpret the evidence and the finding of the jury, there was no consideration. It seems to me that the case is abundantly governed by the principle laid down by the House of Lords in *Foakes* v. *Beer* (3) (9 App. Cas. 605) and that, applying that principle to the facts which I have stated, there was no consideration for the promise not to serve the bankruptcy notice before twelve o'clock on Friday. It, therefore, becomes unnecessary to consider the further question whether in any event the plaintiff would have been entitled to more than nominal damages for the

A breach of the alleged agreement. For these reasons I agree that the appeal should be allowed.

ROMER, L.J.—I agree. The jury, having returned a verdict in favour of the plaintiff for £500, must be taken to have arrived at a conclusion that the agreement, sued upon by the plaintiff and alleged by him in para. 2 of the statement B of claim, was in fact made. The agreement as stated in para. 2 is in these terms:

> "On the 6th day of July, 1932, the defendants, by their solicitor, Mr. Kennard, verbally agreed with the plaintiff that if the plaintiff would, on the 7th day of July, 1932, pay into any bank at Eastbourne the sum of £208 6s. 3d. in cash for the credit of Messrs. Stanley Evans & Co., the defendants' solicitors, at the Law Courts branch of the Bank of England, such payment would satisfy C all sums which the plaintiff owed to the defendants, and the bankruptcy notice which they had issued on June 24, 1932, for £140 8s. 5d. would not be served on him."

That being the agreement alleged and found by the jury to have been arrived at, the question is whether there was any good consideration for such an agreement. D It was suggested by counsel for the plaintiff that the consideration is to be found in and, indeed, consisted of, the obligation undertaken by the plaintiff to proceed to Eastbourne and there endeavour to borrow money from somebody—from whom was not stated, but from somebody—but a sufficient amount to enable him to pay this debt of £208 odd, the amount of the debt which the plaintiff at that time was owing. In the first place, that is not the agreement alleged, and, if it had been E the agreement alleged, there is no evidence to support such an agreement, that is to say, any agreement that the plaintiff at the request of the defendants should proceed to Eastbourne on any such errand. The evidence, to my mind, makes it perfectly clear what the arrangement come to on July 6 was. It must be remembered that the plaintiff had been given until July 7 to pay this £208 odd, and on July 6 he rang up the defendants' solicitor and explained that he was not able to F find the money on the 7th. Mr. Kennard, the defendants' solicitor, was naturally annoyed, but on being pressed by the plaintiff he agreed to give him still further time, namely, up to twelve o'clock noon on the following day, Friday, July 8. He was induced to do that because the plaintiff said he had to go down to Eastbourne on the following day and he hoped when he got there he would be able to raise the money from some other source. Then he explained to Mr. Kennard that there G would be some difficulty in his getting back from Eastbourne on that day; Mr. Kennard was insisting on being paid cash in London by twelve o'clock on the Friday, and thereupon Mr. Kennard pointed out to the plaintiff that there was a very easy way of providing for payment in cash in London by twelve o'clock on Friday, namely, by paying the money into the bank at Eastbourne to the account of Mr. Kennard at the Bank of England. That was the suggestion made by Mr. H Kennard to help the plaintiff out of the difficulty. In point of fact, what was done on July 6 was, as pointed out by LAWRENCE, L.J., that Mr. Kennard made two concessions to the plaintiff; one was that he should have up to twelve o'clock to pay cash, and the other concession, if concession indeed it was, was that he should pay in this particular way instead of having to come and pay it to London and pay it personally. In my opinion, there is no consideration for the agreement to give I time until twelve o'clock on the Friday, and for the agreement which the jury find was concluded that if it was paid by twelve o'clock the bankruptcy notice should not be served.

For these reasons I agree that this appeal must be allowed, with the consequences that have been indicated by the Master of the Rolls.

Appeal allowed.

Solicitors: *Stanley Evans & Co.*; *G. Edmund Hodgkinson.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re TOOTH. Ex parte THE TRUSTEE *v.* V. A. TOOTH

[CHANCERY DIVISION (Luxmoore, J.), June 26, July 31, 1933]

[Reported [1934] Ch. 616; 102 L.J.Ch. 315; 151 L.T. 424; [1933] B. & C.R. 146]

Bill of Sale—Seizure of goods by grantee—Perfection of right to possession—Subsequent failure to re-register immaterial—Bills of Sale Act, 1878 (41 *&* 42 *Vict., c.* 31), *s.* 11; *Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 *&* 46 *Vict., c.* 43), *s.* 8.

In 1921 T. gave to H. a bill of sale over certain goods to secure a loan. The bill was duly registered and in 1926, within five years of the registration, it was re-registered. Later that year T.'s son paid off H. and took a transfer of the bill of sale. In 1928 the son took possession of part of the goods covered by the bill, and the rest was sold in 1932. The bill was not re-registered in 1931. On a motion by the trustee in T.'s bankruptcy for a declaration that the bill was void and the goods were part of T.'s estate,

Held: when the grantee of a bill of sale took possession of the goods under the bill his legal right to possession was complete, and, therefore, after 1928 the son's title no longer depended on the bill and it was immaterial whether or not it was re-registered in 1931, with the result that the motion failed.

Notes. As to the effect of seizure under a bill of sale, see 3 HALSBURY'S LAWS (3rd Edn.) 316, and cases there cited. For Bills of Sale Act, 1878, and amending Act of 1882, see 2 HALSBURY'S STATUTES (2nd Edn.) 557 and 574.

Cases referred to:

(1) *Johnson* v. *Diprose*, [1893] 1 Q.B. 512; 62 L.J.Q.B. 291; 68 L.T. 485; 57 J.P. 517; 41 W.R. 371; 9 T.L.R. 266; 37 Sol. Jo. 267; 4 R. 291, C.A.; 7 Digest 132, *754*.

(2) *Cookson* v. *Swire* (1884), 9 App. Cas. 653; 54 L.J.Q.B. 249; 52 L.T. 30; 33 W.R. 181, H.L.; 7 Digest 156, *837*.

(3) *Re Townsend, Ex parte Parsons* (1886), 16 Q.B.D. 532; 55 L.J.Q.B. 137; 53 L.T. 897; 34 W.R. 329; 2 T.L.R. 253; 3 Morr. 36, C.A.; 7 Digest 51, *2688*.

Motion by a trustee in bankruptcy for a declaration that a bill of sale to which the bankrupt was a party was void.

Kean for the applicant.

Stable for the respondent (a son of the bankrupt), cited *Johnson* v. *Diprose* (1) and *Cookson* v. *Swire* (2).

Kean, in reply, referred to *Ex parte Parsons* (3).

Cur. adv. vult.

July 31. **LUXMOORE, J.**, read the following judgment.—This is a motion by the trustee of Artemus Tooth, a bankrupt, for a declaration (i) that a bill of sale dated May 10, 1921, made between the bankrupt, of the one part, and a firm of moneylenders trading as Hollingsworth, of the other part, is void in respect of the personal chattels comprised therein; and (ii) that the personal chattels form part of the bankrupt's estate. The motion also asks for delivery up and other ancillary relief.

The bill of sale in question was given to secure £200 and interest at 35 per cent., and it is provided among other things that the chattels should be insured for £1,500. It was duly registered on May 12, 1921, and was re-registered on May 7, 1926. On Dec. 28, 1926, the sum of £173 was due to Hollingsworth on the security of the bill of sale. On that date the respondent, Vivian Artemus Tooth, a son of the bankrupt, paid the amount due to Hollingsworth, and took a transfer of the bill of sale, the rate of interest on the money secured being reduced to 7 per cent. The transfer was effected by a document dated Dec. 28, 1928, expressed to be made between Hollingsworth, of the first part, the bankrupt, of the second part, and the respondent, Vivian Artemus Tooth, of the third part.

The transfer was made in these circumstances. In November, 1926, Hollingsworth were pressing the bankrupt for payment of the money owing to them, and were threatening to seize and sell the property comprised in the bill of sale. The respondent, Vivian Artemus Tooth, was entitled to a reversionary interest under his grandfather's will; he borrowed on the security of this interest sufficient money to enable him to pay off Hollingsworth. At the date of the transfer the bankrupt and his wife were living at Thames Villa, Portsmouth Road, Surbiton, with the respondent and his wife. In April, 1927, the bankrupt had not repaid the respondent the money due under the bill of sale, nor had he kept down the interest, although, according to the respondent's story, he continually asked him to do so. The respondent says that he gave the bankrupt notice of his intention to seize the property comprised in the bill of sale, and that he took formal possession of it. In March, 1928, the respondent and his wife left Thames Villa, and went to reside at 19, Brighton Road, Surbiton. When he left he took a considerable part of the chattels comprised in the bill of sale with him, and those chattels are still in his possession, but he left the rest of the chattels at Thames Villa. He says he did so by arrangement with his mother, who was still living at Thames Villa, for her benefit, and for that of his sister Bessie and his brother Jack, who were also living there. The mother died in November, 1929, and on her death the respondent, who was one of her executors, allowed his brother Jack to retain the furniture until it was sold on April 19, 1932, by public auction, realising £77 12s. 6d.

On May 14, 1931, a receiving order was made against the bankrupt, and he was adjudicated bankrupt on May 18, 1931. The trustee claimed the furniture held by the respondent, and the proceeds of sale of the furniture sold by him, on the ground that the bill of sale was not re-registered as required by s. 8 of the Bills of Sale Act (1878) Amendment Act, 1882, and s. 11 of the Bills of Sale Act, 1878. Section 8 of the Bills of Sale Act, 1882, which replaced s. 8 of the Bills of Sale Act, 1878, provides that every bill of sale shall be void unless attested and registered as therein named, while s. 11 of the Act of 1878 provides that the registration of a bill of sale, whether executed before or after the commencement of the Act, must be renewed once at least every five years, and if a period of five years elapses from the registration or renewed registration of a bill of sale without a renewal or a further renewal as the case may be, the registration shall become void. It is common ground that the last re-registration took place on May 7, 1926, and that if reliance is to be placed on the bill of sale it ought to have been re-registered on or before May 7, 1931.

The answer to the question whether re-registration was necessary or not depends, in my judgment, on what happened in April, 1927. Did the respondent in fact take possession of the goods under the bill of sale or not? If he did, then his legal right to possession was complete and was good against the world, although, as between himself and his father, the relationship of mortgagor and mortgagee still subsisted. If the respondent obtained the legal title to possession such legal title as from the time when it was obtained no longer depended on the bill of sale, and it became immaterial whether it was re-registered or not. If authority is wanted for these propositions, I think it is to be found in the decisions of the Court of Appeal in *Johnson* v. *Diprose* (1) and of the House of Lords in *Cookson* v. *Swire* (2).

It is, therefore, necessary to determine what transpired in April, 1927. The respondent's evidence is given by his affidavit filed in opposition to these proceedings, and as explained in his cross-examination and re-examination, differs in certain respects from his evidence given on his private examination in the bankruptcy, and it is supported by the affidavit of his brother, who was not cross-examined. Notwithstanding the discrepancies, I am satisfied that the story told by the respondent in the proceedings before me is true, and that he did in fact take possession of the chattels in April, 1927, and that with regard to such of them as he did not remove in March, 1928, he allowed his mother to retain for her use and the use of his

A brother and sister. This being so, I hold that the respondent obtained the legal title to the chattels in April, 1927, and no re-registration of the bill of sale was necessary. In the result the motion fails, and I order the trustee in bankruptcy to pay to the respondent the costs of the motion.

Solicitors: *Woolfe & Woolfe*; *A. & G. Tooth.*

B [*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

C

SUTHERLAND *v.* ADMINISTRATOR OF GERMAN PROPERTY

[COURT OF APPEAL (Scrutton, Lawrence, and Greer, L.JJ.), November 29, 30, 1933]

D [Reported [1934] 1 K.B. 423; 103 L.J.K.B. 244; 150 L.T. 247; 50 T.L.R. 107]

Conflict of Laws—Chose in action—Situs—Action for damages in England—Essential documents abroad.

E In 1912 cargo carried in a British ship was insured by the American branch of a German insurance company. Both ship and cargo were lost at sea, and the insurance company, who had paid the cargo owners for a total loss, became subrogated to their rights against the ship. In 1918 an action was brought in England against the shipowners, who were alleged to be responsible for the loss, in the name of the cargo owners for the benefit of the insurance company. F As the result of a compromise of the action the insurance company became entitled to a certain sum of money, which was paid to the British Administrator of German Property, the insurance company being enemy aliens. The Alien Property Custodian of the United States claimed that the right to recover the money was in him under the United States Trading with the Enemy Act, 1917, which vested in him as custodian all the property, rights and assets of the insurance company in the United States of America since the bills of G lading and other documents relating to the claim against the shipowners had been seized by him in the United States of America.

Held: despite the fact that the claim against the shipowners could not succeed without production of the shipping documents which were in the United States, the claim was a chose in action which was situated where the claim could be enforced, i.e., in England where the defendants resided, and, therefore, the claim of the American Custodian in the present action must fail.

H **Notes.** Referred to: *Jabbour* v. *Custodian of Israeli Absentee Property*, [1954] 1 All E.R. 145.

As to the situs of choses in action, see 4 HALSBURY'S LAWS (3rd Edn.) 478, 479, and ibid., vol. 7, 44; and for cases see 8 DIGEST (Repl.) 545, 546.

Case referred to:

I (1) *Administrator of German Property* v. *Russian Bank for Foreign Trade* (1929), C.A., unreported.

Appeal from an order of CLAUSON, J., sitting as an additional judge of the King's Bench Division.

The plaintiff, who was the Alien Property Custodian for the United States of America, claimed a sum of £4,538, which was in the possession of the British Administrator of German Property, by reason of the following circumstances. In the year 1912 a cargo of goods was shipped from Baltimore to Hamburg, in the British ship *Mount Oswald*, which became a total loss in the course of the voyage.

The cargo was insured by the branch in the United States of a German company, the Mannheim Insurance Co., and this company, who, on a date prior to November, 1918, when hostilities in the 1914–18 war ended, paid the insured as for a total loss, thereupon became subrogated to his rights against the ship. An action against the shipowners, who were alleged to be responsible for the loss, was subsequently brought in England in the name of the cargo owners on behalf of the Mannheim Co. and other insurers, and that action was compromised by the payment of a sum of which the proportion payable to the Mannheim Co. was £4,538 8s. 4d. As the Mannheim Co. were enemy aliens that sum was paid to the defendant, the Administrator of German Property. After the outbreak of war between the United States and Germany, and during the pendency of the above-mentioned action, the plaintiff, on Nov. 18, 1918, made a "demand" in pursuance of the United States Trading with the Enemy Act, 1917, upon the Mannheim Co., which had the effect of vesting in him as custodian all the property rights, claims, and assets of that company within the United States. The shipping documents and letters of subrogation had in fact been delivered to the Mannheim Co.'s American branch, and were shortly after Nov. 18, 1918, seized by the plaintiff in his capacity as custodian. In the present action he contended that the right to recover the £4,538 8s. 4d. was vested in him, whereas the defendant maintained that it was "property rights or interests" of an enemy situated in England and passed to him by the operation of the Treaty of Peace Orders.

The Marine Insurance Act, 1906, s. 79 (1) provides:

> "Where the insurer pays for a total loss . . . he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss."

The Treaty of Peace Order, 1919, s. 1 (xvi) provided:

> "All property rights and interests within His Majesty's Dominions or protectorates belonging to German nationals at the date when the Treaty comes into force . . . and the net proceeds of their sale, liquidation or other dealings therewith, are hereby charged . . . (with certain payments)."

Clauson, J., held, that where a German insurer has paid a United States cargo owner for a total loss and was entitled to be recouped out of the proceeds of an action brought by the cargo owner in an English court before the coming into force of the Treaty of Versailles, the insurer's rights were "property rights and interests" of an enemy situated in England, and passed to the Administrator of German Property by virtue of the Treaty of Peace Orders, 1919–1921, s. 1 (xvi), notwithstanding that the bills of lading for the cargo and the letters of subrogation were held in the United States of America by the United States Alien Property Custodian. The plaintiff appealed.

H. I. P. Hallett and *Stephen Chapman* for the plaintiff.

The Solicitor-General (*Sir Donald Somervell, K.C.*) and *Wilfrid Lewis* for the defendant were not called upon to argue.

SCRUTTON, L.J.—These cases, of which we have had several, are generally extremely complicated, because they refer to events which happened during the war, and the unusual legislation of that time has raised a number of very difficult points. But sometimes by good fortune one does find an apparently short way of dealing with a case, and in this case I think I have found a short way of dealing with it. The view which I take is that we are bound by a previous decision of this court, in *Administrator of German Property* v. *Russian Bank for Foreign Trade* (1), in which a similar point was raised and decided.

The plaintiff is the Custodian of Alien Property in the United States of America, and the defendant is the Administrator of German Property in England. The perfectly friendly contest between the American Custodian and the English

Administrator turns on the question which party is entitled to the benefit of a sum which has been obtained in an action brought against English shipowners in England. The matter arises in this way. The circumstances which gave rise to this case happened twenty-one years ago, and we are now in the process of settling their result. An English ship, the *Mount Oswald*, the ownership of which was divided into shares owned by a number of British subjects resident in the United Kingdom, sailed from the United States. She had on board a number of parcels of cargo, of which three parcels, two of agricultural machinery and one of cotton, were consigned to either Germans or Hungarians. Very shortly after leaving the United States, or at least probably shortly after leaving the United States, that ship went to the bottom, and the agricultural machinery and the cotton have been at the bottom of the sea for twenty-one years, and are probably not worth very much now. There were insurances on the two parcels of agricultural machinery and the one parcel of cotton, either by a German insurance company, which was called in this case the Mannheim, or by a subsidiary company related to the Mannheim, and during this case all three insurances have been treated as insurances by the Mannheim. The persons interested in those three parcels claimed upon their insurers, and their insurers paid before the war. Thereupon, in England, without any further documents the insurers would have been subrogated to the rights of the assured in those three parcels, and, as far as England is concerned, in accordance with the usual practice, the insurers would have asserted those rights in the name of the assured and would have been entitled to require the use of the name of the assured.

In 1914 the war broke out, and in that year there was passed a statute which seems to have considerable relevance, the Trading with the Enemy Amendment Act, 1914. Section 6 (1) of that statute provides:

> "No person shall by virtue of any assignment of any debt or other chose in action, or delivery of any coupon or other security transferable by delivery, or transfer of any other obligation, made or to be made in his favour by or on behalf of an enemy, whether for valuable consideration or otherwise, have any rights or remedies against the person liable to pay, discharge, or satisfy the debt, chose in action, security, or obligation, unless he proves that the assignment, delivery, or transfer was made by leave of the Board of Trade or was made before the commencement of the present war."

Nothing happened to vest any title in the plaintiff until the end of 1918. During the whole of the previous period the only persons who could have any claim, if at all, were the Mannheim. The Mannheim, or certain people purporting to act on their behalf, or certain assured whose names they were using, did issue writs in this country in February, 1918, before the end of the war. As far as I can gather, writs were issued in respect of nearly every person interested in every shipment on board the *Mount Oswald*. When those actions ultimately came on for trial, the Court of Appeal found the question a very difficult one as to who were the people who were entitled to the money, and, without going into all the complications or exactly what the legal position was, the Court of Appeal said one of two things. The *Mount Oswald* belonged to shipowners, they had chartered her to one firm, who had sub-chartered her to another firm, and the captain was obliged to sign bills of lading presented by the charterers, and this raised very interesting and difficult questions. The Court of Appeal ultimately did not decide which was the right view, but they said that either, the captain having signed the bills of lading, the owners were liable, or, if the captain was not the agent of the owners to sign, but only the agent of the charterers or sub-charterers, the owners were in possession of the goods in their ship and had lost them and did not restore them, and that it might be, in view of a decision of the House of Lords, to which I need not refer, that though they were bailees they were not bailees on the terms of the bills of lading and not contracting parties, but bailees who had only a particular liability. The Court of Appeal said that in either view the owners were liable because they

A sent an unseaworthy ship to sea, and were not protected by the terms of the bills of lading. A certain sum was in consequence recovered by the plaintiff in one test action, which was taken to apply to all the other actions.

Then came the question: Who is to have that sum? The English Administrator of German Property said: "I am entitled to it under the Treaties of Peace." The American Custodian of Alien Property said: "I am entitled to it either by the B United States legislation which vested it in me at the end of 1918 and the beginning of 1919, or I am entitled to it because I have letters of subrogation from the Mannheim." It seems to me that, if the American custodian puts his claim on that ground, he would be in the difficulty that he would be suggesting that American legislation had dealt with a matter the situs of which was in England, namely, a claim against the English shipowners in damages either for tort or contract. I C think probably his best way of putting his title, if at all, would be under the American legislation, which may be quite independent, of course, of any other rights—subject to this, that the American legislation, unless extremely clear words are used, cannot change the title to claims of Englishmen in England. That would be beyond the jurisdiction of American legislation.

Then we come to what counsel for the appellant says is the vital question in D this case. Here is a chose in action, a claim for damages either for breach of contract or in tort. The claim is made against an English subject resident in England. What is the situs of that chose in action? There is very considerable authority for saying that the situs of such a chose in action is where it can be recovered, namely, where the defendant against whom the claim is made is residing. The attempt made here, as I understand it, to defeat that general rule is this. It E is said that this claim could not be brought without production of the bills of lading, and they were in America, and the fact that the bills of lading were in America makes the situs of the chose in action, which is to be enforced by means of them, in America. I cannot think that that is the true view of the situation. We had a very similar point before us in the case to which I have referred, and by which, I think, this court is bound. It was a case where the English Adminis- F trator of German Property sued the Russian Bank for Foreign Trade, who carried on business in England and, as far as the evidence is concerned, nowhere else. The Russian bank had undertaken that a bill drawn on them should be accepted at a certain place in London, and it was not accepted. The person entitled to the benefit of the bill originally was an enemy, and the Administrator of German Property appeared and claimed upon it against the Russian bank. When asked G what his title was, he said: "My title is under art. 297 (b) of the Peace Order, confirmed by Act of Parliament, which says: 'Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions, and H protectorates, including territories ceded to them by the present Treaty.' " The Administrator of German Property said: "There is my title—'all property, rights and interests.' " The Russian Bank for Foreign Trade replied: "No, you do not get a title under those words, because that claim cannot be put forward without the bill of exchange, and the bill of exchange is not in England. Consequently, it is not in your territory." They further said that the right to claim under the bill I of exchange did not come within the words "property, rights and interests." That was the point which we had to consider in that case, and, without dealing with a number of other questions which were argued, this court said, as I understand the decision, that a chose in action recoverable at a place in the United Kingdom against a person residing in the United Kingdom comes within the words "property, rights and interests." Secondly, the fact that part of the proof of the claim may not be in the United Kingdom and may have to be brought into the United Kingdom does not prevent the chose in action from coming within the words. In my view, that exactly covers what has happened in the present case. Money has been recovered by virtue of a chose in action, an action brought in the United Kingdom A against English citizens, the owners of the ship, an action brought either for damages for breach of contract or for damages for tort. The situs, in my view, of such a chose in action is in the United Kingdom, and that being so it is within the provisions of the Peace Order. It is true that the bills of lading at one time were out of the United Kingdom, but to say that that changes the situs of the chose in action is, as SANKEY, L.J., said in the *Russian Bank for Foreign Trade* B *Case* (1), to confuse the right itself with the means of proving the right.

I come, therefore, to the conclusion that the fact that certain documents relating to the claim were at the time when the American Custodian took possession of them in the United States does not authorise him to say that the situs of the chose in action was in the United States, and, therefore, passed or belonged to him. In my view, the situs of the chose in action was in the United Kingdom, where the C persons against whom the claim was made resided. The fact that certain documents necessary to prove the right were not in the United Kingdom is immaterial. In those circumstances the claim of the American Custodian fails in this case, and the appeal must be dismissed, with the usual consequences.

LAWRENCE, L.J.—I agree. It is to be borne in mind that the holders of the D bills of lading and the documents necessary to prove the claim of the Mannheim Insurance Co., which had by subrogation become entitled to enforce the remedies of the insured, were at the crucial time in the hands of Messrs. F. Herman & Co., in New York. They were the agents of both the Mannheim Insurance Co. and the Continental Insurance Co., which have been called in this case by the comprehensive name of "the Mannheim." The seizure of those documents of title (which E had been sent to, and were in the custody of, the agents of the Mannheim at the time) did not operate to confer on the American Custodian of Alien Property any title to the chose in action. The Mannheim were the persons who had been subrogated to the rights of the insured. When the American Custodian of Alien Property took possession of these indicia of title he was forced to come to England in order to assert his rights in the names of those persons who were really entitled. F. F Herman & Co., the agents, dropped out, and the rights had to be enforced in the name of the persons really entitled, who happened in this case to be the consignees of the goods. The real persons entitled to the chose in action were the Mannheim, and their rights had to be enforced in England against British subjects resident in England. In those circumstances it appears to me plain that the situs of the chose in action was in the United Kingdom and not in the United States of America. G

In view of the facts which I have outlined, I think that this case is brought directly within the decision of this court in *Administrator of German Property* v. *Russian Bank for Foreign Trade* (1), and is in substance indistinguishable from it. The court there had to consider the position of the holder of a bill of exchange drawn upon a house in London and payable in London. The bill of exchange was out of the country, but it had to be enforced in the only place in which it could be H enforced—that is to say, in London. I agree with what SCRUTTON, L.J., and GREER, L.J., said in that case, that the locality of the chose in action was determined by the place where it could be enforced. That is the general rule, and the exceptions to it do not, in my judgment, touch the present case. SANKEY, L.J., said that to hold otherwise would be to confuse the locality of the chose in action with the indicia of title to that chose in action. I

For these reasons, and for the reasons expressed by my Lord, I agree that this appeal fails, and must be dismissed, with costs.

GREER, L.J.—I am of the same opinion. Counsel for the plaintiff admitted that the success of this appeal and his rights depended upon the question whether the property with which this appeal deals was property situate within the jurisdiction of the United States. At the time when the Peace Treaty was made operative as part of the law of this country, the documents were in this country.

A That is not a point which is in any way decisive of this case, because the plaintiff's contention is that before the statute which acquired the force of law under the terms of the Peace Treaty came into operation, the property had passed to the Custodian of Alien Property in the United States. If that were the true fact, in accordance with English law the property had passed properly from the Mannheim Insurance Co. to the Custodian of Alien Property in the United States, and then B he would be entitled to succeed. But that depends upon whether at the time when the American Custodian obtained such rights as he had the property in question was in the United States. If it was not, then it was not within the jurisdiction of the Custodian in America. The question where it was in law must necessarily be determined by the English courts, if they are called upon to determine the question as between the two Administrators of Alien Property.

C I look on it as having been decided in *Administrator of German Property* v. *Russian Bank for Foreign Trade* (1) that a chose in action is to be taken to be situated for the purpose of the operation of the Treaty of Versailles, made operative by statute, in the country in which the debtor resides—that is to say, in the country in which the person who has undertaken an obligation to perform the promise contained in the contract resides. It may be a promise to pay a sum of D money, or it may be a promise to do something which if not done will result in an obligation to pay damages. I think the situs of the chose in action cannot be different when we are dealing with a case in which the obligation is an obligation to pay damages for breach from what it is in a case where the obligation is an obligation to pay a sum of money. It seems to me that the decision in the *Russian Bank Case* (1), and in other cases, is that the situs of the interest or property which E consists of the right of the party to a contract to a remedy in law is in the country where the person is resident against whom the claim for the enforcement of that remedy has to be made.

I do not think it is necessary to refer to the authorities which have been cited. They seem to me to establish, so far as they are not subject to question, that there may be an exception to that rule in the case of stocks and shares and bonds, and F things like that. It may be that there is an exception to the rule, but if there is such an exception I do not think it applies to a claim by an insurance company standing in the shoes of a consignee against a shipowner for delivery of the goods which have been shipped, if that be the claim, or damages for non-delivery of the goods. For these reasons I agree that the appeal must be dismissed.

Appeal dismissed.

G

Solicitors: *William A. Crump & Son*; *Solicitor to the Clearing Office.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

WATSON (TRUSTEES OF) *v.* WIGGINS (INSPECTOR OF TAXES)

[House of Lords (Lord Buckmaster, Lord Warrington, Lord Tomlin, Lord Russell of Killowen and Lord Wright), February 21, 1933]

[Reported [1934] A.C. 264; 102 L.J.K.B. 464; 49 T.L.R. 326; 77 Sol. Jo. 157; 148 L.T. 482; 17 Tax Cas. 728]

Income Tax—Settlement—Revocable with consent of named person—Annuity payable to infant—Liability to tax as income of settlor—Finance Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 20 (1) (*c*).

By a settlement dated March 5, 1930, the settlor covenanted with the trustees that he would during the joint lives of himself and his son, F., who was born on Nov. 26, 1916, pay to the trustees an annuity of £350. It was declared by the settlement that the trustees should stand possessed of the said annuity in trust for F. with power to apply the same for F.'s maintenance, education and benefit. Income not so applied was to be accumulated. It was further provided that the settlor might by deed, with the consent of any one of the five named persons, revoke the trusts of the settlement and declare new trusts. In making payment of the annuity in accordance with the settlement the settlor deducted income tax at the standard rate then in force. F. (while still an infant) claimed through the trustees repayment of tax on the footing that the annuity formed part of his income. The Crown rejected the claim on the ground that the annuity was income of the settlor by virtue of the Finance Act, 1922, s. 20 (1) (c), i.e., that the existence of the power of revocation meant that the income was payable to F. for some period less than that of his life.

Held: the annuity was F.'s income for the purposes of income tax because, although the limitation could be set aside by the exercise of the power of revocation, it was not, while it existed, one for some period less than F.'s life.

Decision of the Court of Appeal ([1933] 1 K.B. 245), affirmed.

Notes. The Finance Act, 1922, s. 20 (1) (c) was replaced by the Income Tax Act, 1952, s. 393 (1).

Distinguished: *Inland Revenue Comrs.* v. *Payne, Inland Revenue Comrs.* v. *Gunner* (1940), 23 Tax Cas. 610. Followed: *Whigam* v. *Inland Revenue Comrs.*, [1941] 2 All E.R. 524. Applied: *Mauray* v. *Inland Revenue Comrs.*, [1944] 1 All E.R. 472. Referred to: *Inland Revenue Comrs.* v. *Nettlefold* (1933), 18 Tax Cas. 235.

As to dispositions in favour of a child prior to April 22, 1936, see 20 Halsbury's Laws (3rd Edn.) 577, 578, paras. 1123, 1124; and for cases on the subject see Digest Supps.

Appeal from the decision of the Court of Appeal (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), on a Case Stated by the Commissioners for the General Purposes of the Income Tax acting in and for the division of West Brixton in the county of Surrey under the Income Tax Act, 1918, ss. 27 and 149, for the opinion of the King's Bench Division of the High Court of Justice.

The Case stated as follows:

"At a meeting of the Commissioners for the General Purposes of the Income Tax acting in and for the division of West Brixton, held at 94, East Hill, Wandsworth, in the county of Surrey, on Nov. 17, 1931, Francis Greville Melmose Watson (a minor) by his trustees claimed relief from income tax under the relevant statutory provisions for the year ended April 5, 1931.

"No question of figures is involved in this case, the sole question upon which the opinion of the court is desired being whether the sums received by the trustees (hereinafter named) under the settlement below referred to during the year ended April 5, 1931, were income of the said minor for the purpose of computing the allowances and deductions to which the said minor was entitled under the relevant statutory provisions for that year.

"By an indenture of settlement dated March 5, 1930, and made between Frederick Percy Watson (thereinafter and hereinafter referred to as the settlor) of the one part and Bernard Burton Gordon Dabell, and Shirley Worthington Woolmer (thereinafter and hereinafter referred to as the present trustees) of the other part after reciting that the settlor was desirous of making the provision thereinafter contained for his son Francis Greville Melmose Watson, who was born on Nov. 26, 1916, the settlor covenanted with the present trustees that he would during the joint lives of himself and his said son pay the present trustees (or other the trustees for the time being of the said settlement) an annuity of £350 to be paid by equal quarterly instalments on the usual quarter days, the first proportion of instalment to be paid on March 25, 1930. It was by the said settlement declared that the present trustees or other the trustees for the time being of the said indenture should stand possessed of the said annuity in trust for the said son with the same power during his minority to apply such annuity for or towards his maintenance, education, and benefit as the trustees would have if the said annuity were income of property vested in the trustees upon trust for the said son for an absolute interest. It was further declared that, as long as the law allowed, the trustees should accumulate and invest any income not applied by them as aforesaid in any trust securities for the time being, but with power at any time to resort to such accumulations and to apply the same as though they were current income.

"It was provided by the said indenture that the settlor might at any time or times thereafter by deed or deeds revocable or irrevocable, with the consent of any one of the following persons, that was to say the present trustees (the said Bernard Burton, Gordon Dabell, and Shirley Worthington Woolmer) or Aubrey Arthur Woolmer (since deceased) and Kenneth Anns, revoke in whole or in part the trusts and powers declared by and contained in the said indenture and appoint any new or other trusts, powers, and provisions in lieu thereof, and that nothing in the said indenture contained should make it obligatory on the trustees to take action to enforce the covenant by the settlor therein contained unless and until special notice had been given to the trustees by or on behalf of the beneficiary and reasonable security had been given to them for the costs of any such proceedings.

"During the year ended April 5, 1931, the settlor duly paid to the present trustees the instalments of the said annuity payable during that year under the said indenture, the said instalments amounting in all to the sum of £350. There was deducted by the settlor from each instalment so paid income tax at the rate of 4s. 6d. in the pound, amounting in all to £78 15s., the net sum of £271 5s. being received by the present trustees. In addition for the period from March 5, 1930 (the date of the settlement), to March 25, 1930, the settlor duly paid to the present trustees the proportion of the instalment due March 25, 1930, amounting to the sum of £19 8s. 10d. and deducted therefrom the sum of £3 17s. 9d. income tax at the rate of 4s. in the pound, the net sum of £15 11s. 1d. being received by the present trustees. It is not disputed that the said instalments so paid were paid by the settlor out of profits and gains brought into charge to tax in his hands or that (subject to the question arising in this case) the sums deducted for income tax from the said instalments were lawfully deducted.

"On July 15, 1931, the said Francis Greville Melmose Watson (through the present trustees) lodged a claim with the respondent for relief by way of repayment of income tax by reference to the tax so deducted from the said instalments of the annuity as aforesaid on the footing that the instalments paid to the trustees during the said year were his income. On Oct. 8, 1931, the respondent objected to this claim upon the ground that the said income must be regarded as the income of the settlor and not of the said Francis Greville Melmose Watson in that it is payable for some period less than the life of the said Francis Greville Melmose Watson within the meaning of the Finance Act, 1922, s. 20 (1) (c). It was against this objection that the appeal was brought. The settlor had not exercised the power of revocation reserved to him either wholly or in part at the date of the hearing of the appeal by us.

"The Finance Act, 1922, s. 20 (1) contains (among others) the following provision:

> " ' (1) Any income (a) of which any person is able, or has, at any time since April 5, 1922, been able, without the consent of any other person by means of the exercise of any power of appointment, power of revocation or otherwise howsoever by virtue or in consequence of a disposition made directly or indirectly by himself, to obtain for himself the beneficial enjoyment; or . . . (c) which by virtue or in consequence of any disposition made, directly or indirectly, by any person after April 5, 1914, is payable to or applicable for the benefit of a child of that person for some period less than the life of the child; shall, subject to the provisions of this section, but in cases under the above para. (c) only if and so long as the child is an infant and unmarried, be deemed for the purposes of the enactments relating to income tax (including supertax) to be the income of the person who is or was able to obtain the beneficial enjoyment thereof, or of the person, if living, by whom the disposition was made, as the case may be, and not to be for those purposes the income of any other person: . . . Provided also that (i) the above para. (c) shall not apply as regards any income . . . which is payable to or applicable for the benefit of a child during the whole period of the life of the person by whom the disposition was made; and (ii) for the purposes of the said para. (c) income shall not be deemed to be payable to or applicable for the benefit of a child for some period less than its life by reason only that the disposition contains a provision for the payment to some other person of the income in the event of the bankruptcy of the child, or of an assignment thereof, or a charge thereon being executed by the child.'

"The following contentions were (among others) advanced on behalf of the appellants on the hearing of the appeal in support of the said claim:

"(i) That the instalments paid under the settlement were income of the beneficiary for the year of claim and were not income of the settlor.

"(ii) The fact that a power to revoke (not exercised) with the consent of the persons named in the settlement was reserved to the settlor did not prevent the income being the income of the beneficiary.

"(iii) That the claim should be allowed.

"On behalf of the respondent it was contended (inter alia):

"(i) That by reason of the power of revocation the annuity in question was payable to or applicable for the benefit of the said Francis Greville Melmose Watson for some period less than his life.

"(ii) That by reason of the said power of revocation the annuity was not payable to or applicable for the benefit of the said Francis Greville Melmose Watson during the whole period of the life of the settlor.

"(iii) That the said annuity must be deemed to be the income of the settlor and not the income of the said Francis Greville Melmose Watson.

"(iv) That the claim should be refused.

"Having considered the facts and arguments adduced before us we dismissed the appeal.

"The appellants immediately after the determination of the appeal by us declared to the commissioners their dissatisfaction with our decision as being erroneous in point of law, and in due course required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 27 and s. 149 which Case we have stated accordingly."

The Court of Appeal held, affirming the decision of ROWLATT, J., that having regard to the fact that by the first proviso referring to para. (c), para. (c) was not to be applicable with regard to income payable to a child during the whole period of the life of the settlor, the rights of the son would last for his whole life notwithstanding the death of the father before him; the disposition was for the whole life of the son, and that disposition was not altered because it was dependent on a revocation. Paragraph (a) was expressly made applicable only where the power of revocation could be exercised without obtaining the consent of some third party, and therefore the income could not be considered as sufficiently within the settlor's power to justify it being treated for the purpose of taxation as his own. The Crown appealed.

The Attorney-General (*Sir Thomas Inskip, K.C.*), *J. H. Stamp* and *R. P. Hills* for the Crown.

A. M. Latter, K.C., *Gavin T. Simonds, K.C.*, and *Cyril L. King* for the taxpayers were not called on.

LORD BUCKMASTER.—This question arises out of a settlement that was executed on March 5, 1930, by one Frederick Percy Watson. It is an unusual document; by it he covenanted with certain trustees that he would, during the joint lives of himself and his named son, pay to the trustees an annuity of £350 a year, to be held by them in trust for the settlor's son, and so that while he was a minor they should have power to provide for his maintenance, education, and benefit, with power to accumulate the income that was not used. There was nothing further in the deed relating to the disposition of this annuity, but it contained a final proviso to the effect that the settlor might at any time or times, and by deed or deeds revocable or irrevocable, with the consent of any one of five persons, of whom two were the trustees, revoke in whole or in part the trusts and powers declared by and contained in the deed, and appoint any new or other trusts, powers, and provisions in lieu thereof.

The annuity was duly paid and, being paid out of moneys from which income tax had been deducted, the trustees applied for repayment of the tax on behalf of the infant child. This application was disallowed by the Special Commissioners, whose decision was reversed by ROWLATT, J., and ROWLATT, J.'s judgment was in terms affirmed by the Court of Appeal from whom this appeal proceeds.

The ground on which the Crown base their claim is this: They say that by reason of the fact that the settlement contains a power of revocation, its provisions make the annuity applicable for the benefit of the child of the settlor for some period less than the life of the child, and that consequently it is brought within the operation of the Finance Act, 1922, s. 20 (1) (c).

In order to see whether that is the true meaning of that subsection, it is necessary to examine the whole section in which the subsection is to be found. It provides that in three definite cases the income under a settlement shall be deemed for the purposes of the enactments relating to income tax to be the income of the person who was able to obtain the beneficial enjoyment thereof or of the person, if living, by whom the disposition was made and not to be for income tax purposes the income of any other person. Now the three cases in which that result arises are quite separate and distinct. The first paragraph, para. (a), is one in general terms relating to dispositions whenever made, and it provides that the income of which any person is able, or has at any time since April 5, 1922, been able, without the consent of any other person by means of the exercise of any power of appointment, power of revocation, or otherwise, to obtain for himself the beneficial enjoyment, is deemed to be his income. Your Lordships will appreciate the fact that that paragraph applies impartially, whoever the beneficiary may be, and however long the period of time of his enjoyment may be, or whenever the deed has been executed. All that is necessary is that, in the case of a person who is able without the consent of any other person, by the exercise of a power of revocation or appointment to obtain for himself the beneficial enjoyment, the income, however disposed of, has to be treated as income for the purposes of supertax of the person in whom that power resides. That paragraph cannot apply in the present case since here the power of revocation can only be exercised with consent. Paragraph (b) is a totally different one. That provides for the case where, by a document executed after May 1, 1922 (other than a document that is made for valuable and sufficient consideration), income is payable to or applicable for the benefit of any other person for a period that cannot exceed six years—it may apply to any persons; it is not limited in any way to children, but the whole thing depends on the period of six years, which is the limit of time within which this deed must operate. The final one is para. (c), which, if words that are not important are omitted, provides for the case where, by virtue of any disposition made by any person after April 5, 1914, income is payable to or applicable for the benefit of a child of that person for some period less than the life of the child, and this paragraph contains no reference to any power of revocation.

In this case the money was limited for the joint lives of the child and the father, and that on the face of it might appear to show that it was for a period less than the life of the child within the meaning of the paragraph; but the Crown have assented to the view that that construction is not open by virtue of a later provision in the section, and, therefore, that question is removed from controversy. The point, and the only point that has been hitherto argued, and on which the opinion of this House has been invited, is whether or not the mere fact that there is a power of revocation contained in the deed ensures that the limitations of the interest are for a less period than the life of the child. I am unable to follow that argument any more than were the other learned judges before whom it has been advanced. If one disregards wholly, as the Crown are prepared to do, the fact that this is a limitation for joint lives and consider it merely as a limitation for one life, it appears to me that it is impossible to say that it is for a period less than the life of the child merely because there is a means by which the actual estate that is conferred may be terminated and cut short. The limitation is for the life of the child, subject to a power that enables the limitation itself to be set aside, but that does not prevent the limitation while it lasts, and is not set aside, being for the life of the child. I am strongly confirmed in that view by the contrast between para. (c) and para. (a). It is quite plain that whoever was drafting this section realised entirely what might happen if a person had a power of revocation, and, in the case where the deed was dealing with any beneficiary, whether related or not to the settlor, and there was a general power of revocation without the consent of any person, then, in that case special provisions are made for it, and the provisions would have affected the particular circumstances that have arisen in this case, but for the fact that the power of revocation which is referred to in para. (a) is one that must be exercised without the consent of any other person, and here the power of revocation can only be exercised with the consent of one of five named persons.

These reasons satisfy me that in para. (c) it was never intended that a limitation for the life of a child should be regarded as a limitation for less than that period by reason of the introduction of a power of revocation which would enable the whole of the provisions to be destroyed, and this is in accordance with the opinion of the Court of Appeal, whose judgment on this point should, I think, be affirmed.

LORD WARRINGTON.—I am of the same opinion.

LORD TOMLIN.—I agree.

LORD RUSSELL OF KILLOWEN.—I am of the same opinion, although I have grave doubts whether, on the actual framework of the settlement here in question, the case falls at all within the provisions of para. (c), but, upon the assumption that it does, I entirely concur in the motion which has been proposed.

LORD WRIGHT.—I agree.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue*; *Shirley, Woolmer & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

THE TREHERBERT

[COURT OF APPEAL (Scrutton, Lawrence, and Greer, L.JJ., assisted by Nautical Assessors), December 7, 8, 11, 12, 1933]

[Reported [1934] P. 31; 103 L.J.P. 65; 151 L.T. 69; 50 T.L.R. 120; 18 Asp.M.L.C. 458]

Shipping—Collision—Crossing vessels—Prolonged courses crossing—Ships approaching buoy from different directions—Stand-on ship drifting nearer buoy—Duty of give-way ship—Sea Regulations, 1910, *arts*. 19, 22.

When vessels are not in a narrow channel they must take their courses as prolonged, and, if the two courses, so prolonged, cross each other, art. 19 of the Sea Regulations, 1910, applies.

Where ships are approaching a buoy from opposite directions, the stand-on ship intending to turn to port at the buoy and the give-way ship intending there to turn to starboard, it is desirable that the stand-on ship should lay a course well clear of the buoy so as to avoid the necessity of the give-way ship having to stop to enable her to pass port to port as she must do if she is not to break art. 22 of the regulations. If, owing to the set of the tide, the stand-on ship has drifted nearer the buoy than was anticipated, the give-way ship must still keep out of the way. She is not entitled to say that the stand-on ship is not giving her a clear berth and she may go on and run into her; she must either stop her engines or reverse in order that the two vessels may not pass the buoy at the same time, or, if the circumstances are such that she cannot, even by stopping her engines, avoid running into the stand-on ship, she must consider whether she should not proceed inside the buoy. If it be a question of either passing inside a channel buoy in ample water or having a collision, the ship ought to pass inside the buoy.

It being alleged that a practice existed that, in navigating round the N.E. Spit Buoy in the Thames Estuary, the pilot of a vessel bound up-river should leave sufficient room in rounding the buoy for a down-coming vessel to pass port to port between his vessel and the buoy.

Held: such a practice, if established, could not override the provisions of art. 19.

Notes. The Sea Regulations, 1910, have been replaced by the International Regulations for Preventing Collisions at Sea, 1948, art. 19 of the regulations of 1910 being replaced by reg. 19 of the regulations of 1948 and art. 22 by reg. 22.

Referred to: *The Manchester Regiment*, [1938] P. 117.

As to regulations for preventing collisions at sea see 30 HALSBURY'S LAWS (2nd Edn.) 676 et seq., and for cases see 41 DIGEST 741 et seq.

Cases referred to:

(1) *The Karamea*, [1922] 1 A.C. 68; 91 L.J.P. 22; 38 T.L.R. 161; 15 Asp. M.L.C. 430; 126 L.T. 417, H.L.; 41 Digest 741, *5934*.

(2) *The Segundo*, not reported.

(3) *The Albano*, [1907] A.C. 193; 76 L.J.P.C. 33; 96 L.T. 335; 10 Asp.M.L.C. 365; 23 T.L.R. 344, P.C.; 41 Digest 742, *5935*.

(4) *The Harvest* (1866), 11 P.D. 90; 55 L.T. 202; 6 Asp.M.L.C. 5, C.A.; 41 Digest 768, *6218*.

(5) *The Ulrikka* (1922), 13 Ll. L.R. 367.

(6) *The Kaiser Wilhelm der Grosse*, [1907] P. 259; 76 L.J.P. 138; 97 L.T. 366; 23 T.L.R. 554; 51 Sol. Jo. 498; 10 Asp.M.L.C. 504, C.A.; 41 Digest 754, *6065*.

Appeal by defendants and cross-appeal by plaintiffs from an order of LANGTON, J.

The defendants, owners of the British steamship *Treherbert*, appealed against a judgment holding them three-fourths to blame for a collision between the *Treherbert* and the Greek steamship *Archon*, owned by the plaintiffs, which took place in the estuary of the River Thames, in the vicinity of the North-East Spit Buoy, on the night of Sept. 6, 1933. In the cross-appeal the owners of the *Archon* appealed against so much of the judgment of LANGTON, J., as held them one-fourth to blame for the collision.

Digby, K.C., and *Willmer* for the defendants.
Raeburn, K.C., and *Hayward* for the plaintiffs.

SCRUTTON, L.J.—This is a troublesome case. There is considerable difficulty as to the facts, and it is not made easier by the suggestion that it is really an international controversy between the Channel pilots and the Cinque Ports pilots. I think that the extent of that controversy has been considerably overestimated when one hears that, so far as the knowledge of experienced counsel goes, there has never been a collision at this Spit Buoy before the present one, so that there does not seem to have been any great practical difficulty in the past between the two schools of pilots.

The collision took place on a very clear night. The *Treherbert* was outward bound from London by the South Edinburgh Channel, and proposed to turn round the North Foreland, when she got to the N.E. Spit Buoy. The *Archon* was inward bound, and proposed, when she got to the Spit Buoy, to turn up the Thames. The *Archon* had the green light of the *Treherbert* on her port bow, the *Treherbert* had the *Archon* on her starboard bow. They contrived to run into each other somewhere to the north—I am intentionally using the vaguest phrase—somewhere to the north of the N.E. Spit Buoy. They completely contradict each other as to the distance, and the learned judge has taken, not a fixed distance, but a distance "at least two cables from the N.E. Spit Buoy."

The first question is: What rules apply? The *Archon's* case is that the *Treherbert*, whose green light was seen on the *Archon's* port bow, was a crossing ship, and the give-way ship within art. 19, and that she, the *Archon*, was a stand-on ship which had to keep her course and speed. The *Treherbert's* case is that the crossing rule does not apply. When asked why it does not apply, it is said, in the first place, that the water in question is a narrow channel. The *Archon* was coming past the N.E. Spit Buoy, and the plaintiffs naturally ask: "What is the other side of the narrow channel, is it the West Hinder Lightship or the coast of Belgium, or what sort of narrow channel is this about which you, the defendants, are talking?"

I think it is quite clear that the *Archon*, coming up and rounding from the southward and eastward of the N.E. Spit Buoy, is not in a narrow channel. If, then, the narrow channel rule (art. 25) is barred by that, on what else can the *Treherbert* rely? She says that there is a practice of pilots who are, on the one hand, going to round the buoy and go south; or, on the other hand, going to round the buoy and go west, to pass port to port. I am quite unable to see how that excludes the crossing rule; in fact, it is the direct consequence of the group of rules of which the crossing rule is one. It begins with art. 19:

> "When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side [i.e., the *Treherbert*] shall keep out of the way of the other."

As to that, it might have been said that they were not crossing, because passing port to port they would not cross each other. In my view, that construction of the article has been ruled out by the decision in *The Karamea* (1) as well as by at least two other decisions. In *The Karamea* (1), there were two vessels which were proceeding at right-angles to each other, and it was known that somewhere near a particular buoy each of them would make a right-angled turn. The *Karamea's* case was that she was not crossing, because she was going to turn and would not cross. This court and the House of Lords rejected that view, and, as I understand the authorities, while there may be cases in narrow channels where one does not prolong the course because one knows that the configuration of the land requires a change of course which will involve that the ships are not crossing, when the vessels are not in a narrow channel they must take their courses as prolonged, and if those two courses so prolonged, cross each other, art. 19 applies. That was decided by every judge in the House of Lords who heard the *Karamea* (1), and by the Court of Appeal. I will not repeat the passages in the *Karamea* (1); I remain of the opinion that what I said then, which I understand the House of Lords to have adopted, was correct. Accordingly the *Treherbert* was a crossing ship under art. 19.

Article 22 (one of the group of four) is:

> "Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the cases admit, avoid crossing ahead of the other."

The *Treherbert*, therefore, which is to keep out of the way of the *Archon*, is not to cross ahead of her. It follows that if she does not cross ahead of her, she will ultimately pass port to port, which in practice is what she does. But she need not necessarily go straight on to pass port to port because, if there is any difficulty about it, art. 23 comes in:

> "Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse";

so that the give-way vessel is not obliged to go on and try to pass port to port by the buoy; if there is any difficulty about it, she has to slacken her speed or stop or reverse. The *Treherbert* was the vessel which had to act, and it appears to me that the so-called practice is merely what must happen under the rule. It does not in any way alter the application of art. 19; it is what must follow under art. 19 if arts. 22 and 23 are observed; the practice merely represents what is desirable. Obviously, in a case like this, it is desirable that the up-coming ship should lay a course well clear of the buoy so as to avoid the necessity of the give-way ship having to stop to enable her to pass port to port, as she must if she is not to break art. 22. It appears to me to follow also that if, owing to the set of the tide, the up-coming ship has drifted nearer the buoy than was anticipated, the down-coming ship must still keep out of the way. She is not entitled to say that the up-coming ship is not giving her a clear berth, and that she (the give-way ship) will go on and run into her; she must, as the give-way ship, either stop her engines or reverse in order that the two vessels may not pass the buoy at the same time; or, if the circumstances are such that she cannot even by stopping her engines avoid running into the up-coming ship, she must consider whether she should not proceed inside the buoy. There is 40 ft. of water at low water (spring tides) inside that buoy. A vessel coming down drawing 12 ft. finds herself in difficulty by reason of the up-coming ship being near the buoy; if she does not think it right to stop her engines and wait till the up-coming ship is clear of the buoy, she can avoid the collision by going with her 12 ft. draught into 40 ft. of water to the west of the buoy; and that is what the *Batavier* did. The *Batavier* had a channel pilot on board and a very experienced master, who had a pilot's licence; and those two experienced men did go inside the buoy some 50 ft. with a ship drawing 12 ft. into 40 ft. of water. The *Treherbert* drew 18 ft., and if it was impossible for her, in her judgment, to go outside the buoy, to the north and east of it, and she insisted on going on, she could have gone inside the buoy with her 18 ft. draught and nothing whatever would have happened.

All the members of the court, however, being landsmen, have been quite unable to understand why, if there were 300 yds. to the east of the buoy, a vessel with a beam of 50 ft. should not have been able to go through that 300 yards in safety. We have had the same difficulty, if the place of collision is two cables at least north of the buoy—1,200 ft.—why the vessel should not have been able to go through that space in safety. We have, of course, felt that we are not navigators, and we also appreciate that the fixing of the place by the learned judge is very vague; but we have asked the assessors this question, and they have given a very intelligent answer.

(Q.) "Assuming the judge's finding of the place of collision at least two cables to the north of the buoy, and that the *Archon* passed, say, one-and-a-half cables off the buoy" (we put one-and-a-half cables because the judge found "not more than two cables" or something between a cable and two cables), "as a matter of good seamanship, could the *Treherbert* either (i) have passed safely between the *Archon* and the buoy, or (ii) drawing 18 ft. 3 in. have passed safely to the west of the buoy where the soundings show 42 ft. of water at low water (spring tides)?"

(A.) "Assuming the judge's finding of the place of collision at two cables to the north of the buoy, the *Archon*, on a course N.N.W. mag. (estimated made good steering N. by W. ½ W.) would have passed the N.E. Spit Buoy five-sixths of a cable or 500 ft. off, when abeam. In our opinion, as a matter of good seamanship, with a distance of one-and-a-half cables between the *Archon* and the buoy, the *Treherbert* could have passed between, though it would have been very close navigation with the prevailing conditions of fresh wind and tide settling down on the buoy. Or the *Treherbert* could have passed with a draught of 18 ft. 3 in. to the westward of the buoy. It should be observed that steering inside a channel buoy can only be justified in order to avoid immediate danger."

Dealing with the last answer first, I entirely agree that as a general rule a vessel ought not to pass inside a channel buoy. But if it be a question of either passing inside a channel buoy in ample water or having a collision, because if the vessel goes on she will run into another ship, I have no doubt whatever that she ought to pass inside the buoy if there is plenty of water, as there was in this case. I quite agree that it is dangerous to pass too near a buoy. We cannot have a better example of that than the case of *The Segundo* (2), where a vessel in the Tyne did pass too near a buoy and stripped all the blades off her propellor by catching the chain, and such a contingency must be taken into account. But in this particular case, if the alternative was running into the *Archon* because she was too near the buoy, or going inside the buoy with perfect safety as the *Batavier* did, with an experienced pilot on board, I have no doubt that that course should be adopted.

As to the first part of the answer of the assessors, the five-sixths of a cable within which they say the *Treherbert* could have passed, though it was rather risky navigation, is arrived at by taking the place fixed by the judge at north of the buoy exactly two cables, and then drawing from that place of collision the course which the *Archon* was steering. But there is great indefiniteness in the judge's finding of the place of collision:

> "I am, accordingly, satisfied that this collision took place somewhere about two cables to the northward of the N.E. Spit Buoy. It may have been a little more, but I do not think it can have been anything less. Whether the buoy bore exactly due south from the place of collision, or a little west, or a little east of south, again I do not pretend to determine, but I am satisfied, after weighing all the credible evidence, that the collision took place to the northward of the buoy, and not less than two cables from the buoy."

Obviously, with a position so vaguely described as that, it is quite impossible to draw a line from any named place and get the exact distance at which the *Archon* could pass the buoy at five-sixths of a cable, particularly as the learned judge finds "certainly more than one cable" as the distance the *Archon* passed the buoy. He finds this:

> "I think the probabilities are—and I am prepared to find as a fact—that he passed the N.E. Spit Buoy at some distance not more than two cables; I think he probably passed it at a distance somewhere between one and two cables."

A We have put in our question a cable and a half, *i.e.*, considerably more than the five-sixths of a cable which the assessors, by drawing a collision at a fixed point north of the buoy, have found to be the room in which the *Treherbert* could have passed, though it was a matter of some little difficulty of navigation.

If that be the true state of things, the *Treherbert* could have avoided this collision at a time up to the last moment—a time when the *Archon* was still keep-
B ing her course and speed, and we have had some difficulty with the cross-appeal, which condemns the *Archon* for not acting under the note to art. 21. I have had that note before me many times, and it is very troublesome to construe and act upon in particular cases.

> "Where by any of these rules one of two vessels is to keep out of the way,
> C the other shall keep her course and speed";

and the note is this:

> "When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert
> D collision."

One of the most instructive cases in which that note has been considered is *The Albano* (3), where LORD GORELL, in giving the decision of the Privy Council, said ([1907] A.C. at p. 207):

> "It must always be a matter of some difficulty for the master of a vessel
> E which has to keep her course and speed with regard to another vessel which has to keep out of her way, to determine when the time has arrived for him to take action, for if he act too soon he may disconcert any action which the other vessel may be about to take to avoid his vessel, and might be blamed for so doing, and yet the time may come at which he must take action. Therefore he must keep his course and speed up to some point, and then act, but the
> F precise point must necessarily be difficult to determine and some little latitude has to be allowed to the master in determining this."

That is the way in which I always approach this note.

In the present case I have formed the view, and the answer given us by the assessors confirms it, that with reasonable care the *Treherbert* could have avoided the collision by going either east or west of the buoy, and that consequently the
G moment had not arrived when it was necessary for the *Archon* to alter her course and speed until it was perfectly obvious that the *Treherbert* was in fact not doing anything that would help anybody, but was coming straight on. The learned judge, in rather an obscure passage, has found the *Archon* guilty of not acting soon enough. He has not expressly stated whether the action that she ought to have taken was to alter her speed or whether it was to alter her course, but he has
H found that she did not take some action, unspecified, as soon as she should have done. I am bound to say that I should have expected the point to have been much more definitely put to the pilot of the *Archon* than it was in fact put in cross-examination. I think one reason why it was not definitely put was that the case for the *Treherbert* was quite different. Her case was that the *Archon* ported into her instead of keeping course and speed. That contention has hopelessly
I failed. Anything more unsatisfactory than the evidence of the pilot, master and look-out man in the *Treherbert* I find it difficult to conceive, and I entirely agree with the view which the learned judge has taken of that evidence. Putting that aside for the moment, and coming back to this point on the assumption that it was taken, though not very strenuously, I am unable to agree with the view taken by the learned judge that the *Archon* is to blame in the circumstances for not acting earlier. I think that the *Treherbert*, up to the time that the *Archon* acted, could have avoided the collision easily by her own action, and if that be so, there was no necessity on the part of the *Archon* to act earlier than she did. In my opinion,

therefore, the cross-appeal must be allowed and the *Treherbert* held alone to A blame for this collision.

LAWRENCE, L.J.—The case made by the *Treherbert* at the trial was not that the *Archon* had set a course too close to the N.E. Spit Buoy or had come too close to that buoy, but that, having reached a position of safety in the accepted way, she suddenly ported towards the *Treherbert* and thereby brought about the B collision. LANGTON, J., in his judgment says:

> "The case which the *Treherbert* puts forward is this. The pilot was quite explicit about it (he was given every possible opportunity), and he said that he saw the *Archon* coming on in such a position as would give him opportunity to pass in safety red to red, that is, to make his turn in the usual way. He did not see the *Archon* coming too close to the buoy in the first instance. He C saw her, as he thought, leaving him ample room, and most explicitly, and testing him in every possible way as counsel for the plaintiffs did, and as I myself did at a later stage, he said that the cause of this collision was not that the *Archon* set an original course too close to the buoy, but that the *Archon*, at a late stage of the proceedings, ported her wheel and ported towards the *Treherbert*. In other words, that, having reached a situation of safety by D quite competent seamanship in the ordinary and accepted way, she suddenly determined to make a position of foolish danger by directing her course towards the ship which she should have been attempting to pass. I have had to determine upon his evidence, and upon the evidence of the ship's company which supported him, whether that is true."

E The learned judge, after carefully reviewing the evidence, came to the definite conclusion that the *Archon* did not take any such port helm action as was imputed to her by the *Treherbert*, and he truly observes that,

> "to put the matter in a vivid phrase, that finding knocks a considerable hole in the story of the *Treherbert*, and she then comes before the court in sad case."

F I entirely agree with the learned judge in taking that view of this part of the case. The *Treherbert*, however, in no way daunted, and ignoring the inconsistency involved, contended, I suppose as an alternative case, that the *Archon* passed too close to the buoy, having regard to the fact that she was in a place where the narrow channel rule (art. 25) applied, or, at all events, in a place where there was an accepted custom that an incoming vessel should give room to enable an out- G going vessel turning southward to pass between her and the buoy. I agree with the learned judge that art. 25 has nothing to do with the case. The word "channel" denotes a depression between two banks or ridges having a definite boundary on each side, and a narrow channel is a channel in which the two boundaries are close to one another. The expression "narrow channel" in art. 25 is, to my mind, wholly inappropriate to describe the place where this collision H occurred. The N.E. Spit Buoy is placed where it is in order to mark the turning point for vessels inward and outward bound either from or towards the south, and it cannot in any sense be described as marking one side of a channel, regard being had to the fact that the other side is open to an indefinite extent. Equally, in my judgment, the contention that the buoy marks an approach to a narrow channel cannot hold good. The channels in the estuary of the Thames consist of three or I four main channels, all of which converge and lead into a wide basin or expanse of sea in which the buoy in question is placed. In my judgment, *The Harvest* (4), a case of collision on the Tyne, is quite inapplicable to such a place as that.

I agree entirely with the learned judge's conclusion that the governing rule in this case is the crossing rule (art. 19). Under that rule the *Treherbert* was the give-way ship, and the *Archon* was the stand-on ship. It was, therefore, the duty of the *Treherbert* to keep out of the way of the *Archon*. It was contended, however, on the part of the *Treherbert* that at that place there was a local practice of

A pilots that the incoming vessel should give room for any outward bound vessel bound southwards to pass between the incoming ship and the buoy, and that in this case the *Archon* did not comply with that practice and did not leave sufficient room for the *Treherbert*.

The first observation which occurs to me is that such a practice cannot override the crossing rule, but I agree with my Lord that the practice does not conflict B with, nor was it intended to override, the crossing rule. In fact, as my Lord has pointed out, it assists the vessels inward and outward bound at this point to pass one another port to port. The learned judge held in the present case that without any negligence on the part of the pilot of the *Archon*, she did not, owing to the set of the tide and the wind, in fact leave sufficient room for the *Treherbert* to pass in safety between her and the buoy. In view of the advice that we have received C from our assessors, I very much doubt whether that finding was correct. As a landsman I do not profess to have any acquaintance with seamanship, but to say that a space of 300 to 400 yards between a buoy (which, after all, is only one point and will be passed in a ship's length) and an incoming ship is insufficient for a vessel of the size of the *Treherbert* to pass through with safety, rather astonishes me. Our assessors say that with careful or close navigation there was sufficient D room. But assuming that there was not, and bearing in mind that the crossing rule applies, how can it be said that the *Treherbert* was justified in going full speed up to a point when she could not see whether there was room enough for her to get through safely without attempting to reduce her speed, and then, finding that there was insufficient room, according to her story, between the vessel and the buoy, running into the on-coming vessel instead of either attempting to take such E close navigation between the two points as was actually left to her, or going to the westward of the buoy, where there was plenty of water for her? We are advised by our assessors, and it seems reasonable, that to go the wrong side of the buoy is a course which should not be adopted unless there is imminent danger. The *Treherbert's* case was that there was imminent danger and, although there was ample water to go to the other side, for some reason which is wholly inexplicable F to me, she chose the course of running into the *Archon* rather than infringing the direction that ships ought not to pass on the wrong side of the buoy.

Junior counsel for the defendants raised a point which rather startles me. He said that as the pilot of the *Archon* had got out of his reckoning when he set his course two miles northward of the Elbow and found himself close to the buoy (I think he said within a mile of the buoy), he ought to have starboarded his helm G to get back on the course which he had set all that distance away, and to have taken that helm action without even sounding any signal to the on-coming ship. It seems to me that such a doctrine would be dangerous and wholly contrary to the rules of navigation. The *Treherbert* could not tell what course had been set or how much the *Archon* was out of her reckoning; all she could see was the course on which the *Archon* was actually proceeding at the time when she had got H near the buoy. The *Treherbert* could then judge the course and the speed sufficiently to enable her to keep out of the way. The rule that the stand-on ship must keep her course and speed is enacted in order that the give-way ship can take such measures as she thinks advisable to keep out of the way of that ship. The give-way ship has no knowledge of the course which has been set by the master of the stand-on ship or of what helm orders have been given, but she can see the I course on which the vessel is actually proceeding at the time when she is approaching her, and, if helm action had been taken by the *Archon* such as suggested by counsel and a collision had occurred, it is plain that she would have had no defence.

There remains only the cross-appeal. I have already stated what was the real case made by the *Treherbert* at the trial, although it is true to say that it was suggested that the *Archon* did not act soon enough in stopping her engines, when she was in the agony of collision. No question, however, was put to the pilot of the *Archon* on this subject, and it seems to me that it would be unfair to condemn him for not having taken action soon enough, without giving him any opportunity of explaining why he did not take action sooner. There may have been many reasons why he did not do so, and it has to be borne in mind that this is a question of good seamanship in the particular circumstances. I need not dwell on the difficulty the master of a vessel, which is bound to keep her course and speed till the last moment, is under in determining when the moment has arrived to take action and what action ought to be taken. It is curious to note that the defendants' case is that the *Archon* ought to have taken action before she heard the one blast from the *Treherbert*—and, according to the *Treherbert's* account, that blast was sounded when the vessels were within a quarter of a mile of each other—and to compare the case so made with *The Ulrikka* (5), where the stand-on ship was held negligent for having altered her course when she was three cables from the give-way ship, and was condemned for having acted too soon. That is only one instance; although there are many others in the reports, I do not think there is a single case in which the pilot or the master of the ship has not been given the opportunity to explain why he delayed the action he did eventually take, and yet has been held to have taken action too late. In my judgment, there is no evidence in the present case on which the learned judge could properly have found that the action taken by the pilot of the *Archon* was taken too late. There is no question here that when he did take action he took the right action, that is to say, he starboarded, but the charge against him is that he did not give the order to starboard the helm soon enough. In my judgment, there is no evidence to support that charge.

I agree, therefore, that the cross-appeal succeeds, and that the main appeal should be dismissed.

GREER, L.J.—I am of the same opinion, and having regard to the fact that the mind of the court goes 75 per cent. of the way the learned judge took, it is not treating him with disrespect if I deal quite shortly with the other 25 per cent.

With regard to the case made by the *Treherbert*, I am satisfied that the argument which has been presented to this court, to persuade us that the crossing rule did not apply, ought to be rejected. It is conceded that the crossing rule applies unless the collision took place in a narrow channel or in some space of water which has by custom of navigation become equivalent to a narrow channel. It is quite clear, and beyond argument, that in the ordinary sense of the word this collision did not take place in a narrow channel. A channel with only one side of it indicated, and many—I might almost say hundreds—of miles, which can be used upon the other side, cannot by any stretch of language be described as a narrow channel. But it is said that there are authorities which show that a vessel which is approaching a narrow channel may have to take the same kind of action, having regard to the need for skilful navigation, as she would take if she were actually in the channel. That I take to be the effect of cases like *The Kaiser Wilhelm der Grosse* (6), where the vessl was approaching the place where she would have to go between two moles and into a narrow channel, and where it may very well be that good seamanship directs that the position is to be treated as if she were already in the channel and not treated as a case of crossing ships. But those decisions have no application whatever to the present case, where the vessels were a very long way from anything that could be described as the entrance to a channel. The object of art. 25, applying to narrow channels, is the same as the object of the crossing rule; it is in order to secure that the vessels shall pass port to port. It is secured in one way by the crossing rule; it is secured in another way by the provision in the narrow channel rule that each shall keep on her own starboard side.

Looking at the case broadly, I think the cause of this collision was the bad lookout kept on the *Treherbert*. The point which the *Treherbert's* witnesses made was that the ship was put into an impossible position by a vessel, which was coming towards them, porting towards the buoy in a way in which she ought not to have been coming—porting almost as much as to bring her over four or five points—

and it was because of that situation that they were unable to avoid the collision. The learned judge has found, and I entirely agree with his finding, that no such porting ever took place. All that happened was that when the *Archon* was, I think, about two miles from the Elbow she altered her heading in order to counteract the set of the tide, which was on her starboard side. In my judgment, from the time that she altered her heading until the time immediately before the collision, she kept her course and speed. I agree with the view which has been expressed by Lawrence, L.J., that if after that time she had altered her heading, she would have failed to keep the course which was determined partly by her heading and partly by the set of the tide, a course which was obvious on a clear night to the approaching vessel if she had kept a good look-out.

In these circumstances it seems to me clear that the learned judge had no option but to put the principal blame for this collision upon the *Treherbert*; and the only other question on which I desire to say a word or two is whether he was right in his view that some blame must be attached to the *Archon*. I regard the general rules applying to negligence on land as applicable to negligence on the sea, and if a vessel knows that the other vessel is doing the wrong thing, and notwithstanding that, continues to be negligent in her own action towards the other vessel which she knows to be doing something wrong, then the action of the first vessel is the effective cause of the collision, and she ought to pay for the whole of the damage thereby caused. Applying that to this case, assuming that the *Archon* was doing something wrong, although the learned judge has found that she was not, in the course which she kept until she got opposite to the Spit Buoy, still, if the *Treherbert* by careful navigation could have avoided the collision and did not do so, then she and she alone is responsible for the consequences. But in this case we have to deal with the note to art. 21, which puts an onus on the vessel at a time when it meets a wrong-doing vessel, to do its best to avoid a collision; that is to say, the vessel which is ordered by the rule to stand on must not continue to stand on in such a way as to make the collision inevitable if she has any reasonable opportunity and knows that the give-way ship is not going to give way so as to avoid the collision. A duty is then put upon the stand-on vessel to do her best in the circumstances. This is an extremely onerous duty and very difficult to perform, because the stand-on vessel is supposed to keep her course until the very last moment, until the moment when she can reasonably judge by some action that the give-way ship is not going to do the right thing to avoid the collision; then the stand-on ship must cease obstinately to stand on and must take some measures to avoid the collision.

I am satisfied in this case that there is nothing that would justify a conclusion that the stand-on ship failed at the right moment to come to a decision that it was necessary for her to act, but unfortunately, when she did act, that was not sufficient to prevent the negligence of the other vessel resulting in a collision between the two. I agree with Scrutton and Lawrence, L.JJ., that the cross-appeal must be allowed with costs.

Solicitors: *Thomas Cooper & Co.*; *Constant & Constant.*

[*Reported by* Geoffrey Hutchinson, Esq., *Barrister-at-Law.*]

DREW *v.* DINGLE

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Lawrence, JJ.), November 2, 1933]

[Reported [1934] 1 K.B. 187; 103 L.J.K.B. 97; 150 L.T. 219; 98 J.P. 1; 50 T.L.R. 101; 77 Sol. Jo. 799; 31 L.G.R. 417; 30 Cox, C.C. 53]

Road Traffic—Express carriage—Carrying of passengers at separate fares—Inclusive fare for passenger and merchandise—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 61 (1) (*b*).

The owner of a motor lorry, who held neither a public service vehicle licence nor a road service licence, conveyed in it a number of persons, each of whom paid him an inclusive fare for the carriage of himself and a quantity of market produce which he was accompanying to market.

Held: inasmuch as fares were paid separately by the passengers, the vehicle became an "express carriage" within the meaning of s. 61 (1) (b) of the Road Traffic Act, 1930, the fact that the passengers also carried merchandise with them being immaterial, and, therefore, the owner was guilty of using the vehicle without the licences required by s. 67 and s. 72 of the Act respectively.

Notes. Section 61 of the Road Traffic Act, 1930, was repealed by the Road Traffic Act, 1956. See now ss. 39 and 40 of the Act of 1956.

As to public service vehicles under the Road Traffic Acts, see 31 HALSBURY'S LAWS (2nd Edn.) 728 et seq., and for cases see DIGEST Supps., cases 76a et seq. For Road Traffic Act, 1956, see 36 HALSBURY'S STATUTES (2nd Edn.) 795.

Case Stated by Cornwall justices.

Two informations were preferred by the appellant, Drew, a superintendent of the Cornwall police, against the respondent, Dingle, charging him: (i) with having, on Dec. 31, 1932, unlawfully used a motor vehicle as an express carriage, not being the holder of a public service vehicle licence to use it as a vehicle of that class, contrary to s. 67 of the Road Traffic Act, 1930; (ii) with using the same vehicle on the same occasion as an express carriage, not being the holder of a road service licence to use it as a vehicle of that class, contrary to s. 72 of the Act.

At the hearing it was proved or admitted that (a) on Dec. 31, 1932, the respondent was driving his motor lorry at Saltash when he was stopped by a police constable; (b) he was then carrying in the lorry a quantity of market produce and five passengers; (c) the passengers were the owners of some of the market produce which was being carried by the respondent, and were accompanying their produce to the market; (d) two of the passengers, both of Stoke Climsland, paid the respondent 10s. for the conveyance of their produce and themselves from Stoke Climsland to Saltash; two others paid him 7s. each for the conveyance of their produce and themselves; and the fifth, 5s. 3d. for the conveyance of his produce and himself from Callington to Saltash; (e) the respondent held neither a public service vehicle licence nor a road service licence for the lorry.

The appellant contended that the vehicle was being used as an express carriage within the meaning of s. 61 (1) (b) of the Road Traffic Act, 1930, and that the respondent should have both a road service licence and a public service vehicle licence in respect of the lorry. The respondent contended that the lorry was adapted to carry less than eight passengers, and was used on a special occasion; that no separate fares were charged for the passengers; and that the charge was made in respect of the carriage of the produce to market, and would have been the same if the passengers had not been carried.

The justices were of opinion, in so far as it was a question of fact, that the payment of one sum to cover the conveyance of both the passengers and their goods did not constitute the conveyance of passengers at separate fares within the meaning of s. 61 of the Road Traffic Act, 1930, and that no separate fares were charged in respect of the passengers, and that the lorry was a vehicle ordinarily used for the purposes of agricultural trade or business and not adapted for carrying eight or more persons as passengers. The justices came to the conclusion that the motor lorry could not be described as a public service vehicle or an express carriage, and they, accordingly, dismissed the informations.

The question for the court was whether the justices came to a correct decision in law.

By the Road Traffic Act, 1930:

> Section 61: "(1) Public service vehicles shall, for the purposes of this Part of this Act and the regulations made thereunder, be divided into the following classes: . . . (b) Express carriages, that is to say, motor vehicles carrying passengers for hire or reward at separate fares (none of which is less than one shilling for a single journey or such greater sum as may be prescribed) and for a journey or journeys from one or more points specified in advance to one or more common destinations so specified, and not stopping to take up or set down passengers other than those paying the appropriate fares for the journey or journeys in question. (2) It is hereby declared that where persons are carried in a motor vehicle for any journey in consideration of separate payments made by them, whether to the owner of the vehicle or to any other person, the vehicle in which they are carried shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares, whether the payments are solely in respect of the journey or not."
>
> By s. 67: "(1) No person shall cause or permit a motor vehicle to be used on any road as . . . an express carriage . . . unless he is the holder of a licence (in this Act referred to as 'a public service vehicle licence') to use it as a vehicle of that class . . . (3) If any person causes or permits a vehicle to be used in contravention of this section he shall be guilty of an offence."
>
> By s. 72: "(1) Subject to the provisions of this section the Commissioners may grant to any person applying therefor a licence (in this Act referred to as a 'road service licence') to provide such a road service as may be specified therein, and a vehicle shall not be used as . . . an express carriage except under such a licence."

Wilfrid Lewis for the appellant.
Dingle Foot for the respondent.

LORD HEWART, C.J.—This is an appeal, by way of Case Stated, from a decision of justices, and, in my opinion, it is clear that it ought to be allowed. The contention of the appellant was that the motor vehicle referred to was being used as an express carriage within the meaning of s. 61 (1) (b) of the Road Traffic Act, 1930. [His Lordship read the subsection and continued:] I think that was so. Much has been said, and well said, by counsel for the respondent, on the question of separate fares, but it seems to me that the evidence was all one way. The fares were paid separately by the passengers, and it is immaterial that those passengers also carried some market produce with them. It is clear on these facts that this vehicle satisfies all the requirements of an express carriage, and that there were two offences committed, in that, first, there was no public service vehicle licence and, secondly, no road service licence. I think, therefore, the case ought to go back to the justices with a direction that the offences charged have been proved.

AVORY, J.—I am of the same opinion. It is difficult to tell what was in the minds of the justices when they said in their opinion that this lorry was a vehicle ordinarily used for the purpose of agricultural trade or business and was not adapted for carrying eight or more persons as passengers. I am satisfied that they were wrong in their opinion that the conveyance of passengers and their goods did not constitute the conveyance of passengers at separate fares. The passengers were being carried for hire or reward within s. 61 (1) (b) of the Road Traffic Act, 1930, and the only question before the justices really was whether they were being carried for hire or reward at separate fares. On the facts found it is clear that they had paid separate fares for being carried, and, to my mind, it is immaterial that they were carrying with them something in the nature either of luggage or of market produce. I think this case ought to be sent back to the justices with the direction of this court that the offences have been proved.

LAWRENCE, J.—I agree. I think the construction which is to be placed on the words "separate fares" in s. 61 (1) (b) of the Road Traffic Act, 1930, appears clearly from the contrast which is drawn in paras. (a) (b) and (c), s. 61 (1), between a contract for carrying passengers at separate fares and a contract for the use of the vehicle as a whole. When those words are contrasted with the words used in s. 61 (2), as to separate payments made by persons, it is clear that the words in s. 61 mean "at separate fares as between the various passengers." I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Treasury Solicitor*; *Foot, Bowden & Blight*, Plymouth.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

GRAY *v.* BLACKMORE

[KING'S BENCH DIVISION (Branson, J.), October 13, 1933]

[Reported [1934] 1 K.B. 95; 103 L.J.K.B. 145; 150 L.T. 99; 50 T.L.R. 23; 77 Sol. Jo. 765]

Insurance—Motor insurance—Exception from insurer's liability—User connected with motor trade—Validity—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 38.

The Road Traffic Act, 1930, provides, by s. 35, that it shall not be lawful for any person to use a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person such a policy of insurance or such security in respect of third-party risks as complies with the requirements of Part II of the Act, which contains ss. 35 to 44. By s. 36 the policy must, in order to comply with those requirements, be one which insures the person insured against any liability he may incur in respect of the death of or bodily injury to any person caused by or accruing out of the use of the vehicle on a road. By s. 38 any condition in a policy given for the purposes of Part II of the Act providing that no liability shall arise under the policy in the event of some specified thing being done after the happening of the event giving rise to a claim under the policy is to be of no effect.

The owner of a motor car injured a pedestrian while driving the car on a road for the purposes of his business as a garage proprietor. The policy in force with relation to the car excepted from the risks insured against claims arising out of the use of the car for purposes connected with the motor trade. In an action by the assured claiming a declaration that the insurers were liable to indemnify him against any amount he might have to pay to the injured person,

Held: on construction, the policy did not cover the car if it were being used for any purpose connected with the motor trade, and on the evidence at the time of the accident the car was being used for such a purpose, but the exception in the policy did not relate to some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy, and, therefore, it was not rendered ineffective by s. 38 of the Road Traffic Act, 1930, the insurers were not precluded from averring that the claim arose from a risk excepted from the policy, and the action failed.

Notes. As to limitations in a motor insurance policy, see 22 HALSBURY'S LAWS (3rd Edn.) 356 et seq., and for cases see DIGEST Supps., tit. Insurance, case No. 3217a et seq. For Road Traffic Act, 1930, see 24 HALSBURY'S STATUTES (2nd Edn.) 569.

Action against an underwriter of a policy of insurance.

The plaintiff was a garage proprietor and the owner of a Morris Oxford car. The defendant, one of Lloyd's underwriters, had subscribed to a policy issued to the plaintiff to cover use of the car from June, 1932, to June, 1933. The proposal form signed by the plaintiff disclosed that the plaintiff's business was that of a garage proprietor. The policy itself provided (i) that the proposal form should be the basis of the policy and considered as incorporated in it; (ii) that the underwriters should indemnify the plaintiff against liability for injuries to other persons caused by the user of the car; (iii) that the policy should not cover any liability incurred while the car was being used for other than private purposes. "Private purposes" was defined as meaning social, domestic and pleasure purposes, and use by the plaintiff in person in connection with his business. The policy further provided that it should not cover the plaintiff if the car was being used for purposes connected with the motor trade.

The certificate issued by the underwriters to the plaintiff, pursuant to s. 36 (5) of the Road Traffic Act, 1930, was in the prescribed form and cl. 6 thereof was as follows:

> "Limitations as to use. 'Private purposes' which means use for social, domestic and pleasure purposes, and use by the policy holder in person in connection with his business or profession. The policy does not cover use for hiring, racing, pace-making, reliability trial or speed testing, commercial travelling, the carriage of goods or samples in connection with any trade or business, or use for any purpose in connection with the motor trade."

On Nov. 16, 1932, the plaintiff was informed that a Buick car had broken down and he was asked to go to its assistance. He did so, in the insured car, found that the Buick car could not be repaired on the spot, and proceeded to tow it to his garage. While so doing he struck and injured a third person, one Hamilton, who began an action against him for damages for injuries caused by the plaintiff's negligence. The plaintiff thereupon instituted the present action claiming a declaration that he was entitled to be indemnified under the policy against any sum for which he might be found liable.

The defendant pleaded that the accident occurred while the car was being used for purposes connected with the motor trade, which was a risk excepted from the policy. To this the plaintiff replied that the defendant had issued to him a certificate stating that the policy was issued in accordance with the provisions of the Road Traffic Act, 1930, and he was, therefore, estopped from averring that the policy did not apply.

The Road Traffic Act, 1930, provides as follows:

> "Section 35 (1): Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Part of this Act.
>
> "Section 36: (1) In order to comply with the requirements of this part of this Act a policy of insurance must be a policy which . . . (b) insures such person . . . as may be specified in the policy in respect of any liability which

> may be incurred by him . . . in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road . . . (5) A policy shall be of no effect for the purposes of this part of this Act unless and until there is delivered by the insurer to the person by whom the policy is effected a certificate . . .
>
> in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed. . . . Section 38: Any condition in a policy or security issued for the purposes of this part of this Act, providing that no liability shall arise under the policy or security or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall be of no effect in connection with such claims as are mentioned in para. (b) of sub-s. (1) of s. 36. . . ."

Beyfus, K.C. and *Manningham-Buller* for the plaintiff.
Schiller, K.C. and *Voss* for the defendant.

BRANSON, J.—In this case the plaintiff sues for a declaration that he is entitled to be indemnified under a policy of insurance subscribed by the defendant against a claim that is being made against him by one Ronald Hamilton, who alleges that he has suffered damage by reason of the negligent use by the plaintiff of a certain motor car. The defence is that, whereas the policy is admitted, the car was at the time of the accident being used by the plaintiff in such a way that it was not covered by the policy, and, therefore, whether the plaintiff be liable or not, the defendant has no interest in the matter whatever.

The decision depends in the first instance upon the question of fact, that is whether, taking the terms of the policy as they appear therein, the plaintiff was covered in respect of the car at the time when the accident happened. The defendant alleges that he was not. A second question arises, if the fact is so found, namely whether, in spite of the term of the policy on which the defendant relies as showing that this car was not being used within the policy—in other words, that he was not on risk at the time—the effect of the Road Traffic Act, 1930, is so to vary the rights of the plaintiff and the defendant as to make the plaintiff entitled to indemnity in respect of this accident.

I think the first matter to consider is the policy as it stands. The policy was issued in pursuance of a proposal form. In that form the plaintiff described himself as a garage proprietor, but his proposal for insurance was for the insurance of a Morris Oxford car under Class A. Class A covers only private cars, and the plaintiff was aware, when he applied for a policy of that class, that, if he asked for one of the other classes in which cars may be used for business purposes, he would have to pay a higher premium. His form was accepted and a policy was issued in respect of it. The material part of the policy is to be found in the clause headed "General Exceptions," and that reads as follows:

> "This policy does not cover any accident, injury, loss, damage, and (or) liability caused, sustained or incurred whilst any motor car in respect of or in connection with which insurance and (or) indemnity is granted under this policy is: (i) Being used otherwise than for private purposes as hereinafter defined . . ."

A few lines further down, under a large printed heading 'Definition of 'Private Purposes,' " the following clause appears:

> "For the purposes of this policy the term 'private purposes' means social, domestic and pleasure purposes and use by the assured in person in connection with his business or profession. The term 'private purposes' does not include use for hiring, commercial travelling, racing, pace-making reliability trial or speed testing, the carriage of goods or samples in connection with any trade or business, or use for any purposes in connection with the motor trade."

So that the policy does not cover the car while being used otherwise than for private purposes as so defined; and if in the present case it was being used at the material time for any purpose in connection with the motor trade then, upon the plain terms of the policy, the policy did not cover the car at that time.

An attempt has been made to say that the two branches of that clause are mutually inconsistent, and that, the policy having been issued in pursuance of a proposal form made by a garage proprietor, it must be read as though the second sentence of the clause was deleted and as allowing the assured to use the car in connection with his business. I cannot so treat the clause.

To ascertain what is the definition of "private purposes," it is necessary to read the whole definition, and the definition contains two branches, one of which includes something which primâ facie would not come under the heading "private purposes," and the second of which excludes something which that first branch has brought in. It is impossible to treat them as mutually inconsistent. One must read the whole thing together and come to a conclusion upon it. If that is done, there is no difficulty at all. If the assured is one whose business is the motor trade, the second branch prevents the first branch from allowing him to use the car for the purpose of his business. In my opinion, therefore, it is quite clear that, upon the policy as it stands, if this car was being used for any purpose in connection with the motor trade the policy did not cover it.

In pursuance of that policy, the defendant issued a certificate of insurance under the Road Traffic Act of 1930. That certificate is in the prescribed form, and contains upon the face of it under the heading "Limitations as to use," the provision that the policy does not cover the use of the car for any purpose in connection with the motor trade. In view of that express statement upon the face of the certificate of insurance, I cannot think there can be anything in the next point taken upon this policy, to wit, a point that some estoppel arises to prevent the defendant from relying upon that limitation as against the assured. The suggestion is that, because at the foot of the certificate of insurance there is a certificate that the policy is issued in accordance with the provisions of the Road Traffic Act of 1930, and because it is contended that the policy is not in accordance with the provisions of the Road Traffic Act if it contains any limitations as to user of the car at all, therefore, the defendant is in some way estopped from saying that the limitation has any operation as against the plaintiff. It may be my own fault, but I cannot see how any estoppel can begin to arise in the matter, and I say no more about that point. That being so as to the position upon the policy as it stands, the question of fact arises: Was this car being used for any purpose connected with the motor trade when the accident happened? If it was, then, unless help can be obtained for the plaintiff from the Road Traffic Act, his claim in this action must fail.

I proceed then to discuss the question of fact. The facts were these. A car belonging to a Mr. Lyons was being driven by one of his brothers in London, and broke down in Charles-street, Mayfair. The brother who was driving it went in the first instance to University Motors and gave them an order to repair the car on the road if they could, and, if not, to move it, but that order was cancelled and the plaintiff was employed instead. Lyons then rang up the plaintiff and told him that, if he could repair the car on the spot, he should do so, and, if not, to do what he thought right. The plaintiff said that, when he got the telephone message, he was also told that Mr. Lyons was concerned about the car being left unattended, as he was afraid the police would issue some kind of a summons. The plaintiff then started off in his Morris car, the car covered in the policy as a private car to be used in the way in which I have held it was to be used. In the car, he took a chaffeur not in his employ, but who happened to have the afternoon off and was willing to assist. He arrived at Charles-street, found that the car could not be repaired on the spot and took it in tow with his Morris car. He says that he intended just to take it round the corner so that it could have a new lease of life, so to speak, by being left in a different place from that which it had occupied for some time, in order to minimise any chance of unwelcome attention by the police. The accident happened when he had put the tow-rope from his Morris to the Buick and was starting to tow the Buick out of Charles-street. He says that he never intended to tow the Buick all the way home to his garage; he intended to ring up a garage with a breakdown van and to get them to tow the car after he had placed it in this new position round the corner in some quiet place in the neighbourhood. In his evidence he said that, in doing this little job of towing, he considered himself as doing a friendly act in order to prevent the chance of a summons being issued against his friend Lyons; that it was no part of his business as a garage proprietor to do this towing; and that he never intended to make any charge for it.

Upon those facts, it seems to me quite plain that the plaintiff went to the scene of the accident in pursuance of an order given him as a garage proprietor to go and see what was the matter, repair the car on the spot if possible, and arrange for its removal if not possible. In other words, he was in charge of the car as the person concerned to repair it and remove it from the road. I think that, when he went there, he went in order to do this work, which was work in connection with the motor trade. I think that, while he was there, he was doing work in connection with his business, which was a business connected with the motor trade; and I think that the attempt which was made in argument, and to some extent by the evidence of the plaintiff, to suggest that, having gone there in the one capacity, he suddenly switches over to another capacity in order to do the towing is a hopeless attempt to get out of what is the real fact of the case. I accept the statement that the plaintiff did not intend to make a specific charge for the proposed towing, but he was proposing to make a charge for the work done, and whether he towed the car himself or sent for someone else, the whole of what he was engaged upon was work in connection with his business, and, therefore, work connected with the motor trade. I think it is plain that, before the relevance of the distinction became apparent to him, the plaintiff was of the same view, because, when he gave notice of the accident to his underwriter, he said: "While about to commence to move off for the purpose of towing another car with my car, etc.," and when the underwriter's agent came to interview him about it and take a statement from him he said: "On Wednesday last I received a telephone message," not "from my friend David Lyons," but "from one of my customers," to "the effect that his brother's Buick had broken down. He requested that I should drive over at once and attend to the car and if necessary arrange for its removal." At the end of the statement he says: "I was, of course, engaged in my business as a garage proprietor at the time." A little higher up, with regard to towing, he says, "I then proceeded to tow this Buick off to a more suitable place to see whether I could remedy the defect." I find, therefore, as a fact that, at the time when the accident happened, the Morris car was being used by the plaintiff for a purpose in connection with the motor trade; and, therefore, unless something contained in the Road Traffic Act of 1930 has altered the rights of the parties under the policy, the words of the policy under which the policy is stated not to cover any accident or liability sustained while the car is being used otherwise than for private purposes as hereinafter defined prevent the plaintiff from obtaining the declaration which he seeks.

The only question left, then, is whether there is anything in the Road Traffic Act, 1930, which alters the rights of the parties as determined by the policy. I am afraid that there is not a great deal of help to be got out of the cases which have already been decided under the Road Traffic Act, 1930, because in none of them was the precise point with which I have to deal raised for decision. I propose, therefore, to turn first of all to the statute and to see what it says. The Act is one to make provision, among other things, for the protection of third parties against accidents arising out of the use of motor vehicles. That part of its object is dealt with in Part II of the Act.

It seems to me that the best way of trying to understand the provisions of the Act is to look at the series of sections, beginning with s. 35, the first section of

Part II. If a person acts in contravention of that section he is made liable to fine or imprisonment or both. So there you have an enactment prohibiting the use of the vehicle upon the road unless the person using it is covered against third-party risks in respect of that user. Then s. 36 provides what the policy must contain if it is to comply with the provisions of the Act, that is, what cover the man who is using the motor vehicle upon the road must have if he is to escape the consequences of s. 35. In order to do so, he has to have a policy of insurance which is issued by an authorised person and insures him in respect of any liability which may be incurred by him in respect of death or bodily injury caused by or arising out of the use of the vehicle on the road. That, it seems to me, is simply prescribing what cover the man must have if he is to escape the consequences of s. 35. Section 35 relates to the use by him of a motor car upon the road, and it is that use by him of that vehicle on the road that has got to be covered or he is liable under s. 35, and all that s. 36 does is to prescribe the kind of cover that he must have in order to escape the consequences of using the vehicle in contravention of s. 35.

What is sought in this case is a construction of the section which should say that any policy issued in respect of any vehicle which may be used on the road must cover that vehicle whenever used on the road for any purpose for which any vehicle can be used on the road. I do not see that the statute says anything of the sort. It is defining the protection a man must have if he is to escape the consequences of s. 35. That that is so appears from the provisions of s. 36 itself. It is obvious from the terms of s. 36 (5) that the policy may contain conditions the nature of which is left completely open. That clearly contemplates that the policy may be issued subject to certain conditions, and unless they are to be conditions limiting the liability of the underwriter, what possible reason can there be for their inclusion in the certificate, the object of the certificate being to make clear to whom it may concern subject to what conditions, if any, the policy has been issued. Section 37 deals with securities, and has no reference to the question I have to decide.

Then comes s. 38, which is relied upon by the plaintiff as doing away with the provision of the policy under which it is agreed that the policy shall not cover the car when it is being used otherwise than for private purposes. The argument is that a provision in the policy that the car shall not be covered if it is being used for a certain purpose is rendered of no effect by this clause. It is said that s. 38 must be read without a comma in it, and, as I understand it, in the following way: "Any condition (a) that no liability shall arise or (b) that any liability so arising shall cease in the event, &c., shall be of no effect." It seems to me that that is an impossible construction to put upon the section, whether you put a comma after "cease" or not. The section seems to me to be perfectly expressed as it appears and to provide that any condition in the policy providing that no liability shall arise under it in the event of some specified thing being done or omitted to be done after the event giving rise to a claim under the policy, shall be of no effect. In other words, the words "in the event of some specified thing being done, &c." apply equally to the words "that no liability shall arise . . ." as they do to the words "that any liability so arising shall cease." I think the matter may be tested in this way, if there are two alternatives, and I leave out one and deal with the other by itself. So treated, the section, according to the plaintiff's argument, would read: "Any condition providing that no liability shall arise under the policy shall be of no effect," which is obviously a provision which the statute never meant to enact; and the attempt to break up the words of the section as suggested by the plaintiff leads to what seems to me to be a nonsensical provision in the statute. It is said that there is no logical reason why, if Parliament intended, as it obviously did intend, to enact that the failure to observe conditions as to something to be done or omitted to be done after the happening of an accident should not be allowed to affect the underwriter's liability in cases of third-party claims, the enactment should not be read as meaning that, no matter what the parties agreed in the policy, if the car did an injury to a third party the underwriter should have to pay, but it seems to me that there is all the difference in the world between the two positions. A man may agree to have certain cover, and he goes forth upon the road covered according to that agreement. Before an accident happens, what offence has he committed? He has got a policy which for all that he has hitherto done covers him, and he is saved from s. 35; and yet if the policy contains conditions as to something which he must do after an accident has happened or something which he must not do after an accident has happened, a failure on his part in that respect may enable the underwriter who was on risk at the time when the accident happened to escape, and one can well understand the legislature saying that that shall not be permitted.

If all was in order between the assured and the underwriter when the accident happened, the position cannot be altered by subsequent breaches or by acts or omissions on the part of the assured so as to make him less able to compensate the person who has been injured. But it would be an entirely different matter for the legislature to go back to a time before the accident had happened and to say that, if anyone chooses to underwrite a policy in connection with a motor car, no limitations as to the time during which, or as to the persons by whom, or as to the manner in which, that vehicle can be used can have any avail to save the underwriter from liability. If that were the state of the law, it would mean that there could be no such policies as are issued at present—policies, for example, where a man insures two or three cars, warranting that only one of them shall be in use at a time, and thereby gets a reduction of premium. No underwriter would underwrite such a policy if it could be said that, ex post facto, a breach of that condition could not be relied upon, and that he might be liable for the damage done by three cars out at one time, although he had only insured two. Similarly, one might imagine any number of ridiculous positions which would arise. I see nothing in the statute which prevents an underwriter and an assured from agreeing to a policy with any conditions that they choose; and if the assured takes the car upon the road in breach of those conditions it cannot thereby throw a greater obligation upon the underwriter. All that happens is that he is on the road without a policy which is covering him under the Road Traffic Act, and he is liable under s. 35 as though he had never taken out a policy at all. He is using a car which is not covered by a policy which insures him under s. 61 (1) (b). That is the result of it, not to put an extra burden upon people who have never agreed to undertake it.

In my view, therefore, upon the plain words of the statute, this action is misconceived. Having come to the conclusion upon the facts that the car was being used for a purpose which was not covered by the policy at all the time in question, I see nothing in the Road Traffic Act, 1930, which enables the assured, the plaintiff, to say: "Notwithstanding that I was using this car in the way in which the policy says, not that I was not to use it, but that I could not use it and retain my cover, you are still liable to pay me under the policy."

For those reasons, I have come to the conclusion that this action fails and must be dismissed with costs.

Solicitors: *Emanuel, Round, & Nathan*; *William Charles Crocker.*

[*Reported by* V. R. Aronson, Esq., *Barrister-at-Law.*]

SMITH *v.* EVANGELIZATION SOCIETY INCORPORATED TRUST

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), February 16, 17, 20, 1933]

[Reported [1933] Ch. 515; 102 L.J.Ch. 275; 149 L.T. 6; 49 T.L.R. 262]

Easement—Light—Extent of right—Amount of light at beginning of period of prescription—Skylight—Quality of light therefrom.

In 1912, at the beginning of the period of prescription, a room in the plaintiff's premises was lit on the east side by a window measuring thirty square feet and on the west by an opening in the wall running along the entire length of the room from floor to ceiling. In addition there was a large skylight in the roof. In 1916 the plaintiff partly closed the opening in the west wall with iron sheeting, and in 1924 he did away with the skylight and closed the remaining part of the opening on the west side, placing therein a window and a door with glass panels. At the same time he enlarged by some thirteen square feet the window on the east side. In an action by the plaintiff for an injunction restraining the defendants from obstructing the light from the east window as enlarged,

Held: if the plaintiff, by closing the opening in the west wall and removing the skylight, had not added to the need of light from the east window there would have been no need for the enlarged light; the plaintiff's right must be measured by the amount of light which he enjoyed through the east window at the beginning of the period of prescription and he could not increase that right by altering his tenement during the period of prescription; and, therefore, he was not entitled to the injunction which he sought.

Per LAWRENCE, L.J.: There is no analogy between reflected light and the direct light coming into a room through a skylight. Although light coming through a skylight enters a room at a different angle from that at which light coming through a side window enters it, the light is, nevertheless, direct light, and it is of the same, if not of a better, quality as the light coming through a side window.

Notes. As to the right to light, see 12 HALSBURY'S LAWS (3rd Edn.) 582 et seq., and for cases see 19 DIGEST 123 et seq. For Prescription Act, 1832, see 6 HALSBURY'S STATUTES (2nd Edn.) 669.

Cases referred to:

(1) *Colls* v. *Home and Colonial Stores, Ltd.*, [1904] A.C. 179; 73 L.J.Ch. 484; 90 L.T. 687; 53 W.R. 30; 20 T.L.R. 475; 19 Digest 123, *830*.

(2) *Yates* v. *Jack* (1866), 1 Ch. App. 295; 35 L.J.Ch. 539; 14 L.T. 151; 30 J.P. 324; 12 Jur.N.S. 305; 14 W.R. 618; 19 Digest 136, *920*.

(3) *Warren* v. *Brown*, [1902] 1 K.B. 15; 71 L.J.K.B. 12; 85 L.T. 444; 50 W.R. 97; 18 T.L.R. 55; 46 Sol. Jo. 50, C.A.; 19 Digest 137, *929*.

(4) *Ankerson* v. *Connelly*, [1906] 2 Ch. 544; 75 L.J.Ch. 804; 95 L.T. 716; 22 T.L.R. 743; affirmed, [1907] 1 Ch. 678; 76 L.J.Ch. 402; 96 L.T. 681; 23 T.L.R. 486, C.A.; 19 Digest 144, *985*.

(5) *Dyers' Co.* v. *King* (1870), L.R. 9 Eq. 438; 39 L.J.Ch. 339; 22 L.T. 120; 34 J.P. 373; 18 W.R. 404; 19 Digest 144, *983*.

Appeal by the plaintiff from an order of MAUGHAM, J.

The facts appear from the judgments.

F. D. Morton, K.C., and *G. P. Slade* for the plaintiff.

J. M. Gover, K.C., and *J. W. M. Holmes* for the defendants.

LORD HANWORTH, M.R.—This appeal raises an interesting point on which it appears that there is no direct authority even among the many which illustrate the difficulties that arise in relation to ancient lights. The facts which raise the point are simple. In July, 1931, the defendants raised a screen against or close to a window belonging to the house of the plaintiff—an eastern window, as to part of which the plaintiff has a right to an easement of light over the defendants' premises, a right acquired during a period of twenty years, the twenty years being a period which the learned judge has found to commence on April 20, 1912, and a right which the learned judge finds has not been in any way qualified, still less abandoned, by the alterations which have been made in the window at the eastern part of the plaintiff's premises, that window having been much enlarged and made into the form of a parallelogram as compared with a triangle which it was at the earlier state of the premises.

The alterations were made in 1924, and up to that time there were skylights over the room which belongs to the plaintiff. It is a room which stands on the plaintiff's own premises; it is lighted from the west by lights and a glass door through which light is transmitted, in addition to the skylights which existed, as I say, up to 1924. Before 1924, on the western side, if I remember rightly, the room had not been enclosed, but the alterations that were made in 1924 altered and improved the space as a room, but took away the skylights through which a large amount of light came to the room. They provided access for an important quantum of light, and the learned judge holds upon the facts, on the details of which he accepted the plaintiff's evidence, that at the present time, if lights of a similar character to the old skylights were placed in the modern roof of the room—apart from, if there is any question of, the prejudice derived from direct as compared with horizontal light, which I will deal with in a moment—there could be no nuisance caused by the defendants' screen, in the sense in which that phrase is used in considering an infringement, especially since *Colls* v. *Home and Colonial Stores, Ltd.* (1).

The evidence about the present condition of the premises, and accepted by the learned judge, stands in this way. He recalls that Mr. Waldram, the expert called for the plaintiff, gave evidence, and he stated three things which I propose fully to accept. In the first place, he stated that the room has sufficient light for ordinary purposes on the west, as the buildings to the west remain to-day, and that although there is practically no light coming from the east. Next he said this:

> "If the two skylights were in some way replaced so as to give the light which was admitted into the room, the effect of the obstructing screen would be to leave the occupants of the room with sufficient light anywhere near the west window and to make the occupants of the eastern side rely almost entirely on the skylights."

I accept those propositions. Then he adds to that this remark:

> "The light given by the skylights is sufficient for many purposes, while very unsatisfactory for certain purposes, in particular for clerical work. . . . For general purposes, if we reconstruct the skylights, there would be sufficient light in the room for the ordinary purposes of mankind."

The learned judge on that holds that the room is adequately lit for ordinary purposes, and especially that, if there were skylights still existing, it would be adequately lit and no nuisance could arise. Counsel for the plaintiff, as a second and subsidiary point, has called our attention to the fact that to certain intending tenants the vertical light might not be as satisfactory as a horizontal light, and it may be, indeed, that there is some evidence that a lesser sum would be obtained as the annual value of the premises if it enjoyed vertical light as against horizontal light. But there was really no evidence that for ordinary purposes and for what may be called the major part of intending tenants, the light was not satisfactory for the ordinary purposes to which the room was being put, and as the learned judge does not find that, in fact, there has been any diminution in value, I think one

A must accept what the learned judge has found to the full, namely, that if the skylights were reconstructed there would be sufficient light in the room for the ordinary purposes of mankind, using that phrase in the sense in which it is required by the decision in *Colls* v. *Home and Colonial Stores, Ltd.* (1).

That being so, we have to consider what is the effect of the alterations which were made by the plaintiff in 1924. In *Colls' Case* (1) ([1904] A.C. at p. 185) B LORD HALSBURY uses the words which were quoted by the learned judge below.

> "The test of the right" [that is to light] "is, I think, whether the obstruction complained of is a nuisance, and, as it appears to me, the value of the test makes the amount of right acquired depend upon the surroundings and circumstances of light coming from other sources, as well as the question of the proximity of the premises complained of. What may be called the uncertainty C of the test may also be described as its elasticity."

It would seem quite plain from those words, therefore, that we have to consider what was the light coming through the skylight as well as the light which was coming through the eastern window. LORD MACNAGHTEN ([1904] A.C. at p. 187) said this:

> D "It was not sufficient to constitute an illegal obstruction, that the plaintiff had, in fact, less light than before; nor that his warehouse, the part of his house principally affected, could not be used for all the purposes to which it might otherwise have been applied. In order to give a right of action, and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying E on his accustomed business."

and LORD DAVEY says ([1904] A.C. at p. 203):

> "It does seem to me unreasonable to hold that where a man for his own convenience or profit converts two or more rooms of his house into one without making provision for lighting them, or converts a portion of his house into a photographic studio, or puts it to some similar purpose, he can suddenly call F upon his neighbour to leave him a supply of light which is rendered necessary only by such alterations, and thereby impose what is in substance and in truth an increased burden on his neighbour."

It is quite true that those observations of LORD DAVEY may be attributed to the facts as they were in *Colls' Case*, but the reasoning of them seems to apply in a case where the plaintiff alters the condition of his premises and deprives himself G of a certain quantum of light during the period of the twenty years which has to be considered before the commencement of the action. These words that I have quoted from LORD HALSBURY and LORD MACNAGHTEN clearly indicate that the plaintiff does not obtain a right to a quantum of light measured absolutely, but to a quantum of light measured relatively.

H In the present case there were skylights until 1924, and, starting in 1913, the light from the eastern window was relatively unimportant. What, then, has been gained by prescription during the twenty years? As LORD HALSBURY said ([1904] A.C. at p. 183):

> "There has been a complete uniformity of decision upon the construction of the statute, that it has made no difference in the right conferred, but is only I concerned with the mode of proof; but, although I quite concur with this construction, which is supported by an overwhelming body of authority, yet I cannot but think the language of the statute has led to some of the decisions which your Lordships are now called upon to review."

What is it that he gains by the lapse of the twenty years? He gains, when proof is given, the right to light; but the section says:

> "When the access and the use of light to and for any dwelling-house shall have been actually enjoyed for the full period of twenty years";

it is not merely the access, but the use of the light which must be proved to have been enjoyed, and thereupon, when that proof has been given, the right to the access and to the use is to be deemed absolute and indefeasible. It seems that consideration must be given to the condition of the premises at the commencement of the period of twenty years. It does not seem possible that the twenty years could be used by the plaintiff upon a crescendo of the light which he asks to gain a right to. One must consider what was the access and what was the use of light which had been actually enjoyed therewith for the full period of twenty years, and that seems to carry one back to the condition of the premises as they stood at the commencement of the twenty years, in accordance with the rule laid down by LORD HALSBURY, that one has to consider the surroundings and circumstances of light coming from other sources. A B

In the words of LORD CRANWORTH in *Yates* v. *Jack* (2), which WRIGHT, J., quoted in *Warren* v. *Brown* (3) ([1900] 3 Q.B. at p. 729)—a decision which LORD HALSBURY says was correct: C

> "When the full statutory time is accomplished, the measure of the right is exactly that (neither more nor less) which has been uniformly enjoyed previously."

That word "uniformly" seems of importance, and, indeed, is indicated by the terms of s. 3 of the Prescription Act. It seems to me that MAUGHAM, J., has followed that reasoning, and the principle and the statements in the speeches in *Colls' Case* (1) accurately and correctly, and more than that, he has adopted the reasoning of WARRINGTON, J., in *Ankerson* v. *Connelly* (4), and in the Court of Appeal, to which that case was afterwards taken. It is said that *Ankerson* v. *Connelly* (4) does not provide an authority in the present circumstances, because the court were there dealing with rights which had already been consummated by the lapse of the twenty years; but the reasoning to which I have already referred in *Colls' Case* (1) seems to be the same reasoning which was adopted in *Ankerson's Case*, and quite apart from the question whether the right was an inchoate right or one which had been consummated by the lapse of time. WARRINGTON, J., as he then was ([1906] 2 Ch. at pp. 547, 548), said this: D E F

> "The defendant having shut out from his window all the light from the west, which previously he enjoyed, all the light from the north, the whole of the vertical light from the sky, and all the light from the east except that which comes through the only aperture which is material, that is the gap, has brought about this effect, that a building erected on the servient tenement which, before the alteration of the dominant tenement, would not have been a legal interference with the claim of the dominant tenement would now be such an interference"; G

and he holds that such an alteration by the plaintiff cannot, I will not use the words "increase the burden," but make more essential the right to the plaintiff which he now claims.

In the Court of Appeal there are passages which, to my mind, are of importance. LORD COZENS-HARDY ([1907] 1 Ch. at p. 682) says this: H

> "It is no longer sufficient for a plaintiff to say: 'Oh, you are depriving me of a portion of light, and a portion of light which is so obviously important to me —because it is the only light which I, by acts of my own, have chosen to leave to my own premises—that I am entitled to an injunction.'" I

And ([1907] 1 Ch. at p. 683) he says this:

> "In a case like that it seems to me that when the defendant" [the defendant in that case was the owner of the right] "by his own act has blocked out practically the whole of the light which the room had before, it does almost necessarily and inevitably follow that the obstruction (even the complete obstruction) of the small remnant of light which remained would not by itself have been an actionable wrong in respect of the old light to the premises; and that, I think, is the view which the learned judge really took."

SIR GORELL BARNES, as he then was ([1907] 1 Ch. at p. 685) said:

> "The result, therefore, is that before these alterations on the dominant tenement the erection which the plaintiffs put up would not have been a legal interference with the rights to light of the dominant tenement; and although, as matters now stand, some light would in fact be cut off by blocking up the space which is left after the alterations which have been made by the defendant, the alterations cannot in fact affect the plaintiffs' rights, because they had that right before to block up to that extent."

There is no trace in that case of the reasoning depending upon the completed acquisition of the rights. The test is derived from a proper application of *Colls' Case* (1), and the observations that are made in *Colls' Case* (1) are to the effect that one must look upon the surroundings and the circumstances of light coming from other sources. It appears to me that the learned judge has properly directed himself in accordance with those observations, and he has come to the conclusion that, unless the plaintiff himself had added to the necessity of this light coming from the eastern window, there was no need for that light; that as the premises stood at the commencement of the period of twenty years they were abundantly lighted, and no nuisance would have been caused by the blocking-up of the portion of the eastern window which has acquired a right to ancient lights. In those circumstances he finds that the premises, in the condition in which they started at the commencement of the twenty years, were sufficiently lighted, that no nuisance was created by what has been done by the defendants in that sense, and on that ground he held that the action was not maintainable.

For the reasons which he gave, and for those which I have ventured to add, I think he was right, and the appeal must be dismissed with costs.

LAWRENCE, L.J.—The question in this case is whether MAUGHAM, J., was right in holding that for the purpose of determining whether the screen erected by the defendants constitutes an actionable nuisance, he ought to have had regard to the condition of the room in question as it existed at the commencement of the period of prescription, or whether he ought to have had regard to the present altered condition of that room.

At the commencement of the period of prescription in 1912 or 1913 (it is immaterial to determine which of those two dates is the correct one) the room, which measures 19 ft. in breadth from east to west, and 24 ft. in length from north to south, was lit on the east side by a window containing a superficial area of 30 sq. ft., and on the west side by an opening along the entire length of the room from the floor to the ceiling. In addition to this window and opening, the room had a large skylight between 3 ft. and 4 ft. in width, running across the room from the ridge to the eaves on both sides of the roof. In these circumstances the learned judge found as a fact that if the screen had been erected at the commencement of the period of prescription it would not have constituted an actionable nuisance, and I agree with that finding. During the period of prescription the plaintiff made certain alterations to the room, substantially affecting the light coming to it. In 1916 he partly closed the opening on the west side with corrugated iron sheeting, and in 1924 he altered the roof, entirely doing away with the skylight, and closed up the remaining part of the opening on the west side, placing a window and a door with glass panels in the part so closed up. At the same time the plaintiff enlarged the window on the east side by about 13 sq. ft.

The learned judge has found as a fact that the screen erected by the defendants substantially darkens the room in its altered condition and would constitute an actionable nuisance if regard is to be had to that condition. I also agree with that finding. It is clear from the judgment of the learned judge that in arriving at his findings of fact he fully recognised that since *Colls* v. *Home and Colonial Stores, Ltd.* (1), the court, in considering whether an obstruction to the access of light constitutes an actionable nuisance or not, must have regard to other sources of light which the room possesses, disregarding, however, any access of light of which the plaintiff may be deprived at any time. In reaching his conclusion on the main point of this case, namely, that the issue of actionable nuisance or no actionable nuisance at the end of the period of prescription falls to be determined according to the conditions prevailing at the commencement of that period, the learned judge has relied upon the principle recognised by the House of Lords in *Colls' Case* (1) and by the Court of Appeal in *Ankerson* v. *Connelly* (4) that the owner of the dominant tenement cannot by any act of his own during the period of prescription impose a new burden upon his neighbour. In my opinion, the cases upon which the learned judge has so relied are distinguishable from the present in that there the owner of the dominant tenement had made the alterations after having acquired an easement over the servient tenement, and not, as in the present case, where the alterations were made before any easement had been acquired by him. For myself, I very much doubt whether the principle recognised and applied in those cases has any application to a case where the alterations are made before any easement has been acquired over the servient tenement, and where the alterations cannot be said to have increased the burden on the servient tenement.

In my opinion, the true principle upon which this case ought to be decided is that, as the right to the access of light which the owner of the dominant tenement acquires under s. 3 of the Prescription Act is measured by the amount of light actually enjoyed throughout the whole of the period of prescription, so the freedom from nuisance, to which the owner of the dominant tenement becomes absolutely and indefeasibly entitled under the section at the end of the period of prescription, must be measured by and be the same as the freedom from nuisance which the dominant owner was in fact enjoying at the commencement of that period. It follows, in my judgment, that the right of the dominant owner cannot be enlarged by any alteration in his tenement during the period of prescription. In my opinion, that view is confirmed by the passage from the judgment of WRIGHT, J., in *Warren* v. *Brown* (3) ([1900] 2 Q.B. at p. 729), referred to by the Master of the Rolls.

Applying that principle to the facts of the present case, I am clearly of opinion that the learned judge was right in mentally reconstructing the premises and the surroundings as they existed in 1912, and taking into account the access of light through the skylight and through the opening on the west side of the room enjoyed by the plaintiff at the commencement and during the greater part of the period of prescription. The enjoyment of that access of light was not precarious, and could not, against the will of the plaintiff, have been obstructed to such an extent as to render the room unfit for the ordinary purposes of inhabitancy of business according to the ordinary notions of mankind, having regard to the locality and to the surroundings.

A novel contention, however, was raised by counsel for the plaintiff, namely, that the light coming through a skylight is of a different and inferior quality as compared to that coming through a window in the side wall of the room; and in support of that contention he referred to cases in which the court has drawn a clear distinction between direct light and reflected light, and has held that it is no answer to a claim by a dominant owner to restrain the obstruction of the access of direct light to his tenement from the servient owner to say that after that obstruction there will be sufficient reflected light left. In my opinion, those cases have no application to the facts of the present case. There is no analogy between reflected light and the direct light coming through a skylight in the room. Apart altogether from the fact that the windows which have been obstructed in the present case by the screen were close to the ceiling of the room, and, therefore, approximated closely to a skylight, there is nothing in this contention. Although light coming through a skylight enters a room at a different angle from that at which light coming through a side window enters it, the light is, nevertheless, direct light, and it is of the same, if not of a better, quality as the light coming through a side window. The suggestion that a man commits an actionable nuisance by obstructing the access of light through a window on the east side of his neighbour's room, when that room is already abundantly lighted by a large opening on the west side and a large skylight in the roof, because the light coming through the skylight is of a different quality from that coming through the east window, is certainly a novel one, and one which, in my judgment, is not well founded.

For the reasons stated, I agree that this appeal fails and ought to be dismissed with costs.

ROMER, L.J.—Section 3 of the Prescription Act, 1832, enacts:

> "When the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

That Act was passed in the year 1832, and until the year 1904 there were many persons, including some persons of great eminence, who thought that in enacting that section the legislature meant what it said, and, accordingly, they thought, and in some cases held, that where light over the servient tenement had been received by the dominant tenement for the period mentioned in that section, the owner of the dominant tenement acquired a right to receive that light without substantial diminution. It was, however, held in *Colls* v. *Home and Colonial Stores, Ltd.* (1) by the House of Lords that that is by no means the meaning or effect of that section, and that all that the dominant owner gets after his twenty years' enjoyment is a right only to receive so much light over the servient tenement as is essential for the comfortable enjoyment of the dominant tenement according to the ordinary usages of mankind. The result is that, if the dominant tenement can be comfortably enjoyed without the use of any light coming over the servient tenement, the owner obtains, notwithstanding the words of the Act, no right whatsoever to the light that he has been enjoying for the twenty years.

One of the results of that decision is that it is necessary to consider, in any action brought for the obstruction of an ancient light, what other lights are possessed and enjoyed by the owner of the dominant tenement, and not only must it be ascertained what lights he is enjoying at the date of action brought, that is to say, at the end of the period of twenty years, but also what lights he enjoyed at the commencement of the period; for the right acquired must be measured by the enjoyment over the twenty years. Supposing at the commencement, for instance, of the twenty years, the dominant tenement is receiving light over the servient tenement through a window, say, 6 ft. high and 3 ft. broad, a big window, and that after five years the owner of the dominant tenement reduces the size of that window, which means that he requires more light over the servient tenement for the comfortable enjoyment of his premises than he was receiving before, because the bigger window could have been obstructed to a larger extent than it would be now possible to obstruct the smaller window, and yet leave sufficient light for the comfortable enjoyment of the dominant tenement. The owner of the dominant tenement does not get the right, by reason of the alteration, to further light than he was enjoying at the beginning of the twenty years—not because by diminishing the size of his window he is enlarging the burden borne by the servient tenement, because at the time no burden at all is being borne by that tenement, but because at the end of the twenty years he will not have enjoyed that additional light for the necessary period. He will only have enjoyed it for fifteen years. For these reasons, in my opinion, MAUGHAM, J., was not only justified, but he was bound to consider what lights were being enjoyed by this room of the plaintiff's that is in question in this action, at the commencement of the twenty years, that is to say, on April 20, 1912. At that time, as has been pointed out, the room was not only receiving light through a window on the east, which was in the same position as part of the present window on the east, but it was also receiving light through the skylight. It is said by counsel for the plaintiff that the light through the skylight should be disregarded for the purpose of measuring the enjoyment at the beginning of that period, because he had no prescriptive right at that time to the light coming through the skylight, and that it has been said that unless you have a prescriptive right to other light, the light can be disregarded for the purposes of considering the light actually enjoyed at the beginning or at the end of the period. That, however, is not the law. What Lord Lindley stated in *Colls' Case* (1) ([1904] A.C. at p. 210) was this:

> "As regards light from other quarters, such light cannot be disregarded; for, as pointed out by James, V.-C. in *Dyers' Co.* v. *King* (5), the light from other quarters, and the light the obstruction of which is complained of, may be so much in excess of what is protected by law as to render the interference complained of non-actionable. I apprehend, however, that light to which a right has not been acquired by grant or prescription, and of which the plaintiff may be deprived at any time, ought not to be taken into account."

So that it is not all light to which a right has not been acquired by grant or prescription that is left out of account, but only such light of which the plaintiff may be deprived at any time.

The question, therefore, which Maugham, J., had to decide was whether he was entitled to take into consideration the light coming through the skylight as being light of which the plaintiff could not be deprived, and he obviously, and, in my opinion, rightly, arrived at the conclusion that that was light of which, in fact, the plaintiff never could be deprived, except by his own action, and, of course, if a plaintiff deprives himself by his own action of light of which he would not otherwise be deprived, he has only himself to thank. Maugham, J., taking into consideration the fact that this light was coming through those skylights, has arrived at the conclusion that but for their removal by the plaintiff himself, there would, notwithstanding the erection by the defendants of the screen blocking out the light from the east window, be enough light left for the comfortable enjoyment of this room according to the ordinary usages of mankind. On the evidence given by Mr. Waldram, he was, in my opinion, abundantly justified, and indeed bound, I think, to come to that conclusion. On the first point, therefore, raised on behalf of the plaintiff upon this appeal, the learned judge, in my opinion, was right.

As regards the second point to which counsel for the plaintiff directed our attention, and indeed, on which he insisted in his reply, I think the learned judge again was right. The point was this. Counsel says that, even if you do take into consideration the existence of the skylight, yet nevertheless the light from that is so different from the light formerly coming through the east window that it should be really disregarded. The light, however, is not different in quality, and all that can be said about it is that Mr. Waldram agreed that it was not suitable for clerical work, and that, if the eastern window were blocked up and the plaintiff had to re-open the skylight and rely upon the light coming through those windows for the purpose of lighting the east end of his room, the room would not fetch such a high rental. But we have nothing to do, in considering the question of obstruction of ancient lights, with the diminution in rental value of houses. I doubt whether, since *Colls' Case* (1) was decided, in any case in which an obstruction of an ancient light has been held not to be actionable, there has not been diminution in the rental value of the dominant tenement; because people are willing to pay higher rents for property which is in possession of light in excess of the minimum required for comfortable enjoyment of a house; in other words, as we know, people are willing to pay higher rents for luxuries, and excess of light over that required for the comfortable enjoyment must now be regarded, even though in the case of ancient lights, as a luxury.

For these reasons, it appears to me that the decision of Maugham, J., on both points was right, and that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Oldman, Cornwall, & Wood Roberts*; *Lydale & Sons.*

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

JONES *v.* THOMAS

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Lawrence, JJ.), November 1, 2, 13, 1933]

[Reported [1934] 1 K.B. 323; 103 L.J.K.B. 113; 150 L.T. 216; 98 J.P. 41; 31 L.G.R. 424; 30 Cox, C.C. 47]

Bastardy—Evidence—Corroboration—Conduct of alleged father—Need to lead to inference supporting complainant's evidence—Untrue statement by alleged father—Bastardy Laws Amendment Act, 1872 (35 *&* 36 *Vict.*, *c.* 65), *s.* 4.

The alleged father of an illegitimate child, on an occasion prior to the hearing of the complaint in bastardy, made an untrue statement to the complainant's father to the effect that he had not seen the complainant for a whole year. At the trial he admitted that he had spoken to the complainant on two dates subsequently to the only date on which the complainant alleged that connection had taken place, but, as far as any independent evidence went, the circumstances of those meetings were perfectly innocent.

Held: the conduct of the alleged father may amount to corroboration of the evidence of a complainant, as required by s. 4 of the Bastardy Laws Amendment Act, 1872, but only when it is of such a nature and made in such circumstances as to lead to an inference in support of the evidence of the complainant; and in the present case the mere fact that the alleged father had knowingly made a false statement was not of itself corroboration of the complainant's evidence.

Notes. Referred to: *Credland* v. *Knowler* (1951), 115 J.P. Jo. 279.

As to corroboration of the mother's evidence in bastardy proceedings, see 3 HALSBURY'S LAWS (3rd Edn.) 120, and for cases see 3 DIGEST 394 et seq. For Bastardy Laws Amendment Act, 1872, see 2 HALSBURY'S LAWS (2nd Edn.) 478. The Act is repealed as from April 1, 1958, by the Affiliation Proceedings Act, 1957; see, as respects corroboration, s. 4 (2) thereof.

Cases referred to:

(1) *Mash* v. *Darley*, [1914] 3 K.B. 1226; 83 L.J.K.B. 1740; 111 L.T. 744; 79 J.P. 33; 30 T.L.R. 585; 58 Sol. Jo. 652; 24 Cox, C.C. 414, C.A.; 3 Digest 397, *322*.

(2) *Thomas* v. *Jones*, [1920] 2 K.B. 399; 90 L.J.K.B. 49; 85 J.P. 38; 36 T.L.R. 549, D.C.; reversed, [1921] 1 K.B. 22; 90 L.J.K.B. 49; 124 L.T. 179; 85 J.P. 38; 36 T.L.R. 872, C.A.; Digest Supp.

(3) *Dawson* v. *McKenzie*, 1908, 45 Sc.L.R. 473; 15 S.L.T. 951; Digest Supp.

(4) *McWhirter* v. *Lynch*, 1909 S.C. 112; 46 Sc.L.R. 83; 16 S.L.T. 526; 3 Digest 396, *317 xxxii*.

(5) *Macpherson* v. *Largue*, 1896, 23 R. (Ct. of Sess.) 785; 33 S.L.R. 615; 4 S.L.T. 43; 3 Digest 396, *317 xxix*.

Case Stated by Merionethshire justices.

A complaint was preferred by one Margaret Thomas, a single woman, against the appellant, Jones, alleging that he was the father of her bastard child. The child was born on Dec. 29, 1932, and the complainant alleged one act of connection only, on March 31, 1932. The complainant's father gave evidence that on Aug. 30, 1932, he went to see Jones concerning his daughter's condition; that Jones, on being asked whether he understood the object of the visit, said that he did, and that, on being told that Mr. Thomas proposed to see Jones's father, Jones said that he had not spoken to the complainant for a whole year. At the hearing Jones admitted that he had spoken to Miss Thomas on May 20, 1932, and on or about July 22, 1932. The complainant stated that on those two occasions she spoke to Jones of her condition of pregnancy, but the circumstances of the meetings were, as far as any independent evidence went, perfectly innocent. Jones denied that he had told the complainant's father on Aug. 30, 1932, that he had not seen the complainant for a year, but on this matter the justices accepted the evidence of A the complainant's father.

The justices held that there was sufficient corroboration to satisfy s. 4 of the Bastardy Laws Amendment Act, 1872, which requires that in bastardy proceedings the evidence of the mother shall be corroborated "in some material particular by other evidence to the satisfaction of the justices." They relied particularly on the untrue statement made by Jones to the complainant's father at the interview of B Aug. 30, 1932. The other matters to which the justices attached importance are set out fully in the judgment of AVORY, J. They adjudged Jones to be the father of the child, and ordered him to pay 5s. a week for its maintenance and education, together with expenses incidental to birth, and the costs of the order.

J. W. Morris and *G. A. Thesiger* for the appellant.

R. M. Montgomery, K.C., and *John Roberts* for the respondent. C

Cur. adv. vult.

Nov. 13. The following judgments were read:

LORD HEWART, C.J. [read by AVORY, J.]—This is an appeal by Special Case from a decision of justices of the peace for the county of Merioneth, whereby they adjudged the appellant to be the father of an illegitimate child of the respondent. D The child was born on Dec. 29, 1932, and the respondent alleged that the appellant had had connection with her once only, on March 31, 1932. The question we have to determine is whether the evidence of the respondent was corroborated in a material particular as required by s. 4 of the Bastardy Laws Amendment Act, 1872.

The father of the respondent stated that on Aug. 30, 1932, he went to see the E appellant concerning the respondent's condition, and that the appellant, upon being asked whether he understood the visit, said that he did so, as a result of what one William Richard Jones had told him the previous Sunday. The appellant denied everything, and, upon being told that the respondent's father proposed to see the appellant's father, said that he had not spoken to the respondent for a whole year. In fact the appellant had seen and spoken to the respondent on May 20, 1932, and F July 22, 1932, and the justices treated the untrue statement of the appellant to the respondent's father that he had not spoken to her for a whole year as corroboration of her evidence. There was no other corroboration in any material particular. It is true that the Case states that the justices were impressed by untruthful suggestions made on the appellant's instructions to the respondent, and by what they regarded as the untruthful evidence given on his behalf in support of these sugges- G tions. But there was no evidence that the suggestions and evidence in question were untrue except the denials of the respondent.

The conduct of the alleged father may amount to corroborative evidence where it appears that there is reason to infer from such conduct that the mother's story is presumably true, as in *Mash* v. *Darley* (1) and *Thomas* v. *Jones* (2). And in the Scottish case of *Dawson* v. *McKenzie* (3) there are dicta by LORD DUNEDIN and H LORD McLAREN which suggest that the fact of the alleged father having made statements which have been proved to be untrue may be sufficient corroborative evidence to satisfy the statute. But, as I read those dicta, it is only when the untrue statements are of such a nature, and made in such circumstances, as to lead to an inference in support of the evidence of the mother that they can be regarded as corroborative evidence, and the mere fact of the alleged father having knowingly I made false statements is not in itself corroboration within the statute.

I do not think that the conduct of the appellant, and, in particular, his statement to the respondent's father that he had not spoken to the respondent for a whole year, afford any corroboration in a material particular of the evidence of the respondent, and therefore, in my opinion, the appeal should be allowed.

AVORY, J.—In this case the child was born on Dec. 29, 1932, and the probability of conception, therefore, was at the end of March. It was the respondent's case that connection took place on March 31, 1932, and that was the only occasion. In view of this fact, and the fact that there was no independent evidence of the parties being seen together at that date, it is necessary, in my opinion, to criticise closely the alleged evidence of corroboration of the respondent's evidence in some material particular.

The justices rely on four matters as corroboration in material particulars. Under heading No. 1 they say:

> "According to the respondent's evidence (which we accepted) the respondent had two interviews with the appellant with respect to her condition—the first on May 20, 1932 (within two months of the date of conception), and the next on or about July 22, 1932 (after the respondent had seen the doctor). The fact that such interviews took place was proved to our satisfaction by the evidence called both by the respondent and the appellant."

In No. 2 they say:

> "We were greatly impressed by the evidence (which we accepted) of the respondent's father, to whom the appellant denied that he had spoken to the respondent for a whole year (which, in our judgment, was untrue), and to whom he made a conditional promise to come down to meet the respondent, which promise he did not keep."

In No. 3 they say:

> "But what impressed us more than anything was the untruthful suggestions made on the appellant's instructions to the respondent, and what we regarded as the untruthful evidence given on his own behalf in support of those suggestions. In our judgment, the appellant and certain witnesses had agreed to give false evidence concerning the respondent in order to defeat the respondent's application, and we could not but view his denial of the respondent's evidence in the light of this fact, and regard his whole conduct in the matter as strong corroboration of the respondent's evidence."

In No. 4 they say:

> "The appellant, in cross-examination, said he had asked the respondent's father to name the respondent's witnesses, although, according to him, the appellant, he knew there were no witnesses."

With regard to heading No. 1, which is relied upon, that means merely that they believed the respondent's evidence, and disbelieved the appellant's evidence, and affords no corroboration. With regard to No. 3, which they say impressed them more than anything, that means the appellant's conduct in putting forward a defence which they did not believe afforded corroboration. It might just as well be said that the appellant's denial on oath that he was responsible for her condition afforded corroboration of the respondent's evidence. I see no ground for saying that there was a conspiracy between the appellant and the witnesses for the defence to give false evidence. No. 4 calls for no comment. It clearly did not afford corroboration.

It remains to consider No. 2, and on behalf of the respondent it is contended that *Mash* v. *Darley* (1) supports the finding of the justices, and that that finding is further supported by the decisions in the Scottish Courts. *Mash* v. *Darley* (1) is, of course, binding upon us in any case where the facts are similar, but I do not think it is any authority for saying that an untruth told by the appellant before the hearing of itself affords corroboration, nor do the Scottish decisions, in my opinion, affirm any such proposition.

I agree with the judgment of LAWRENCE, J., which I have had the opportunity of reading, on the effect of those decisions, and, in the result, I am of opinion that there was no corroboration of the respondent's evidence in any material particular to justify the decision of the justices.

LAWRENCE, J.—I am of the same opinion. The corroboration relied upon was, first, that there was independent evidence that the appellant had met the respondent on May 20, 1932, and July 22, 1932, on which occasions the respondent alleged that she had informed the appellant of her pregnant condition. As the independent evidence does not in any way tend to confirm the respondent's account as to what passed at these interviews, I am of opinion that it is not evidence which in any material particular makes it more probable than not that the appellant is the father of the child, and is, therefore, not corroborative evidence within the section.

The second head of corroboration relied upon was that the respondent's father gave evidence of an interview with the appellant at which he accused the appellant of being the father, and, as he alleged, the appellant, whilst denying paternity, denied that he had spoken to the respondent for a whole year. This evidence of the respondent's father was accepted by the justices, and as the appellant's evidence before them was that he had spoken to the respondent both on May 20, 1932, and July 22, 1932, it must be taken that the appellant made an untruthful statement to the respondent's father when accused by him of the paternity. I am of opinion that this evidence is not sufficient corroboration to support the decision.

Much reliance was placed before us upon two cases in the Court of Session, *Dawson* v. *McKenzie* (3) and *McWhirter* v. *Lynch* (4), in the former of which LORD DUNEDIN said:

> "Now the mistake which the learned sheriff has made here is in taking the mere proof of opportunity as amounting to corroboration. Mere opportunity alone does not amount to corroboration, but two things may be said about it. One is, that the opportunity may be of such a character as to bring in the element of suspicion. That is, that the circumstances and locality of the opportunity may be such as in themselves to amount to corroboration. The other is, that the opportunity may have a complexion put upon it by statements made by the defender which are proved to be false. It is not that a false statement made by the defender proves that the pursuer's statements are true, but it may give to a proved opportunity a different complexion from what it would have borne had no such false statement been made."

It is, in my opinion, clear that LORD DUNEDIN meant by "a proved opportunity," on which the alleged father's untrue denial might put a complexion of suspicion, an opportunity proved by evidence other than that of the mother.

In the present case the only connection alleged was on March 31, 1932, and the meeting at which connection was alleged to have taken place was proved only by the evidence of the mother, and not by any independent evidence. In these circumstances I do not think that a denial by the appellant which is shown by independent evidence to be untrue only with reference to two meetings after conception can be regarded as corroboration within the dictum of LORD DUNEDIN. As AVORY, J., pointed out in *Thomas* v. *Jones* (2) ([1920] 2 K.B. at p. 409), a disbelief of the alleged father's evidence where it is in contradiction of the mother's testimony does not afford corroboration of that testimony.

There is no doubt that any untrue statement by a person when accused of an offence gives rise to some suspicion, but there is no authority which suggests that every untrue statement by an alleged father is corroborative of the mother's evidence, and the Court of Session expressly disclaimed any such view. And where, as here, the untrue statement is only shown to be untrue by the proof of incidents (namely, the meetings of May 20 and July 22, 1932) which, so far as the independent evidence goes, were perfectly innocent, we do not think it is corroboration within the meaning of the section.

The third head of corroboration was the suggestions in cross-examination made on the appellant's behalf to the respondent, and the evidence of the appellant and his witnesses, which the justices disbelieved. It was attempted to support this head of corroboration by the observations of BUCKLEY, L.J. (as he then was), in *Mash* v. *Darley* (1) ([1914] 3 K.B. at p. 1231), but in my judgment that case is clearly distinguishable. There the alleged father had been tried and convicted for having unlawful carnal knowledge of the mother, and attacked the mother's character before the committing justices, but on his trial made no such attack. When bastardy proceedings were subsequently instituted all that Buckley, L.J., held was that his conduct in first attacking the mother's character, and then refraining from doing so, might be treated as corroboration. In the present case the justices have relied most strongly upon the case put forward by the appellant and his witnesses in the bastardy proceedings, which they disbelieved, as corroborating the mother's evidence. It appears to us that if this is corroboration any case put forward by an alleged father which is disbelieved may be regarded as corroboration of the mother's evidence. It may be suggested that the fact that the appellant told a story in the witness-box different from what it must be assumed he told to the respondent's father is a similar change of front to that considered by Buckley, L.J., but in my view the facts are distinguishable, and it would be unsafe to treat as corroboration in every case every inconsistency between the alleged father's evidence and what he is held to have said on previous occasions. Moreover, if, as the Lord Justice Clerk said in *Macpherson* v. *Largue* (5), approved by Lord Dunedin, in *Dawson v. McKenzie* (3) the appellant's evidence, if disbelieved, ought to be taken out of the case, the change of front disappears.

The last head of corroboration is, in my view, obviously unsound, and was not supported in argument.

I am, therefore, of opinion that there was no sufficient corroboration of the respondent's evidence, and that the appeal must be allowed.

Appeal allowed.

Solicitors: *Churchill, Clapham & Co.*, for *Richard E. George*, Newtown; *Rhys Roberts*, for *Guthrie, Jones, & Jones*, Dolgelley.

[*Reported by* T. R. Fitzwalter Butler, Esq., *Barrister-at-Law.*]

MODERN LIGHT CARS, LTD. *v.* SEALS

[King's Bench Division (Roche, J.), May 3, 4, 1933]

[Reported [1934] 1 K.B. 32; 102 L.J.K.B. 680; 149 L.T. 285;
49 T.L.R. 503; 77 Sol. Jo. 420]

Hire-Purchase—Payment—Promissory note given as collateral security—Note discounted.

An agreement, under which the owner of a motor car delivered the car to a person described therein as the "hirer," provided that the owner should let and the hirer should hire the car for a period of twenty-four months for an agreed sum payable partly forthwith and as to the balance by monthly instalments; that the hirer should execute and deliver to the owner a promissory note for the total amount of the instalments, which was to be treated as collateral security and not as payment of the instalments; that the car should remain the property of the owner until the hirer exercised the option to purchase thereinafter contained; and that on payment of all the instalments the hirer should have the option of purchasing the car for the sum of one shilling. Subsequently, the owner discounted the promissory note. The hirer paid the initial sum and the instalments for some months, and then sold the car to one R., who bought it in good faith and without knowledge of the agreement and in turn sold it to the defendant who re-sold it.

Held: neither the giving of the promissory note as collateral security nor the discounting of it operated as payment so as to pass the property in the car to the hirer; the agreement was not an agreement for sale, nor did it evidence a sale on credit, nor was it a bill of sale, but it was an enforceable hire-purchase agreement; and, therefore, the defendant was liable to the owner in damages for the conversion of the car. A

Notes. Referred to: *United Dominions Trust, Ltd.* v. *Bycroft*, [1954] 3 All E.R. 455. B

As to what amounts to payment under a hire-purchase agreement, see 19 HALSBURY'S LAWS (3rd Edn.) 540, and for cases see 3 DIGEST 92–98.

Cases referred to:

(1) *Helby* v. *Matthews*, [1895] A.C. 471; 64 L.J.Q.B. 465; 72 L.T. 841; 60 J.P. 20; 43 W.R. 561; 11 T.L.R. 446; 11 R. 232, H.L.; 3 Digest 93, *245*. C

(2) *McEntire* v. *Crossley Bros., Ltd.*, [1895] A.C. 457; 64 L.J.P.C. 129; 72 L.T. 731; 2 Mans. 334; 11 R. 207, H.L.; 3 Digest 94, *249*.

(3) *Continental Guarantee Corpn., Ltd.* v. *Mercado*, unreported.

(4) *Re Rankin and Shiliday*, [1927] N.I. 162; Digest Supp.

(5) *Cooper* v. *Oswald Tillotson, Ltd.* (1933), unreported D

(6) *Chown* v. *B. S. Marshall* (1925), Times Newspaper, Dec. 19.

Action tried by ROCHE, J.

The plaintiffs, motor-car dealers, claimed from the defendant, also a motor-car dealer, the return of a Standard motor car, or damages for its detention. The car in question had been delivered to a Mrs. Sherrard in pursuance of an agreement, dated June 4, 1932, which the plaintiffs said was a hire-purchase agreement giving E
Mrs. Sherrard no right to part with it until she had exercised the option to purchase contained in it. The defendant contended that the agreement was not a hire-purchase agreement, but was an out-and-out sale to Mrs. Sherrard, or, alternatively, that it was a bill of sale, void for want of registration.

The agreement of June 4, 1932, provided (by para. 1) that the owners (the plaintiffs) agreed to let, and the hirer (Mrs. Sherrard) to hire, a 16 h.p. Standard car F
for a term of twenty-four months for the sum of £284 13s., payable as to £63 15s. on the signing of the agreement, and as to the balance by equal monthly instalments of £9 4s. 1d.; (by para. 2) that the hirer should, on the said June 4, execute and deliver to the owners a promissory note payable to them for the total amount of the instalments, such promissory note to be treated as collateral security for the payment thereof and not as being itself a payment of the instalments; (by G
para. 3) that during the currency of the agreement the hirer should not sell, offer for sale, assign, or charge the said motor car and that it should remain the property of the owners until the hirer exercised the option of purchasing thereinafter contained; (by para. 4) that, if the hirer made default for ten days in the payment of any instalment or failed to fulfil any condition of the agreement, the owners should have the right to re-take possession of the motor car; (by para. 9) that the hirer H
might at any time determine the hiring by returning the motor car to the owners without prejudice to the latter's right in respect of any prior breach of covenant by the hirer; and (by para. 11) that, on completion of all payments under the agreement, the hirer should have the option to purchase for the price of 1s.

Mrs. Sherrard duly paid the sum of £63 15s., and executed and delivered to the plaintiffs a promissory note for the specified amount, and she paid the monthly I
instalments as they fell due until November, 1932. The plaintiffs in the meantime had endorsed the promissory note to a third party for the sum of £191 5s. On Sept. 6, 1932, Mrs. Sherrard purported to sell the motor car to a Mr. Randall, who purchased it in good faith and without knowledge of the agreement of June 4, 1932, and he in his turn sold it on Sept. 22, 1932, to the defendant for £135. In November, 1932, the plaintiffs commenced this action, claiming the return of the car. It was stated that the agreement was in a form which had been widely adopted, and that the action was looked on as a test case.

A *F. J. Tucker, K.C.*, and *Russell Vick* for the plaintiffs.
Gordon Alchin and *H. E. R. Boileau* for the defendant.

ROCHE, J.—This is an action claiming damages for conversion of a motor car. The matter arises out of a hire-purchase agreement. The defence, in substance, is that the agreement which is relied upon as a hire-purchase agreement is not a hire-B purchase agreement at all. The case is said to be in the nature of a test case. I think that it is, in a sense, for it appears that the document relied on as a hire-purchase agreement is in a form adopted in particular by one company, the United Dominions Trust Co., which is a company concerned in connection with this case, and, it is said, by certain joint stock banks, but that there is another and more common form rather more akin to what may be called the form which was con-C sidered by the House of Lords in the well-known case of *Helby* v. *Matthews* (1), and that certain persons, or companies, who are concerned with the use of the latter form of hire-purchase agreements are persons and companies with whom the defendant, who is a motor-car dealer, deals, and that they have either encouraged or advised, I think, was the defendant's word, the defendant in connection with this case, and are interested in the determination of this case, as is, no doubt, the D defendant, and equally, no doubt, the United Dominions Trust Co. They are all concerned and interested in this case, and in that sense it is a test case.

Although there are no decisions which bind my decision in this case, I think that, having regard to the conclusions of fact at which I have arrived, there are decisions of two or three courts which are such that I am almost bound to follow them, and I propose to do so all the more because I myself agree with those decisions. I will E refer to them more particularly in a moment.

What are the facts in summary, or outline form? I find them to be these. Mrs. Sherrard had taken under the document which is in question a Standard motor car from the plaintiffs, who were dealers, and she had agreed in that document not to sell it. She did sell it to a Mr. Randall, in breach of her agreement. He sold it to the defendant. The plaintiffs in this action are claiming the return of the motor F car, or damages for its conversion. The defendant has, in fact, after action brought, or, at any rate, after notice of the claim, sold the motor car. He did not do that surreptitiously or in any way with which anybody finds fault, except that, of course, if he is wrong it is a tortious sale, because his possession was tortious, but it was not a dishonest one. He said to the plaintiffs: "This had better be sold, and in the interests of everybody I propose to sell it," and I do not think that the G plaintiffs, as a matter of business, demur to that proposition.

The possession and detention of the motor car by the defendant, and his subsequent conduct, are matters complained of as being a tort and conversion. Various topics arise. Counsel for the defendant has put it in five or six submissions which I took down, but, broadly speaking, his submission is that this is not a hire-purchase agreement at all. He says, with regard to this document: You must look H at the reality of the transaction, and not at its form, a proposition which is abundantly right and has the high authority of the House of Lords, both in *McEntire* v. *Crossley Bros., Ltd.* (2) and of the same tribunal in *Helby* v. *Matthews* (1). Looking at the real nature of the transaction, it is said on behalf of the defendant that this is either a sale on credit, or a bill of sale, or an agreement to sell, and that, if it is a sale on credit to Mrs. Sherrard, Mrs. Sherrard had a title to and property in I the car and she could sell it to the defendant through the intermediary of Mr. Randall. If it is a bill of sale, it is unregistered, and it is void, and everything is bad, and, indeed, in that case also Mrs. Sherrard could sell and give a title. If it was an agreement on the part of Mrs. Sherrard to buy she was in possession, and under s. 21 (2) of the Sale of Goods Act, 1893, she could give a good title, and did give a good title.

As to all those contentions, my finding of fact is that this was intended to be, and was, a hire-purchase agreement. It is the same conclusion of fact on a different document as was arrived at by the tribunals, and, in particular, the House of Lords, in *Helby* v. *Matthews* (1). I think the document meant exactly what it said, and the parties intended to do exactly what the document said that they were doing. It follows that I find as a fact that it was not a sale on credit, that it was not a bill of sale, and that it was not an agreement to sell. Perhaps the strongest point in the argument which was addressed to me by counsel for the defendant was based upon the matter which forms the distinguishing feature of this hire-purchase agreement from what I may call the other class or type of hire-purchase agreement, namely, the existence of a financier or banker, a body or person who is finding the money and, as a rule, is quite a different person from either the dealer or the purchaser of goods such as cars. He makes himself the owner of the property, and then hires it out on a hire-purchase agreement to the person who is going to use it and has the option to purchase. In this case the method adopted is different, and the person who remains the owner and hires out the car with an option of purchase is the motor dealer, and the financier remains a financier or person who advances funds for the purpose of facilitating and making possible the transaction. That fact in itself, so far from militating against the conclusion that the document is what it purports to be, and what the transaction purports to be, one of hire-purchase, to my mind tends the other way, because it is much more in accordance with the realities of the transaction when the dealer is the person who hires out the car.

The point, however, is made that a promissory note was given by Mrs. Sherrard to the plaintiffs, and that it was given under the scheme, and under the document of hire-purchase, that it covered all the instalments, that it was dealt with by being transferred to the United Dominions Trust Co., the financial or banking company, and that that fact shows that there was a payment, which it is said, leads to the conclusion that the transaction is one of sale or one of agreement of sale. That depends, I think, upon what the note was. I hold that it was precisely what it was said to be, by way of collateral security. Several difficult points arise whether it is apt to say that the note was capable of being discounted in the ordinary sense, or was discounted, and what the rights of a holder of the note could be. Speaking for myself, I find it almost impossible to see that there ever could be a person who was the holder of this note, having regard to the form in which it was drawn, and the manner in which it was drawn, who would be a holder for value and have any better rights than the plaintiffs in the present case would have upon this note. However, it is unnecessary to determine that point, and it is probably unwise to express any further opinion about the matter which might arise between different parties in the future. It is sufficient to say that there is nothing in that which it was contemplated should be done with the note, or in that which was in fact done with the note, which makes me alter my conclusion, derived from all the facts of the case, that the intention of all parties was that the note should be given by way of collateral security, and not by way of payment, conditional or otherwise. I think that that sums up my conclusions of fact, and it is all that it is necessary for me to say about that part of the case.

Something should be said about the authorities to which I have referred. They are three, and two of them are unreported, but I think that all, without exception, arise out of documents which are in all material respects the same as the documents in the present case. I think also that it is true to say that they all arose, and were decided on documents in use by the bank or finance company, or their predecessors in business, which is concerned in the present case—the United Dominions Trust Co. The three decisions are, first, that of the *Continental Guarantee Corpn., Ltd.* v. *Mercado* (3). That having come before the Recorder of London sitting in the Mayor's Court, the recorder had formed a conclusion unfavourable in business matters, and also as a matter of law, to the Guarantee Corpn., which was relying on bills of exchange which were given as collateral security. That adverse opinion, both as a matter of business and of law, was not shared by the Divisional Court, consisting of ACTON and MACKINNON, JJ. There is a good deal in their judgments which affords me guidance in this case.

The next decision is one which is not binding upon me, but it is a decision of the Court of Appeal in Northern Ireland to which I naturally pay the greatest respect, and it seems to me to be in consonance with the conclusions which I myself should draw in this case. It is *Re Rankin and Shiliday* (4). There the Lord Chief Justice in the court of first instance had held on an agreement which is indistinguishable, in my judgment, from the agreement in this case, that assuming that it was a hire-purchase agreement, it was void in law, and the instalments were all paid off as soon as the Curtis Automobile Co. turned into cash the bills of exchange which were given as collateral security. The Curtis Automobile Co. were in the same position as the plaintiff company in the present case, and from that moment the purchase was completed. That decision was reversed by the Court of Appeal, consisting of ANDREWS and BEST, L.JJ., and I should desire to adopt in its entirety the reasoning of those two judges. The arguments addressed to the Court of Northern Ireland were not, perhaps, precisely put in the same way as the arguments that have been addressed to me, but they were based on substantially the same facts, and were directed to the same conclusion being asked from the court.

The last case to which I want to refer is the very recent decision of GODDARD, J., in *Cooper* v. *Oswald Tillotson, Ltd.* (5), of which a shorthand note has been furnished to me. It was a case tried at the last Liverpool Assizes, and the judgment was given as lately as April 28, 1933. That, again, is on a hire-purchase agreement in the same form as in the present case, and the decision is such as, in my judgment, supports the conclusion at which I have arrived in the present case. I have also been referred to *Chown* v. *B. S. Marshall* (6), a decision of FRASER, J. That throws less light on this matter, in my opinion, than the other three cases to which I have referred, but those are the authorities which I adopt and follow in the present case.

There are only two other things with which I have to deal. A contention was put forward by counsel for the defendant that the remedy to re-take possession of the car was suspended while the bills were current. That was not the form in which he preferred to put in the forefront his contention about the bills. His contention about the bills was naturally directed to there being payment, and to the fact that the bills being given was evidence that this was a sale, or an agreement to sell, but he did rely upon that point as it had been relied upon, I think, in *Re Rankin and Shiliday* (3) in the Court of Appeal in Northern Ireland. The answer assigned in the judgment in that case seems to me to be a proper answer to that point, and I should desire to express myself in no other way.

The last point that I need mention, other than the point about damages, is that it is contended for the defendant that with regard to the sale by Mrs. Sherrard, if it was wrong and unauthorised, yet payments were accepted under the bills, or by the bills, after that breach of agreement was committed, and that the plaintiffs, after such acceptance of payment, had lost their right to re-take possession, and, accordingly, were not in a position to maintain an action for trover. I do not agree with any of those propositions. The payments were not taken by the plaintiffs themselves, and, in my judgment, the plaintiffs had done nothing, even assuming that they were taken on their behalf by their agents, to preclude them from the right to re-take, nothing to prevent their having a right to possession, and nothing to prevent their having a right to maintain this action for trover. Among other reasons there is this, that there was, on any showing, under the depreciation clause, as much, or more, owing under the hire-purchase agreement as was taken in these payments which are objected to as precluding the plaintiffs from their right to maintain the action.

The last matter is a matter of damages. There has been a discussion in several cases whether the right of the plaintiffs in cases such as this is not a right to recover the market value of the goods in question, which is the general measure of damages in an action of trover, and whether it is not limited to the further sums that, at the date of the tort, could be recovered by the plaintiff in the action under the hire-purchase agreement. Mr. Tucker, while making no admission whether that principle is well founded in law or not, has expressed his willingness to accept a sum of £140, which is the amount that could be recovered under the hire-purchase agreement, as the amount of damages recoverable, and Mr. Alchin has agreed that figure as being sufficiently correct for the purposes of my judgment. I adopt it, and give judgment for the sum of £140, with the costs of the action.

Solicitors: *H. Huband Harper*; *G. H. Drury*.

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

Re F. A. COULSON. Ex parte OFFICIAL RECEIVER (TRUSTEE IN BANKRUPTCY)

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), October 6, 1933]

[Reported [1934] Ch. 45; 103 L.J.Ch. 31; 150 L.T. 5; 77 Sol. Jo. 749; [1933] B. & C.R. 173]

Bankruptcy—Inquiry into debtor's property—Examination of person capable of giving information—No time-limit of power to make order—Exercise in second bankruptcy after discharge in first bankruptcy—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 25 (1).

The debtor was adjudicated bankrupt in 1922, but obtained an order of discharge which became effective in 1924. At the time of that bankruptcy it was known that the debtor was entitled to a contingent interest under the will of J.G., but, owing to the uncertainty of the contingency, it was treated as of no value. In 1928, however, by reason of an intervening interest having passed, the interest became of value. On March 2, 1931, the debtor was again adjudicated bankrupt and an application was made to the registrar under s. 25 (1) of the Bankruptcy Act, 1914, for an order directing the trustees of the will of J.G. to attend to give information as to the contingent interest. The registrar was of opinion that s. 25 was not applicable by reason of the fact that the debtor had obtained his discharge in the first bankruptcy.

Held: the powers given by s. 25 (1) were not limited to any time or to the duration of the bankruptcy from which the debtor obtained his discharge, but remained in being, and, therefore, the case must go back to the registrar for him to exercise his discretion on the matter.

Notes. As to inquiry into the debtor's property, see 2 HALSBURY'S LAWS (3rd Edn.) 405–409, and for cases see 5 DIGEST 614 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Appeal by the Official Receiver, trustee in the second bankruptcy, from a refusal of MR. REGISTRAR MELLOR to appoint a day to examine certain persons under s. 25 of the Bankruptcy Act, 1914.

W. N. Stable for the appellant.

LORD HANWORTH, M.R.—It is right to send this case back to the learned Registrar for the purpose of his exercising his discretion as to what order he will make under s. 25 of the Bankruptcy Act, 1914. We understand that he has not exercised any discretion at all, but, from the information which he has been good enough to provide for us, that he felt himself unable to make use of the section by reason of the fact that in respect of a bankruptcy in which the debtor was adjudi-

A cated a bankrupt on March 31, 1922, the debtor obtained his discharge from the order of adjudication, which became effective in 1924.

The facts are that on Oct. 18, 1922, the application for discharge was heard, the discharge was suspended for two years, and the bankrupt was ordered to be discharged as from Oct. 18, 1924. Now there has supervened a subsequent bankruptcy. On March 2, 1931, Mr. Coulson was once more adjudged bankrupt, and B a trustee was appointed. It appears that in the first bankruptcy the bankrupt disclosed that he had a contingent interest under the will of John Green, deceased, but against that no value was placed owing to it being on such an uncertain contingency that no price could be obtained for it. By reason of the intervening interest having passed in 1928 the bankrupt has become entitled to a sum of money, and what is suggested is that it might be of assistance to the registrar that the C trustees under the will under which that interest arose should come and give assistance and evidence, they being ordered to attend under s. 25. By s. 3 of the Bankruptcy Act, 1926, any property acquired by the bankrupt since he was last adjudged bankrupt,

> "which at the date when the subsequent petition was presented has not been distributed amongst the creditors in such last preceding bankruptcy, shall . . . D vest in the trustee in the subsequent bankruptcy or administration in bankruptcy as the case may be."

It is obvious that that section depends upon the fact whether there had been a distribution in the earlier bankruptcy or not. It is not certain what are the facts in respect of this interest which fell in in 1928.

E The powers which are given by s. 25 are not limited to any time or to the duration of the bankruptcy from which the debtor obtained his discharge at a later date, and it will be observed that by s. 26 (9) an indication is given which would seem to indicate that the powers of s. 25 remain in being. That sub-s. (9) is as follows:

> "A discharged bankrupt shall, notwithstanding his discharge, give such assis-F tance as the trustee may require in the realisation and distribution of such of his property as is vested in the trustee, and, if he fails to do so, he shall be guilty of a contempt of court."

That clearly indicates the distinction which is drawn between the discharge of the bankrupt and the duty which still remains in the trustee as to the realisation and distribution of his property. On those considerations it appears to us that it would G be an unfortunate contraction of the powers that are given by s. 25 to hold that they were limited and lost by the discharge of the bankrupt from his bankruptcy. In these circumstances it appears to us that the powers of s. 25 survive the discharge of the bankrupt, and we send the case back to MR. REGISTRAR MELLOR for the purpose of his exercising his discretion upon the matter before him.

H **LAWRENCE, L.J.**—I agree.

ROMER, L.J.—I agree.

Solicitors: *Tarry, Sherlock, & King.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re GATES. ARNOLD *v.* GATES

[CHANCERY DIVISION (Clauson, J.), May 18, 1933]

[Reported [1933] Ch. 913; 102 L.J.Ch. 369; 149 L.T. 521]

Solicitor—Trustee—Right to profit costs—No charging clause in trust instrument—No agreement with partners not to share in profits of work done for trust.

A solicitor, one of three partners in a firm, was appointed trustee of part of the residuary estate of a testator whose will did not contain a clause entitling him to charge for his professional services. Work in connection with the trust was done by the solicitor's firm.

Held: in the absence of an express agreement between the solicitor-trustee and his partners that the solicitor-trustee should not participate in the profits of the work done for the trust, the firm was not entitled to any profit costs.

Notes. Approved: *Re Hill, Claremont* v. *Hill*, [1934] All E.R. Rep. 617.

As to the right of a solicitor-trustee to profit costs, see 31 HALSBURY'S LAWS (2nd Edn.) 127–129, and for cases see 42 DIGEST 117 et seq.

Cases referred to:

(1) *Re Doody, Fisher* v. *Doody*, [1893] 1 Ch. 129; 62 L.J.Ch. 14; 68 L.T. 128; 41 W.R. 49; 9 T.L.R. 77; 37 Sol. Jo. 49; 2 R. 166, C.A.; 24 Digest 602, *6334*.

(2) *Clack* v. *Carlon* (1861), 30 L.J.Ch. 639; 7 Jur.N.S. 441; 9 W.R. 568; 4 L.T. 361; 42 Digest 118, *1151*.

(3) *Broughton* v. *Broughton* (1855), 5 De G. M. & G. 160; 25 L.J.Ch. 250; 1 Jur.N.S. 965; 43 E.R. 831; 26 L.T.O.S. 54; 3 W.R. 602; 42 Digest 118, *1146*.

(4) *Christophers* v. *White* (1847), 10 Beav. 523; 50 E.R. 683; 24 Digest 602, *6330*.

Summons to vary taxing master's certificate.

The testator, who died on Dec. 19, 1925, appointed his son, Geoffrey Benjamin Gates, sole executor and trustee of his will. Some time after the testator's death the applicant plaintiff in the action, who was a solicitor, was appointed trustee with Geoffrey Benjamin Gates of a fourth share of the residuary estate, which was settled in trust for John Stanley Gates, another son of the testator. In April, 1927, the applicant took out an originating summons for administration of the estate, and an order was made for administration thereof. The costs of the proceedings were ordered to be taxed and paid out of the estate. The applicant produced a bill of costs before the taxing master for work purporting to have been done by the applicant's firm, of which he was a partner. In fact, the applicant himself had done the work. There was no power contained in the will for a solicitor-trustee to charge. It was contended before the master that the custom of the firm was that when one of the partners was a trustee without express power to charge given to him by the instrument creating the trust, the profit costs were taken by the other partners, and it was suggested that an agreement should be entered into to that effect. The master held that as there was no such agreement in writing, and as no agreement as suggested could be entered into to have retrospective effect, and as there was no power in the will for a solicitor-trustee to charge profit costs, the latter should be disallowed.

Horace Freeman for the applicant.—It is admitted that a solicitor-trustee may employ his partners to act as solicitors for the trust, as in *Re Doody, Fisher* v. *Doody* (1) and *Clack* v. *Carlon* (2). In effect that was what was done in this case, for the arrangement between the partners that the plaintiff should not have any of the profit costs really meant that he had employed the other partners only to do the work. [He also referred to *Broughton* v. *Broughton* (3).]

Leslie F. Mumford for the respondent, the plaintiff's co-trustee.

CLAUSON, J.—The plaintiff in the action, Mr. Montie Phillip Arnold, is a trustee with the defendant, Geoffrey Gates, of a one-quarter share of the residuary estate which was settled by the will of the testator in trust for his son, John Stanley Gates, and his children, Geoffrey Gates, another son, having been appointed by the will sole executor and trustee of the estate generally. It was in his capacity of trustee of that quarter share that the plaintiff brought this action against his co-trustee for the administration of the estate of the testator, as a net result of which an order was made by me on Dec. 7, 1931, for the division of the estate in accordance with a scheme which I approved on behalf of certain infants. It was one of the terms contained in that order that some costs, including the plaintiff's costs, should be taxed and paid or retained out of the estate generally.

The plaintiff, who is a member of the firm of Messrs. Hicks, Arnold, & Bender, brought in his bill of costs for taxation, described as "the plaintiff's" bill of costs, the name of his firm—namely, Messrs. Hicks, Arnold, & Bender—being endorsed on the back of the bill, that firm having in fact acted throughout the legal proceedings for Mr. Arnold, the plaintiff in the action. The master, on taxation of the bill, disallowed profit costs; but, before dealing in any detail with the plaintiff's objections to such disallowance and with the reasons given by the master for overruling those objections, let me first of all deal with the matter generally.

The objection against allowing the plaintiff profit costs is—stating it generally—that, in the absence from this will of any express power for a solicitor-trustee to charge, the plaintiff, by employing the firm of solicitors of which he was himself one of the partners to act for him in the conduct of the action (which firm did so act), was in effect acting as his own solicitor.

It is true there is authority for saying that, if a litigant, being a solicitor-trustee, is in partnership with other solicitors, he may employ those partners to act for him as his solicitors, provided arrangements are made that none of the profit costs which those partners make finds its way into his own pocket. In *Re Doody* (1), which was a case of a solicitor-mortgagee, Stirling, J. (after quoting a passage from the judgment of Lord Cranworth in *Broughton* v. *Broughton* (3), which is as follows:

> "The result there is, that no person in whom fiduciary duties are vested shall make a profit of them by employing himself, because in doing this he cannot perform one part of his trust, namely, that of seeing that no improper charges are made. The general rule applies to a solicitor acting as a trustee"),

continued as follows:

> "It therefore follows that, as a general rule, neither a solicitor-trustee nor a firm of which the trustee is a member can receive out of the trust estate profit costs by way of remuneration for transacting legal business in connection with the trust. To this general rule there are some exceptions, to one of which I may refer at once. It was decided by Lord Hatherley, when Vice-Chancellor, in *Clack* v. *Carlon* (2), that a solicitor-trustee may employ his partner to act as solicitor for himself and his co-trustees with reference to the trust affairs, and may pay him the usual charges, provided that it has been expressly agreed between himself and his partner that he himself shall not participate in the profits or derive any benefit from the charges. Nothing short of this will be sufficient. In particular it was decided in *Christophers* v. *White* (4) that the general rule applies, although all the business has been transacted by the partners of the solicitor-trustee, and not by the trustee himself."

Accordingly, if the plaintiff had employed other members of the firm to act as his solicitors, I should have felt justified for the reasons expressed by Stirling, J., in allowing his partners to take the profit costs. The difficulty is that the plaintiff here did not take that course. Instead of doing so, he employed and acted by his firm, and, in so acting, he, being one of the three partners in the firm, was acting as solicitor on his own behalf in transacting legal business connected with the trust, notwithstanding the fact that there were two other partners, not trustees, associated with him in the transaction. There appears to be no authority for saying that a solicitor-trustee who has two partners, and whose firm acts as solicitors for him, is in any better position than a solicitor-trustee who, carrying on business alone and not in partnership, acts as his own solicitor in the matter of his trust. In such a case it appears to me plain that he could not be allowed to charge profit costs, and I do not see how, in the circumstances of the case with which I have to deal, profit costs can be allowed.

I must now go back to deal with the circumstances of this case in order that the matter may be properly dealt with. As to the objections, what happened was this. When the bill came before him, the taxing master wrote across it in red ink: "Allow out of pockets only," and, accordingly, disallowed all profit costs. I am not clear what the objections to the disallowance exactly mean, but I take them to mean that it has been the practice of the plaintiff's firm to arrange that in a case where one of the partners happened to be a trustee and there was no power in the instrument of trust for a solicitor-trustee to charge, the profit costs should be taken by the non-trustee members of the firm. But that does not get over the difficulty. The fact is that, in that statement of the firm's practice, it is assumed that the firm are employed to act as the solicitors to the solicitor-trustee. The master overruled the objection on the ground that there was no express agreement in writing to exclude the plaintiff from sharing in the profit costs, and he, accordingly, refused to give effect to such an agreement unless it was in writing.

In upholding the master's decision I am not doing so for the reason he stated, because the real difficulty which I feel is one that would not be dissipated even if there were such an express agreement between the three partners. It would be dissipated if I were satisfied that, instead of the firm having been employed as solicitors, the plaintiff's partners had been so employed and acted in that capacity, with, of course, proper safeguards against any portion of the profit costs coming into the hands of the solicitor-trustee, but I am told that it cannot be said with truth that that was the case.

I have entered upon this explanation in order that there may be no question as to the grounds upon which I decide this case. The result is that the objections must be overruled on the grounds which I have stated and, accordingly, in the result I hold that the master was right in disallowing the profit charges, and I must dismiss the summons.

Solicitors: *Hicks, Arnold, & Bender*; *W. Silverwood Cope & Son.*

[*Reported by* J. H. G. Buller, Esq., *Barrister-at-Law.*]

PERROTT AND PERROTT, LTD. *v.* STEPHENSON

[CHANCERY DIVISION (Bennett, J.), October 27, 1933]

[Reported [1934] Ch. 171; 103 L.J.Ch. 47; 150 L.T. 189; 50 T.L.R. 44; 77 Sol. Jo. 816]

Company—Directors—Exercise of powers—Need of unanimity.

One of the articles of a limited company provided, inter alia, as follows: "The governing directors shall have power from time to time and at any time to appoint and remove at will additional directors. . . . In all questions arising the opinion of the governing director or directors shall prevail."

Held: that, although it was a rule of corporation law as laid down in KIDD ON CORPORATIONS, and in *Grindley* v. *Barker* (1) (1798), 1 Bos. & P. at p. 236, and *Withnell* v. *Gartham* (2) (1795), 6 Term. Rep. at p. 398, that when a duty is delegated to a body of persons, those persons can act by a majority, nevertheless that rule had no application in the case of articles of association of companies incorporated under the Companies Acts, but was limited to cases where the duty to be performed by a corporation was a duty of a public nature; and the true construction of the article was that the powers conferred on the governing directors by it were to be exercised by all of them unanimously.

Notes. As to meetings of directors, see 6 HALSBURY'S LAWS (3rd Edn.) 315 et seq., and for cases see 9 DIGEST (Repl.) 454, 455, 542 et seq.

Cases referred to:

(1) *Grindley* v. *Barker* (1798), 1 Bos. & P. 229; 126 E.R. 875; 13 Digest 314, *471*.

(2) *Withnell* v. *Gartham* (1795), 6 Term. Rep. 388; 1 Esp. 321; 101 E.R. 610; 17 Digest (Repl.) 49, *580*.

Motion.

A resolution purported to have been passed by two of the three governing directors of the plaintiff company appointing two additional directors of the company. This motion, which was in an action against certain directors of the company, and was treated as the trial of the action, asked, inter alia, that it might be declared that the appointment of the two additional directors was invalid on the ground that the three governing directors of the company had not unanimously passed the resolution appointing them. Article 90A of the company's articles provided inter alia that:

> "The governing directors shall have power from time to time and at any time to appoint and remove at will additional directors. . . . In all questions arising the opinion of the governing director or directors shall prevail."

Article 114 provided as follows:

> "The directors may meet together for the dispatch of business, adjourn, and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business. Until otherwise determined, two directors, one of whom must be a governing director, shall be a quorum. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes the chairman shall have a second or casting vote. A director may, at any time, summon a meeting of the directors."

The main question for the decision of the court was whether the words "the opinion of the governing director or directors" in art. 90A meant the opinion of the majority of the governing directors or whether they meant their unanimous opinion.

Gavin Simonds, K.C., and *Lindon* for the company.

Topham, K.C., and *Vernon*, for the defendants, referred to KIDD ON CORPORATIONS, vol. 1, p. 400, *Grindley* v. *Barker* (1), *Withnell* v. *Gartham* (2), BUCKLEY ON THE COMPANIES ACTS, p. 718, and GRANT ON CORPORATIONS, p. 68.

BENNETT, J.—The question involved in this motion is whether, on the construction of art. 90A of the articles of association of the plaintiff company two of the three governing directors have the power against the will of the third to appoint additional directors. The question turns on the construction of that article. Article 114 is only important in so far as it enables me to contrast the language in it with that in the former article.

Upon the language of art. 90A it seems to me reasonably plain that the words "governing directors" are not equivalent to "a majority of the governing directors." The defendants contend that to interpret the words "governing directors" as meaning "a majority of the governing directors" would be in accordance with the rule of corporation law said to have been laid down in KIDD ON CORPORATIONS, and in *Grindley* v. *Barker* (1) and *Withnell* v. *Gartham* (2).

In my judgment, the rule which has been laid down by the authorities on which the defendants rely has no application to the case of articles of association of companies incorporated under the Companies Acts, but is limited to the case where the duty to be performed by a corporation is a duty of a public nature. That is reasonably clear from the judgment of EYRE, C.J., in *Grindley* v. *Barker* (1), where he is contrasting powers of a general nature with those of a private nature.

The rule of corporation law having, in my judgment, no application to the articles of this company, the question falls to be determined by the words of the articles, and contrasting the language of art. 90A with that of arts. 114 and 117, the conclusion to which I have come is that the powers conferred on the governing directors by art. 90A are to be exercised by all of them. The plaintiffs are therefore entitled to declarations as set out in the writ, and there will be liberty to apply.

Solicitors: *Tamplin & Co.*; *Kimbers, Williams & Co.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

R. *v.* HARE

[COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Avory and Lawrence, JJ.), November 20, 1933]

[Reported [1934] 1 K.B. 354; 103 L.J.K.B. 96; 150 L.T. 279; 98 J.P. 49; 50 T.L.R. 103; 24 Cr. App. Rep. 108; 32 L.G.R. 14; 30 Cox, C.C. 64]

Criminal Law—Indecent assault on male—Liability of woman to be convicted—Indecent assault on female—Liability of woman—Offences against the Person Act, 1861 (24 *&* 25 *Vict., c.* 100), *s.* 52, *s.* 62.

A woman may be convicted of indecent assault on a male person, contrary to s. 62 of the Offences against the Person Act, 1861.

Semble: A woman may be convicted of indecent assault on another female, contrary to s. 52 of the above Act.

Notes. Sections 52 and 62 of the Offences against the Person Act, 1861, have been replaced by s. 14 (1) and s. 15 (1) of the Sexual Offences Act, 1956, respectively.

As to indecent assault, see 10 HALSBURY'S LAWS (3rd Edn.) 669, 755, and for cases see 15 DIGEST (Repl.) 900, 910, 1026–1028. For Sexual Offences Act, 1056, see 36 HALSBURY'S STATUTES (2nd Edn.) 215.

A **Appeal** against conviction.

The appellant, Maggie Hare, was charged at the Central Criminal Court on an indictment which contained, inter alia, three counts charging her with indecent assault on a boy of the age of twelve years. Before the prisoner pleaded, her counsel moved to quash the counts in the indictment which charged indecent assault, on the ground that s. 62 of the Offences against the Person Act, 1861, B under which those counts were framed, referred only to assaults of a sodomitical character. This submission was overruled, and the prisoner then pleaded "Not Guilty." Evidence was given by the boy that the appellant had induced him to have connection with her on three occasions, and by the boy's father that, on being accused by him of these offences, the prisoner at first maintained silence, but C subsequently admitted that connection had taken place three times. The jury found the prisoner Guilty on the three counts which charged indecent assault, and the Recorder sentenced her to fourteen months' imprisonment in the second division.

Venetia Stephenson for the appellant.
Eustace Fulton, for the Crown, was not called on to argue.

D By the Offences against the Person Act, 1861:

> "Section 52: Whosoever shall be convicted of any indecent assault upon any female . . . shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour."
>
> "Section 62: Whosoever . . . shall be guilty . . . of any indecent assault E upon any male person, shall be guilty of a misdemeanour . . ."

The judgment of the court was delivered by

AVORY, J.—The appellant was convicted before the Recorder of London at the Central Criminal Court on three counts of an indictment which charged her with having committed an indecent assault on a boy under the age of sixteen, in fact F of the age of twelve years. The alleged indecent assaults were made upon Aug. 9, 12 and 19, and it must be taken on the verdict of the jury that they accepted the evidence of the boy and his father. The boy's evidence was that the appellant instigated and induced him to have connection with her on the three occasions alleged. The father corroborated the boy's evidence by proving that subsequently, when the boy was taken to hospital, it was found that he had been infected with G a venereal disease. There was evidence that this disease had been communicated to him by the appellant. The boy's father said that, having ascertained these facts, he accused the appellant, who at first maintained silence, but when the accusation was repeated admitted that connection had taken place three times.

Upon that evidence we are asked to hold that it was not competent for the recorder to leave the case to the jury or for the jury to convict. The argument is H that, the offence being laid under s. 62 of the Offences against the Person Act, 1861, a woman cannot be convicted of an indecent assault upon a male person. The boy, being under the age of sixteen, was by law incompetent to consent to any such conduct as took place between him and the appellant, and there can be no question that the nature of the conduct was indecent. The whole question is whether the offence under s. 62 is to be limited to an indecent assault of a sodomitical character. I For the appellant some reliance has been placed on the heading of this group of sections. The heading of ss. 61–63 of the Act of 1861 is "Unnatural Offences." There is no question that s. 61 and the first part of s. 62 deals with what everyone would call unnatural offences, namely, bestiality or acts of a sodomitical character, but s. 62 then proceeds "[whosoever . . . shall be guilty] of any indecent assault upon any male person." The question is whether there is any ground for limiting the meaning of those words in the manner suggested.

The heading of a group of sections, as is well known, forms no part of the enactment; it is not voted on or passed in Parliament. Headings and marginal notes are inserted only after a Bill has become law. A heading cannot control the plain meaning of the enacting part of the section. It may, in some instances, be looked at as a preamble, if there is some ambiguity in the meaning of the section on which it can throw light. In this case we can see no ground for saying that there is any ambiguity. Having regard to the fact that the words "whosoever" in s. 61 admittedly includes a woman and that the first part of s. 62 admittedly includes a woman, there can be no reason for saying that the phrase "whosoever . . . shall be guilty . . . of any indecent assault upon any male person" does not also include a woman.

There are many other sections in the statute to which reference has been made, such as s. 52, where the word "whosoever" is used. There is no doubt, in our opinion, that in s. 52 the word "whosoever" includes a woman. There can be no reason for saying that a woman cannot be guilty of indecent assault upon another female.

In the result, we think that the point urged on behalf of the appellant has no substance and that the appellant was properly convicted. The appeal must be dismissed.

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal*; *Director of Public Prosecutions.*

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

THE KAITUNA

[COURT OF APPEAL (Scrutton, Greer and Romer, L.JJ., assisted by Nautical Assessors), June 19, 20, 21, July 3, 1933]

[Reported [1933] P. 234; 103 L.J.P. 1; 150 L.T. 112; 18 Asp.M.L.C. 429]

Shipping—Collision—"End-on rule"—Applicability—Need for both side-lights of each vessel to be more constantly visible to the other than one side-light only —Sea Regulations, 1910, *art.* 18.

Article 18 of the Sea Regulations, 1910, does not apply to vessels approaching one another at night so as to involve risk of collision unless both side-lights of each vessel are more constantly visible to the other than one side-light only; it is not sufficient to render art. 18 applicable that one vessel may very occasionally see two side-lights, though generally seeing one side-light.

The *S.* and the *K.*, both steam vessels, were approaching each other at night on courses which proved to be crossing at a fine angle. The *K.* was in light draught, and in the prevailing conditions of wind and swell was "yawing" in such a manner that both her side-lights were almost constantly seen by those on board the *S.* The green side-light only of the *S.* was generally visible to those on the *K.*, though occasionally both side-lights might be visible.

Held: art. 18 did not apply, and the *K.* was not, therefore, to blame for having failed to act in accordance with it; on the facts, the vessels were crossing vessels within art. 19, and the *S.* was alone to blame for having failed to keep out of the way.

Notes. The Sea Regulations, 1910, have been replaced by the International Regulations for Preventing Collisions at Sea, 1948. Article 18 of the regulations of 1910 has been replaced by r. 18 (a) of the regulations of 1948 which, apart from the substitution of "power driven vessels" for "steam vessels" is in identical terms.

A As to collisions at sea, see 30 HALSBURY'S LAWS (2nd Edn.) 661 et seq., and for cases see 41 DIGEST 685 et seq.

Cases referred to:

(1) *The Orduna (Owners)* v. *Shipping Controller*, [1921] 1 A.C. 250; 90 L.J.P. 67, H.L.; 41 Digest 741, *5925*.

(2) *The Beryl* (1884), 9 P.D. 137; 53 L.J.P. 75; 51 L.T. 554; 33 W.R. 191; 5 B Asp.M.L.C. 321, C.A.; 41 Digest 742, *5941*.

(3) *The Nichols* (1868), 7 Wall. 656.

(4) *The Constitution* (1864), 2 Moo.P.C.C.N.S. 453; Brown & Lush. 324; 10 L.T. 894; 10 Jur.N.S. 831; 15 E.R. 972, P.C.; 41 Digest 746, *5971*.

(5) *The Ava* (1873), 29 L.T. 781; 2 Asp.M.L.C. 182, P.C.; 41 Digest 692, *5223*.

(6) *The Jesmond and the Earl of Elgin* (1871), L.R. 4 P.C. 1; 8 Moo.P.C.C.N.S. C 179; 25 L.T. 514; 1 Asp.M.L.C. 150; 17 E.R. 280, P.C.; 41 Digest 740, *5919*.

(7) *The Cleopatra* (1856), Sw. 135; 166 E.R. 1059; 41 Digest 740, *5908*.

(8) *Crown Steamship Co.* v. *Eastern Navigation Co.*, 1918 S.C. 303; 41 Digest 728, *5667*, *iv*.

(9) *The Otranto*, [1931] A.C. 194; 100 L.J.P. 11; 144 L.T. 251; 47 T.L.R. 163; D 18 Asp.M.L.C. 193, H.L.; Digest Supp.

Appeal and **Cross-Appeal** from an order of LANGTON, J.

The plaintiffs, owners of the Norwegian steamship *Selje*, claimed damages in respect of a collision between the *Selje* and the British steamship *Kaituna*, belonging to the defendants, which took place off the south coast of Australia to the westward of Cape Otway on the night of March 29, 1929.

E The *Selje* was a steel screw steamship of 6,598 tons gross, 420 ft. in length, and was on a voyage, from Williamstown (near Melbourne) to Las Palmas for orders, laden with a cargo of wheat. The *Kaituna* was a steel screw steamship of 2,042 tons gross, 279·5 ft. in length, and was on a voyage from Adelaide to Melbourne. The collision took place shortly after 10 p.m. in fine, clear weather. The vessels had previously sighted each other at a distance of eight to ten miles, the F *Selje* then being on a course of N. 86 W. magnetic, and the *Kaituna* on a course of S. 78 E. The vessels were, therefore, on courses converging at an angle of eight degrees.

On behalf of the *Selje* it was alleged that in these circumstances they saw two white lights of the *Kaituna* bearing nearly ahead, withal fine on the starboard bow. The lights afterwards disappeared from view, but later they again came into sight, G together with both side-lights of the *Kaituna*. On behalf of the *Kaituna* it was alleged that the masthead lights of the *Selje* were made out bearing about one-and-a-half points on the port bow. The *Kaituna* kept her course and speed, and, as the vessels approached, the lights of the *Selje* were observed narrowing on the port bow of the *Kaituna* and the green light of the *Selje* was made out. The lights of the *Selje* thereafter drew ahead of the *Kaituna* at a distance of two to three miles H and crossed on to her starboard bow. The *Kaituna* continued to keep her course and speed.

On behalf of the *Selje* it was contended before LANGTON, J., that art. 18 of the Sea Regulations ("end-on" rule) applied, and that the *Kaituna* improperly failed to port her helm so as to pass the *Selje* on her port side. For the *Kaituna* it was contended that art. 19 of the regulations ("crossing" rule) applied, and that the I *Selje* was to blame for failing to pass starboard to starboard when in a position to do so, and for improperly porting.

LANGTON, J., after consultation with the Elder Brethren, held that it was a case of nearly end on. The advice given by the Elder Brethren was stated by LANGTON, J., in his judgment as follows:

> "They do not pretend to say that in any case or in all circumstances of vessels crossing at eight degrees it must be a case which seamen would treat as a matter coming within art. 18. But they say: 'Take into account these circumstances—the vessels are meeting at night, and they are meeting in an ocean

> swell, and in conditions where there is some squally weather. Take all these conditions'—and they think that they ought to take all conditions into account in judging whether a case is to be treated as a crossing case or not—'taking all these conditions into account this case falls within the "end-on" rule.' They say: 'Suppose you had a perfectly flat calm and two vessels meeting in broad daylight, it might be that with the two vessels proceeding as they ought, practically on railway lines, a competent seaman would be able to determine exactly, with a long range of view, that the two vessels were actually crossing, although at so fine an angle. But different considerations apply when you have to take into consideration an ocean swell, night, and the fact that one vessel—except for 105 tons in her stern—is practically flying light and has, as her draught, six feet forward and some thirteen feet aft.' In their view there must have been considerable yawing on the part of that vessel, and probably on the part of both vessels, and therefore there must have been times at which if a continuously competent and vigilant look-out had been kept the two side-lights of each vessel must have been, at times, open to the other vessel."

The learned judge accepted this advice, and held that art. 18 applied. He then considered the subsequent navigation of the *Selje* and found that the *Selje* was to blame for porting to the green light of the *Kaituna* and stopping her engines. The learned judge held both vessels to blame, apportioning blame as to one-quarter to the *Kaituna* and as to three-quarters to the *Selje*, and directed that the plaintiffs should pay half the defendants' costs.

The owners of the *Kaituna* appealed, and the owners of the *Selje* also appealed.

Raeburn, K.C., and *Pilcher* for the appellants, owners of the *Kaituna*.

Digby, K.C., and *Stenham* for the respondents and cross-appellants, the owners of the *Selje*.

Reference was made to *The Orduna* (1), *The Beryl* (2), *The Nichols* (3), *The Constitution* (4), *The Ava* (5), *The Jesmond and Earl of Elgin* (6), *The Cleopatra* (7), *Crown Steamship Co.* v. *Eastern Navigation Co.* (8), *The Otranto* (9).

Cur. adv. vult.

July 3. The following judgments were read.

SCRUTTON, L.J.—This appeal concerns a collision at night off Cape Otway on the south coast of Australia between the Norwegian steamer *Selje* and the British steamer *Kaituna*. The *Selje* was the larger of the two, 6,598 tons gross and 420 ft. long, the *Kaituna* being 2,042 tons gross and some 280 ft. long. The *Selje* was laden with a draft of 28 ft. 3 in. forward and 28 ft. 6 in. aft; the *Kaituna* was light 6 ft. 3 in. forward and 13 ft. 9 in. aft. The *Selje* had masthead lights on two masts, the *Kaituna* on only one mast. The courses were crossing at an angle of eight degrees, the *Selje* N. 86 W.; the *Kaituna* S. 78 E.; both magnetic. In these circumstances the two steamers came into collision at right angles, a result which indicates something very wrong somewhere. Each says she saw the other eight to ten miles away. The judge has found that art. 18 of the Sea Regulations, 1910, applied, the ships being "nearly end on" within the meaning of that rule; that the *Kaituna* was to blame for not porting so as to comply with art. 18 by passing the other vessel port to port, and that the *Selje* was to blame for altering her helm without giving a whistle signal, and for porting to a green light. He puts the principal blame on the *Selje*, who admits helm action without a whistle signal, and finds the *Selje* three-quarters to blame and the *Kaituna* one-fourth. Each ship appeals.

The case depends in the first instance on whether the "end-on rule" (art. 18) or the "crossing rule" (art. 19) applies. There was eight degrees difference in courses, but the *Kaituna* was very light forward and there was a south-west swell and wind on her starboard bow. In these circumstances there was probably yawing, which might alter her heading from time to time, and affect the visibility of one or other of her side-lights to the approaching ship. The judge below has taken what I think

A is the rather unusual course of asking the Trinity Masters in effect whether art. 18 or art. 19 applied.

> "In these circumstances would a competent seaman act and treat the matter as within the 'end-on rule' or the 'crossing rule'?"

They answered: "It is undoubtedly and quite clearly a case of 'nearly end on,'" B i.e., art. 18. They gave their reason:

> "But different considerations apply when you have to take into consideration an ocean swell, night, and the fact that one vessel—except for 105 tons in her stern—is practically flying light and has, as her draught six feet forward and some thirteen feet aft."

In their view there must have been considerable yawing on the part of that C vessel, and probably on the part of both vessels, and, therefore, there must have been times at which, if a continuously competent and vigilant look-out had been kept, the two lights of each vessel must have been, at times, open to the other vessel. It will be observed that they say "at times." Now the addition which was made to art. 18 attempts to define when vessels are meeting "nearly end on," in itself a vague and not very helpful description, by pre- D scribing as "the only conditions to which the rule applies," the case where at night "each vessel is in such a position as to see both the side-lights of the other." It will be noted "each vessel," not one vessel only. As a matter of construction it appears to me that it will not be sufficient to make art. 18 apply that one vessel may, though generally seeing one side-light only, very occasionally see two side-lights. Difficult questions may arise while the conditions of one side-light only, E or two side-lights, visible, each exist for a substantial time. There may be an ambiguous and varying condition in which the other ship seeing repeated changes of visibility may be well advised to take off her speed and wait till she can clearly understand what the changes mean. But if one condition substantially prevails, and there is only a brief interval of the other condition, in my opinion, the requirement that each vessel shall be in such a position as to see both the side-lights of F the other is not complied with. Now, the probable extent of yawing, if any, of a vessel very light forward with swell and wind on her starboard bow is a matter of nautical experience for which the court must rely on its assessors, and we have asked our assessors, not the construction of the rules, which is not, in my opinion, for them, but the probable results of given data.

We ask them the following questions: Would the result of the pleaded courses, G speeds, drafts, S.W. swell and wind, with one of the ships very light forward be: (a) That each ship would see both side-lights of the other constantly? They answer: "No." (b) "Or for a substantial time though not constantly?" They answer (b): "*Kaituna* might possibly see both *Selje's* lights occasionally, but not necessarily, and *Selje* would see both *Kaituna's* lights more frequently." (c) "Or [the question goes on] would each ship generally be only seeing one side-light of H the other?" Answer (c): "The *Kaituna* would be generally seeing the *Selje's* green light. The *Selje* would almost constantly see both *Kaituna's* side-lights." The last question was: "(d) Would one ship only be in that position, seeing one side-light, if so, which ship?" Answer (d): "*Kaituna*."

It will be seen that they reply that each vessel would not constantly see the two side-lights of the other; that the *Selje* would see both lights of the *Kaituna* "almost I constantly" or "more frequently"; but that the *Kaituna*, though she might possibly see both *Selje's* lights occasionally, but not necessarily, would generally be seeing the *Selje's* green light only. I should, myself, come to the same conclusion. It follows, in my opinion, that this was not a case in which "each vessel was in such a position as to see both side-lights of the other," and that, consequently, there is no ground for finding *Kaituna* to have broken art. 18.

Turning from probabilities to evidence, Thorson in charge of the navigation of the *Selje*, when asked whether the *Kaituna* could see both his side-lights, says twice: "I could see his, but I do not know that he could see mine." It is suggested that he said at the inquiry in Australia soon after the collision: "He should have seen my green light," but he says he does not remember. The inquiry was three years ago, and the evidence given there was not proved, its agreed admission only applying to these *Kaituna* witnesses. The navigator in charge of the *Kaituna* says he only saw the two lights of the *Selje* for a brief moment when the *Selje* showing green on his starboard bow swung round and he lost the green and saw the red, at a time when the collision could not be avoided, and he, the *Kaituna* did then port and stop his engines. In my opinion, the ground on which the judge has held the *Kaituna* to blame cannot be supported.

The *Selje*, however, attacked the *Kaituna* on another ground—that the right-angled blow shows that the *Kaituna* must have starboarded, as without her starboarding there must have been an impossible amount of porting on the *Selje* to get a right-angled collision. The *Selje* is helped in this contention by the well-meant, but rather unfortunate, excuse of the *Kaituna's* witness in making the *Selje* cross his bows at an angle of sixty degrees and get three points on his starboard bow before suddenly porting to a green light. I have considered whether this means bad look-out on the *Kaituna* or merely an excessive estimate in a sudden emergency. The *Kaituna's* witness has steadily denied starboarding, and the judge finds he never did starboard. I appreciate that, if he did, he would, apparently, be repeating the mistake for which the *Orduna* (*Owners*) v. *Shipping Controller* (1) was held liable of starboarding to help the *Selje* to go clear at a time when the *Selje* could go clear without his assistance, but I can find no ground for interfering with the judge's acceptance of the *Kaituna's* evidence. The *Selje's* story was one of persistent porting for a considerable time without even giving a whistle signal of what she was doing. We were told that the Norwegian owners felt aggrieved that their officers in whom they had confidence were held to blame; but Thorson admitted that he altered his helm three times without giving a whistle signal, and the judge has found that he got on the starboard bow of the *Kaituna* and then ported to a green light.

In my opinion, the *Kaituna's* appeal should be allowed, the *Selje's* appeal dismissed, the judgment below altered, and the *Selje* held alone to blame for the collision. The *Kaituna* must have the costs here and below.

GREER, L.J.—The litigation with which we are concerned in this appeal arose out of a collision between the Norwegian steamship *Selje* and the British steamship *Kaituna* shortly after 10 p.m. on March 29, 1929. Each of these ships put the entire blame for the collision on the other. The learned judge who tried the actions in the Admiralty Division found that both ships were to blame, and assessed the relative blameworthiness in the proportions of three to one, adjudging that three-fourths of the total damage should be borne by the *Selje*, and one-fourth by the *Kaituna*.

The *Kaituna* is a steel screw steamship of 2,042 tons gross and 1,208 net registered, 279·5 ft. in length, and 40·1 ft. beam, with engines of 194 h.p. On the night of the collision she was on a voyage from Adelaide to Melbourne. Her load was light, her draught being six feet forward and thirteen feet aft. The *Selje* was a much larger vessel (6,598 tons gross and 420 ft. in length), on a voyage from Williamstown, near Melbourne, in Australia, to Las Palmas for orders.

About half an hour before the collision, when the ships first sighted one another, their courses were: *Selje*, N. 86 W. magnetic; the *Kaituna*, S. 78 E. magnetic. They were then eight to ten miles distant from one another. These courses were crossing courses at the fine angle of eight degrees. It is obvious that if these courses were kept they would intersect sooner or later; the point of intersection would depend on the speed of the two ships. It seems probable that, as the proved speed of each vessel was eight-and-a-half knots, if they had both kept their course and speed, they would not have met at the point of intersection of their courses, but would have crossed in safety. If this be right, it would follow that one or other or both of the vessels must have done wrong to bring them into collision. The

A evidence on behalf of the *Selje* was taken by the trial judge on April 26, 1932, more than three years after the event. The defendants' witnesses were not available in this country, and in order to avoid the expense of a commission to Australia the parties agreed by their solicitors and counsel that the evidence of the captain, the third mate, and the engineer of the *Kaituna*, given at two inquiries at Melbourne—one on April 9, 1929, the other on April 24, 1929—should be used as evidence at
B the trial. At the first inquiry the owners of the *Selje* were represented and so had the same opportunity of cross-examining the witnesses with the view of establishing that the cause of the collision into which the court was inquiring was the bad navigation of the *Kaituna* as they would have had if the witnesses had been examined in the action. They availed themselves of that opportunity.

The questions in the action mainly turned on the evidence of the third officer
C of the *Selje*, and that of the third officer of the *Kaituna*. The trial judge saw and heard the third officer of the *Selje* in the witness-box, and declined to accept his evidence as being within any measurable distance of a reliable account of what happened during the material time when he was on the bridge in sole charge of the navigation of the *Selje*. I am inclined to think that the learned judge was, perhaps, a little hard on the third officer of the *Selje* when he described him as "a man of
D very low intelligence and with a poor notion of the rules," and in another part of his judgment as "a mental defective," but it is impossible to read the transcript of the shorthand note without agreeing with the learned judge's view that the evidence of this witness cannot be relied upon, and should not be accepted as affording anything like an accurate account of the events preceding the collision. On the other hand, the third officer of the *Kaituna* gave his evidence in Australia when
E the events of the night of March 29, 1929, were fresh within his recollection. He gave a clear and intelligible account of what happened. His evidence is not in conflict with the evidence of any witness except that of a witness whom the judge has refused to believe; for my part, I think the court ought to accept his evidence as in the main truthful and accurate, though subject to the critical attitude that should always be adopted to evidence of a navigator given in his own favour, and
F in favour of the ship he was employed by.

I have come to the conclusion that our judgment in these appeals should be to the effect that the *Selje* was solely to blame. I think the most probable explanation of the collision between these two vessels may be stated as follows. When they sighted one another at a distance of about eight miles, their courses were such that they would in all probability have crossed at a safe distance from one another.
G However this may be, the *Selje* did in fact safely cross ahead of the *Kaituna* from port to starboard. Both vessels were then proceeding in safety, green to green. The *Selje* then, through some unexplained aberration on the part of her third mate, who, imagining his ship would be in danger if she continued her course, ordered his helm hard-a-port, again crossed the bow of the *Kaituna*, possibly for a moment during the swing showing her two side-lights to the *Kaituna* at a time when it was
H impossible for the latter to save the situation by acting on the end-on rule. There is a part of LANGTON, J.'s judgment in which he appears to have adopted this view of the facts. He says:

> "But even on the supposition that she first saw the *Selje* much nearer than I think she would have me believe, still she did see the *Selje* crossing her bows,
> I and she did see the green light of the *Selje* on her starboard bow. I think it must have been fine on the starboard bow—nevertheless it was a position of safety. In those circumstances I do not think she could be blamed for keeping her course. What she did do was, when she appreciated that the *Selje* was performing this suicidal manœuvre of porting to a green light, and actually showing her red light, she then not unnaturally put her engines full astern and did what she could to lessen the collision."

The account given by the third officer of the *Kaituna*, confirmed by the captain, is to the effect that when the ships on their stated courses approached within a distance of two miles of one another, the course of the *Selje* led her over from the port side of the *Kaituna* to about a point or point-and-a-half on the starboard side. She then straightened up by what he thought might be merely a sheer, but it turned out to be the result of helm action as she came round and ultimately showed her two side-lights when it was impossible to avoid collision. Vincent, the third officer of the *Kaituna*, stated at the first inquiry that he first saw the *Selje's* green light about ten minutes before he took the bearing of Cape Otway. When he took the bearing of Cape Otway it was about three minutes to ten. He saw that the masthead lights of the *Selje* were widening out, she was a point on the port bow and appeared to be about to cross the bow of the *Kaituna*. She did so cross when the ships were about two or three miles apart, and she then seemed to steady on her course parallel to the *Kaituna*. When she was about six ships' lengths away —about a quarter of a mile—she swung round, and he then saw both red and green lights and immediately ordered his engines hard astern and shouted to the captain. The captain of the *Kaituna* said in his evidence at the same inquiry that he came off the bridge at ten minutes to ten, that the *Selje's* lights were then a point on the port bow, masthead lights well open, and green light showing. He remained on the bridge until she crossed. The third officer then took a bearing of Cape Otway, and the captain then went below to his cabin. It seems to me incredible that the captain would have gone to the cabin unless he had satisfied himself that there was then no risk of collision. He was called up at 10.3, and then saw the *Selje* across the *Kaituna's* bow. He observed that the telegraph was at full speed astern, and asked the third officer: "Are the engines full speed astern and the helm hard-a-port?" and received an affirmative reply. In my judgment, if these ships were ever on courses in which the "end-on" rule applied, they had got out of danger into safety, when the *Selje*, having the *Kaituna* on her starboard hand, crossed a second time in front of the *Kaituna*, brought the "crossing" rule into operation, broke it, and became responsible for the collision which resulted in her total loss. The *Kaituna*, in my judgment, was not to blame. She kept her course and speed until a collision became inevitable, and then unsuccessfully tried to avoid a collision, or in any case to mitigate the damage it would cause. I agree with the learned judge's finding that the *Kaituna* did not starboard.

LANGTON, J., after consulting the Elder Brethren, decided, I think with some reluctance, that the case was one in which the duty of both ships was to act under art. 18 of the Sea Regulations, 1910, which is known as the "end-on" rule, and not under art. 19, known as the "crossing" rule. Article 18 states quite distinctly how an "end-on" case is to be judged by night. By night it applies only to cases in which each vessel is in such a position as to see both side-lights of the other. It does not, of course, mean that when the vessels are, say, five or six miles apart they are then to act under the rule, but only if they are meeting end on in such a manner as to involve risk of collision, and it does not apply to two vessels which will, if both keep their respective courses, pass clear of each other. In my judgment, when these two vessels sighted one another they were vessels which, if both kept their respective courses, would in all probability pass clear of each other. I am also satisfied that before any risk of collision arose they had in fact, as the judge says in the passage I have quoted, passed clear of one another into a position of safety. If this be right, I cannot understand how any blame can attach to the *Kaituna* because she failed in time to anticipate that the *Selje* was going to convert the safe green-to-green position into a case in which the vessels would momentarily be end on at a time when obedience to the end-on rule could not prevent the collision. I agree that in all probability the *Kaituna's* witnesses in Australia may have failed accurately to estimate the distance of the *Selje* from the *Kaituna* when she first crossed, and the distance which her lights got on to their starboard bow, but these distances must necessarily be only approximate. Notwithstanding the fact that they may have over- or under-estimated these distances, I think their evidence should be accepted to the extent that the *Selje* had crossed into a position of safety before she ported her helm and came round across the course of the

Kaituna and so brought about the collision. There is nothing in the assessors' answers to the questions submitted to them inconsistent with this view of the cause of the collision between the two ships.

For these reasons, I think the *Selje* was alone to blame for the collision, and the appeal of the *Kaituna* should be allowed with costs here and below, and judgment should be entered declaring the *Selje* alone to blame, and the appeal of the *Selje* should be dismissed with costs here and below.

ROMER, L.J.—The first and the most important question arising on this appeal is whether the two vessels involved are to be considered as having been meeting end on or nearly end on within the meaning of art. 18 of the regulations, or as having been crossing within the meaning of art. 19. In view of the explanatory portion of the former rule the question may be stated thus. Was each vessel in such a position as to see both the side-lights of the other at the material time—the material time being the time when the necessity for precaution begins; that is to say, when there is a probability of a risk of collision?

In order to determine this question it becomes necessary in the first place to ascertain what is the meaning to be attributed to the words "in such a position." In ordinary cases in which each vessel is kept constantly upon its course as will happen when the water is reasonably smooth and the helmsman knows his business no difficulty can arise. But supposing that by reason of a heavy swell or otherwise one of the vessels, while in general only showing one of its side-lights to the other, yaws from time to time so that it now and then shows both its side-lights, is that vessel at the moment of yawing to be deemed to be in such a position as to show both its side-lights to the other within the meaning of the rule? In my opinion it is not. The regulations are, after all, regulations for preventing collisions at sea, and may properly be construed in case of doubt in such a way as to prevent collisions rather than to make them inevitable. If, for instance, two vessels are sailing on parallel courses showing green to green, and both suddenly yaw so that each vessel momentarily sees both lights of the other and thereafter sees the green only, it would seem extravagant to treat them as being both obliged to port their helms by reason of a rule designed to prevent collisions at sea. And yet in one sense each vessel is at the moment of yawing in such a position as to see both the side-lights of the other. If, however, the words "in such a position" are read, as I think they should be read, as referring to the ship's general course there would be no necessity for porting under art. 18. The fact of the yawing, however, would be a circumstance imposing upon each vessel the necessity for caution. Article 18 is expressly stated not to apply to two vessels which must, if both keep on their respective courses, pass clear of each other, and the subsequent reference to the side-lights would seem to be inserted for the purpose of indicating a method of ascertaining at night what the respective courses are. Even a vessel that is yawing can have no difficulty in knowing in substance what its own course is and to what extent (say) its port light may be visible to another vessel on its starboard bow. Its estimate of the course of the other vessel will depend upon the extent to which it sees both side-lights of that vessel. If in either case one of the side-lights of the vessel is only occasionally seen, the vessels are not, in my opinion, meeting end on, or nearly end on, so as to involve risk of collision.

If this be so, the answers given by the assessors on the present appeal to the questions put to them by the court clearly indicate that the two vessels were not within art. 18, but were crossing vessels within the meaning of art. 19, the *Selje* having the *Kaituna* on its starboard side. For we are told by the assessors that the *Kaituna* might possibly see both *Selje's* lights occasionally, though not necessarily, and that *Kaituna* would be generally seeing *Selje's* green light, by which they obviously meant would be seeing her green light only. And these answers of the assessors deduced merely from the pleaded courses, speeds, draughts, swell and wind, and the fact that *Kaituna* was very light forward are, in my opinion, confirmed by the evidence of the witnesses. For the witnesses on board the

Kaituna swore that they did not see the red light of the *Selje* until the latter ported shortly before the collision; while Thorson, who was the officer of the watch on the *Selje* at the material time, said that he did not know if the *Kaituna* could see both the *Selje's* lights. Now, the *Selje* was not yawing much. Thorson said she yawed half a point at the most. She had obviously crossed *Kaituna's* bows some little time before the collision, and on a course at an angle of eight degrees to that of the *Kaituna*, Mr. Vincent, on the *Kaituna*, estimating this distance at the time as being two or three miles. Even when yawing to the maximum extent, therefore, the *Selje's* red light could not have been visible on the *Kaituna* unless that light could be seen across *Selje's* bows to the extent of two-and-a-half degrees. If it could, it means that the light was not screened to the extent required by art. 2 (d). If, however, this regulation had not been complied with, and I understand that some slight departure from it is not uncommon, it was for Mr. Thorson to prove the existence of and extent of such departure seeing that the onus lay upon the plaintiffs to prove their allegation that the case fell within the "end-on" rule. If the red light of the *Selje* could have been seen across her bows to the extent of two-and-a-half degrees, Mr. Thorson must have known it. I, therefore, deduce from his evidence that it could not.

The case, therefore, not falling within the "end-on" rule, the only other question of fact is whether or not the *Kaituna* starboarded before the collision. This suggestion was rejected emphatically by Langton, J., and, in my opinion, rightly so. It is, no doubt, difficult to see how, with the admitted courses of the two vessels, the *Selje* could have got at right-angles to the *Kaituna* unless the latter had starboarded. But the estimate as to distance, bearings and times is most unreliable on both sides, and it is impossible to say with certainty what were the relative positions of the two vessels at any particular time before the collision. If, for instance, the *Selje* crossed the bows of the *Kaituna* at a considerably greater distance than three miles she might conceivably have got to such a position on the starboard bow of the *Kaituna* as that by porting she would bring herself in front of the *Kaituna* nearly at right angles. But in any case I do not think that any mathematical difficulty in accounting for the existence of a right angle that is itself somewhat problematical should induce the court in face of the explicit denials of those in charge of the *Kaituna* to hold that they performed so extraordinary and so unnecessary a manœuvre as starboarding her helm.

In my opinion, the appeal of the defendants should be allowed, and that of the plaintiffs dismissed, with the consequences stated by Scrutton, L.J.

Appeal allowed; cross-appeal dismissed.

Solicitors: *William A. Crump & Son*; *Thomas Cooper & Co.*

[*Reported by* Geoffrey Hutchinson, Esq., *Barrister-at-Law.*]

A

STREATHAM CINEMA, LTD. *v.* JOHN MCLAUGHLAN, LTD.

[KING'S BENCH DIVISION (du Parcq, J.), June 1, 1933]

[Reported [1933] 2 K.B. 331; 102 L.J.K.B. 536; 149 L.T. 447;
B 97 J.P. 273; 49 T.L.R. 471; 31 L.G.R. 219]

Gaming—Betting—Totalisator—Credit betting—Legality—Betting Act, 1853 (16 *& 17 Vict., c.* 119), *s.* 1.

Credit betting by means of a totalisator is not illegal under the Betting Act, 1853, s. 1.

C Premises were let by the plaintiffs to the defendants, the lease authorising the use of the premises, among other purposes, "for the carrying on of a social or tote club." The defendants conducted a "tote club" on the premises on a cash basis, but the plaintiffs did not know that it was so conducted. On a claim by the plaintiffs for rent, the defendants contended that the rent was not payable as the lease was, to the knowledge of the plaintiffs, made for an illegal purpose, namely, the carrying on of a totalisator.

D **Held**: where a totalisator was carried on on a credit basis, there was no infringement of s. 1 of the Betting Act, 1853; and, therefore, the "tote club" could have been carried on legally; the plaintiffs, in the absence of knowledge or notice to the contrary, were entitled to assume that it would be so carried on; and the rent was, accordingly, recoverable.

E **Notes.** As to betting houses, see 18 HALSBURY'S LAWS (3rd Edn.) 199 et seq., and for cases see 25 DIGEST 433 et seq. For Betting Act, 1853, see 10 HALSBURY'S STATUTES (2nd Edn.) 761.

Cases referred to:

(1) *Shuttleworth* v. *Leeds Greyhound Association, Ltd.*, [1933] 1 K.B. 400; 102 L.J.K.B. 264; 148 L.T. 424; 97 J.P. 37; 49 T.L.R. 143; 77 Sol. Jo. 48;
F 31 L.G.R. 100; 29 Cox, C.C. 583, D.C.; Digest Supp.

(2) *Attorney-General* v. *Luncheon and Sports Club, Ltd.*, [1929] A.C. 400; 98 L.J.K.B. 359; 141 L.T. 153; 45 T.L.R. 294, H.L.; Digest Supp.

Action tried by DU PARCQ, J., without a jury.

The plaintiffs, Streatham Cinema, Ltd., were the owners of premises situated G at No. 225, High Street, Streatham, S.W., and by a lease dated Oct. 14, 1932, they let those premises to the defendants, John McLaughlan, Ltd., for a term of seven years at an annual rent of £1,050, payable quarterly in advance. The lease contained the following covenant by the lessees:

> "Not to . . . use or occupy the said premises or permit the same to be used or occupied for any purpose other than as a private residence and (or) for the H carrying on of a social or tote [totalisator] club or for the purpose of whist drives in a lawful and orderly manner and so that no act or thing whatsoever shall be . . . in breach of the laws and regulations of the local and other authorities relating to the conduct and management thereof."

The defendants carried on on the premises a "tote club" on a cash basis; but, after I the decision of the Divisional Court in *Shuttleworth* v. *Leeds Greyhound Association, Ltd.* (1), in which it was held that the carrying on of a totalisator on this basis amounted to an infringement of s. 1 of the Betting Act, 1853, the defendants, by a letter dated March 9, 1933, informed the plaintiffs that they proposed to discontinue the business, and they declined to pay any further rent. The plaintiffs brought an action in which they claimed £262 10s., being one quarter's rent of the premises payable in advance. The defendants contended that the rent was not payable, as the contract was illegal, or made for an illegal purpose, namely, the carrying on of a totalisator club, as the plaintiffs well knew.

By the Betting Act, 1853, s. 1:

> "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same . . . betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race or any other race, fight, game, sport, or exercise."

Gilbert Beyfus, K.C., and *H. J. Wallington* for the plaintiffs.

T. Eastham, K.C., and *James MacMillan* for the defendants.

DU PARCQ, J.—This is an interesting case. The plaintiffs are the Streatham Cinema, Ltd., and the defendants are John McLaughlan, Ltd. Down to some time in 1932 the plaintiffs had been carrying on a cinema theatre at some premises at Streatham; that enterprise had come to an end and they were minded to let the premises, and found tenants in the defendants. The defendants were a firm described as turf accountants—that is another way of saying bookmakers—and they carry on a business as bookmakers in New Bond Street, where their business is that of what is called credit bookmaking. It is important to note that the solicitors who were acting for the defendants in negotiating the terms of the lease wrote to the solicitors acting for the plaintiffs on Sept. 28, 1932, a letter in which they said this:

> "The lessees will be Messrs. J. McLaughlan, Ltd., whose registered office is at 11, Duke Street, Edinburgh, and their business address 94, New Bond Street, W.1. Description, turf accountants. It appears that our clients are desirous of opening a tote club at the premises, and we presume there is no objection to this."

There was no objection to that, and, indeed, when the lease was executed (it is dated Oct. 14, 1932) it contained this clause:

> "The tenants do hereby for themselves and their assigns covenant with the lessors in manner following, that is to say . . . not to permit or suffer any sale by auction to be held . . . nor use or occupy the said premises or permit the same to be used or occupied for any purpose other than as a private residence and (or) for the carrying on of a social or tote club or for the purpose of whist drives in a lawful and orderly manner and so that no act or thing whatsoever shall be done committed permitted or suffered in or about the premises or any part thereof which may constitute a nuisance or annoyance or damage to the lessors or other the owners or occupiers of adjoining premises or be in breach of the laws and regulations of the local and other authorities relating to the conduct and management thereof."

It is clear, therefore, that the landlords knew that one of the objects for which the premises might be used was that of carrying on a tote club. It was not the only object. If they liked, the tenants could use them as a private residence; they could carry on a social club there; they could hold whist drives there; they were not obliged to have a tote club there, but they could, without any objection from the landlords, if they were minded to do so, carry on a tote club; and the landlords were told before the lease was executed that they did intend to have on the premises a tote club which might mean, of course, in conjunction with a social club or in conjunction with a private residence as part of the premises, or might not.

The first question is: Did that fact mean that the lessors were letting the premises for an illegal purpose? If one substitutes for the purpose of a tote club words which indicate clearly some disorderly use of the premises which everybody would know necessarily to be illegal, then, of course, the whole lease would be void. If it had been, for instance, for the purpose of carrying on the business of selling liquor without a licence, clearly the whole transaction would be void and not a penny of rent could be recovered. On the other hand, if the purpose is one which may be carried out either in a legal manner, or in an illegal manner, it cannot be said that the agreement is void, because the lessor is entitled to presume that the business will be carried on in a legal and not an illegal manner. In a sense one gets into a somewhat artificial atmosphere. I am bound to ask myself, not what the parties thought the law was but what the law really was; and it may well be, and probably is, the fact that both the lessors and the lessees were under the impression (which they shared with a great many other people including many lawyers) that any form of tote club was perfectly legal. The truth is, as we now know by the decision of the Divisional Court in *Shuttleworth* v. *Leeds Greyhound Association, Ltd.* (1), that some tote clubs at any rate are illegal. Counsel for the defendants says that all tote clubs are illegal. Alternatively, he says that the lessors must have known that this tote club would be illegal, and it is necessary that I should examine those contentions. If all tote clubs are illegal, then the defendants are entitled to refuse to pay any rent. They may not in doing so be acting in a conspicuously meritorious manner, but they would be perfectly entitled to say: "You are people who have been acting wrongly and criminally, and the result is that you, as a criminal with us, cannot come into court and make us pay you. We are in the happy position of those who are on the defensive, but can put up a good defence."

The question depends on the interpretation of s. 1 of the Betting Act, 1853. The first few lines of that section do not affect this question. It cannot be contended now, at any rate, since the decision of the House of Lords in *Attorney-General* v. *Luncheon and Sports Club, Ltd.* (2), that where a club has on its premises a totalisator used by members of the club betting among themselves, the club taking a share of the proceeds as its reward for maintaining the totalisator and doing the necessary clerical work, the room or other place where the totalisator is, is being

> "kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner"

and so on "betting with persons resorting thereto." So it is quite plain that it is possible to carry on a tote club without in any way offending against the prohibition in the first part of the section. Then come the words which have to be carefully considered,

> "or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid."

So far as those last words are concerned, it was only faintly argued that they affected this case at all, and I am unable to see that they do. But as to the other words, counsel for the defendants has put forward an extremely ingenious argument, which, however, I do not think can succeed. It is perfectly true that many tote clubs, perhaps nearly all tote clubs, are illegal because of the words of the section relied on. It was held recently by the Divisional Court, in the decision to which I have already referred, *Shuttleworth* v. *Leeds Greyhound Association, Ltd.* (1), that where a tote was installed upon premises and persons resorted to those premises in order to use it, taking tickets and paying for the tickets at the time they made their bets, although they were not resorting to those premises to make bets with the owner or occupier, they were, nevertheless, resorting thereto for the purpose of money being received on behalf of the owner or occupier as consideration for an assurance or undertaking or agreement to pay thereafter money on an event or contingency.

But it has been argued by counsel for the plaintiffs, and I think he is right, that if people choose to carry on a tote club where no money is staked at the time that the bet is made, where no valuable thing is given at the time, and where all that takes place is that a promise is given by the person making the bet that, if he loses his bet, he will pay at some future time, the premises are not affected, and the action of the proprietor of the premises is not affected, by the prohibition in the Act. Counsel for the defendants suggests that such a construction, and such a result, are repugnant to common sense. It may be so. I ventured to say to him during the course of the argument that I thought that, if one tried to be guided by common sense in construing the statutes which govern gaming and wagering in this country, one might find oneself in serious difficulties; and if I am asked why it is a criminal offence to make a bet with a street bookmaker by paying cash at the time the bet is made, whereas no offence at all is committed when a bet is made by post by incurring a debt with a bookmaker at his office, frankly I find myself unable to answer the question and I do not attempt to. I can only interpret the law as I find it, and if people think that it ought to be altered, it may be that the legislature will some day alter it. On the other hand, there may be behind these laws a wise and beneficent purpose which some of us are unable to fathom or understand, and I shall not presume to inquire any further. I think that, just as the bookmaker who gives credit to his customers carries on his business unmolested and is doing nothing illegal, so, if people choose to have a tote club upon their premises and take no money and no valuable consideration at the time the bet is made, they are not breaking the law. I think counsel's suggested construction is too strained. I think the use of the word "thereafter," where it occurs in the section, shows that what is struck at is the case where money is paid, and at the time the money is paid there is received in return for that money, which is the consideration, a promise to pay money thereafter at some future date when the race has been run, or the fight or game is over, and the event has been determined.

That leads me to the conclusion that, assuming, as I am bound to assume (though, no doubt, it is contrary to the fact), that the lessors and lessees knew the law, what they knew was that a tote club might be legally carried on or it might be illegally carried on. If so, the lessors were saying: "We will let our premises to you, you may have whist drives there provided you carry them on lawfully; you may use them as a private residence; you may use them as a social club; you may use them for a tote club; you may use them for nothing else"; and they were entitled to assume that, in using them as a tote club, the defendants would use them lawfully as a tote club, and were not bound to assume that they would use them unlawfully as a tote club. In the course of the argument I suggested the analogy of the letting of premises to be used as a night club. There would be nothing illegal in that. It is possible, I suppose, to have a club which is open all night where no one drinks anything stronger than water or lemonade after the proper closing hours. Everyone knows that there are people who break the law and provide intoxicating liquor at hours when the sale of it is prohibited. But the man who lets his premises for the purpose of a night club would be entitled to assume that the business would be lawfully carried on.

That is not the end of the case, because counsel for the defendants says, quite rightly, that, if the plaintiffs knew that, although the premises could be lawfully used as a tote club, they were going to be unlawfully used, the defendants would have a good defence. I have already said that I do not think there is any evidence before me that they had notice or knowledge of that.

Now, what is the position? The premises were, no doubt, carried on illegally. There is no evidence that the lessors knew that until, it may be, the date in March, when by a letter dated March 9, 1933, they learned from their tenants that they had been carrying on the business in an illegal way. It does not even follow from that that they had knowledge, because it might be that on March 9 the defendants were wrong in thinking that they had carried on the business illegally, not realising that it was possible to carry it on lawfully. But let it be assumed that that letter is to be read as an admission that up to that date they had carried on the club unlawfully. What happens then? The plaintiffs are also told: "We have up to this date carried an the business illegally. From now on we are not going to carry it on illegally, for we are not going to carry on a tote club any more—certainly not an illegal one." It seems to be absurd on those facts to say that their effect on the landlords is that they can never have any rent. The tenants write and say: "You did not know—through your ignorance of the law you did not appreciate it—that we have been carrying on an illegal business on your premises. Henceforth we are going to use them either not at all, or certainly for no purpose that is not perfectly lawful." It seems to me it would be surprising if the tenants could properly add: "Therefore, in the future we are not going to pay you any rent." It seems to me that that is an impossible conclusion, and I am therefore of opinion, in spite of the ingenious contentions forcibly argued by counsel for the defendants, that the plaintiffs are entitled to succeed, and that there must be judgment for the amount claimed, £262 10s., with costs.

Judgment for plaintiffs.

Solicitors: *Isadore Goldman & Son*; *Thompson, Near & Co.*

[*Reported by* T. R. F. Butler, Esq., *Barrister-at-Law.*]

LATHAM *v.* GOLDSBURY

[King's Bench Division (Avory, J.), February 3, 1933]

[Reported [1933] 1 K.B. 844; 102 L.J.K.B. 401; 148 L.T. 528; 49 T.L.R. 258; [1933] B. & C.R. 86]

Bankruptcy—Property available for distribution—Reputed ownership—Debt "growing due"—Bankruptcy Act, 1914 (*4 & 5 Geo. 5, c. 59*), *s.* 38 (*c*).

D., the tenant of a public-house, deposited with the brewers, his landlords, a sum of £750 as security for the due performance of his tenancy agreement, and received from the brewers deposit receipts. He lodged these with a bank as security for an overdraft, which was guaranteed by one G., and a charging order was made. On Oct. 30, 1931, D. committed an act of bankruptcy, and on Nov. 5, 1931, notice of the bank's charge was given to the brewers. In March, 1932, after giving D. credit for the £750 originally deposited, there was in the hands of the brewers a sum of £218 odd due from them to D. This sum was claimed both by D.'s trustee in bankruptcy, as a debt due or growing due to the bankrupt and within his order or disposition within the meaning of s. 38 (c) of the Bankruptcy Act, 1914, and by G., who had in October, 1932, paid the bank the amount of the overdraft and thereby became subrogated to the bank's rights.

Held: the trustee in bankruptcy was entitled to the sum as a debt "growing due" and in the reputed ownership of the bankrupt within s. 38 (c), but G. was not so entitled as he had not given notice of the bank's charge to the brewers until after the trustee's title had accrued.

Notes. As to reputed ownership, see 3 Halsbury's Laws (3rd Edn.) 438 et seq., and for cases see 5 Digest 743 et seq. For Bankruptcy Act, 1914, see 2 Halsbury's Statutes (2nd Edn.) 321.

Cases referred to: A

(1) *Blakey* v. *Pendlebury's Trustees*, [1931] 2 Ch. 255; 100 L.J.Ch. 399; 145 L.T. 524; 47 T.L.R. 503; [1931] B. & C.R. 29, C.A.; Digest Supp.

(2) *Re Couston, Ex parte Watkins* (1873), 8 Ch. App. 520; 42 L.J.Bcy. 50; 28 L.T. 793; 21 W.R. 530, L.C. & L.J.; 5 Digest 803, ***6863***.

Interpleader issue tried by Avory, J., without a jury.

One Drake, who was the tenant of a public-house from certain brewers, deposited B with his landlords sums amounting to £750 as security for the performance of the terms of his tenancy, and the brewers gave him deposit receipts. Drake lodged these receipts with the Westminster Bank to secure an overdraft, which was guaranteed by one Goldsbury. A charging order was made on April 12, 1929. On Oct. 30, 1931, Drake committed an act of bankruptcy, and a receiving order was made against him. Neither the bank nor Mr. Goldsbury gave the brewers notice C of the charge till Nov. 5, 1931. On March 8, 1932, a balance was struck between Drake and the brewers, with the result that, after giving credit for the £750, a sum of £218 8s. 4d. was due from the brewers to Drake. On Oct. 19, 1932, Goldsbury paid the bank £300, the amount of the bank's advance to Drake, and thereby became subrogated to the bank's rights. The sum of £218 8s. 4d. was claimed both by Latham, who had been appointed Drake's trustee in bankruptcy, as a debt D "growing due" to the bankrupt at the date of the receiving order, and in his reputed ownership at that date, and also by Goldsbury as successor in title to the bank. The brewers interpleaded, and an issue was directed between the trustee Latham as plaintiff, and Goldsbury as defendant.

By the Bankruptcy Act, 1914, s. 38:

> "The property of the bankrupt divisible amongst his creditors, and in this E Act referred to as the property of the bankrupt, . . . shall comprise the following particulars. . . . (c) all goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action F other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section."

C. N. Tindale Davis for the plaintiff.

C. Gallop for the defendant.

AVORY, J.—One, Drake, who was the licensee of a public-house under the brewers, Watney, Combe, Reid & Co, Ltd., deposited with the brewers sums G amounting to £750 as security for the due performance of the terms of his tenancy of the public-house. On March 8, 1932, as a result of his trading with the brewers, after giving him credit for that £750, there was a balance of £218 8s. 4d. due from the brewers to Drake. Drake became bankrupt, and the act of bankruptcy, to which the bankruptcy dates back, was committed on Oct. 30, 1931. The trustee in Drake's bankruptcy now claims that sum of £218 8s. 4d. as property divisible H among his creditors.

The whole question in issue before me turns on whether it is property divisible among his creditors within the meaning of the Bankruptcy Act, 1914—in other words, whether it was, on Oct. 30, 1931, a debt either due or growing due to the bankrupt in the course of his trade or business. In *Blakey* v. *Pendlebury's Trustees* (1) the meaning of those words "growing due" was carefully considered and I adjudicated on by the Court of Appeal. Lord Hanworth, M.R., said ([1931] 2 Ch. at p. 264):

> "The word 'debt' seems to connote a contractual liability as between debtor and creditor, but 'growing due' is not an apt expression to cover a debt which is already a contractual obligation, though the due date for payment has not yet been reached. It seems to intend something that in the course of the trade or business will ripen into a debt, though not a debt, and only in an inchoate state at the commencement of the bankruptcy."

That seems to me exactly to express the condition of this sum of £218 8s. 4d. at the date of the commencement of the bankruptcy. It was "in an inchoate state" which would ripen at the date of payment.

The only other question was whether this sum was in the reputed ownership of the bankrupt. I felt some doubt whether a debt "growing due" could be in reputed ownership, but I am satisfied by the words of LORD SELBORNE in *Re Couston, Ex parte Watkins* (2) (8 Ch. App. at p. 528):

> "The doctrine of reputed ownership does not require any investigation into the actual state of knowledge or belief, either of all creditors, or of particular creditors, and still less of the outside world, who are no creditors at all, as to the position of particular goods. It is enough for the doctrine if those goods are in such a situation as to convey to the minds of those who know their situation the reputation of ownership, that reputation arising by the legitimate exercise of reason and judgment on the knowledge of those facts which are capable of being generally known to those who choose to make inquiry on the subject. It is not at all necessary to examine into the degree of actual knowledge which is possessed, but the court must judge from the situation of the goods what inference as to the ownership might be legitimately drawn by those who knew the facts."

Therefore, I am satisfied that this sum of £218 8s. 4d. was a debt due or growing due which was in the order and disposition of the bankrupt. The question in the present issue was whether Mr. Goldsbury, who paid off Drake's bank overdraft, and was thereby subrogated to the rights of Drake, is entitled to this sum as against the trustee in bankruptcy. The short answer seems to me to be that no notice was given to the debtors by Mr. Goldsbury till after the title of the trustee had accrued. In those circumstances, I think the trustee is entitled to this sum.

Judgment for the plaintiff.

Solicitors: *Kenneth Brown, Baker, Baker*; *Lucien A. Isaacs.*

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

ASLAN *v.* IMPERIAL AIRWAYS, LTD.

[KING'S BENCH DIVISION (MacKinnon, J.), April 10, 11, 1933]

[Reported 149 L.T. 276; 49 T.L.R. 415; 77 Sol. Jo. 337; 38 Com. Cas. 227]

Carriage by Air—Carriage of goods—Carriers as bailees—Provision in consignment note reserving right to refuse to accept goods for carriage—Exception of liability for negligence—Provision of safe aircraft—Implied undertaking of exercise of reasonable care and skill—No absolute warranty.

The defendants, an air traffic company, undertook to carry for the plaintiff by air a box containing bullion and gold coins from Baghdad to London. By cl. 2 of the consignment note: "The air traffic companies reserve the right to refuse to accept any goods for carriage." By cl. 9: "The air traffic companies . . . accept freight for carriage only at the risk of the senders or their authorised agents. No responsibility is accepted for loss, damage or delay caused directly or indirectly during the conveyance by aeroplane or otherwise in connection therewith. . . ." The box was lost in transit.

Held: (i) in view of the terms of cl. 2 of the consignment note the defendants were not common carriers and not under the liability of common carriers, but were bailees liable for negligence under the contract of carriage;

(ii) there must be implied in the consignment note an undertaking by the defendants that they would provide, by the exercise of reasonable care and skill, a vehicle reasonably safe for the carriage of valuable goods of the nature agreed to be carried; but

(iii) cl. 9 protected the defendants from liability for the negligence of their servants or agents in connection with the carriage of the box or for breach by the defendants of their implied undertaking to supply a suitable aircraft.

Semble: In the absence of such express terms as appeared in cl. 2 there is no reason why a man who carries goods by air should not be a common carrier.

Per MacKinnon, J.: I am quite clear that I ought not to import into a contract for carriage by air an absolute warranty of the airworthiness of the aircraft similar to the warranty of the seaworthiness of a ship implied in a contract for carriage by sea.

Notes. As to civil liability in relation to the carriage of goods by air, see 5 Halsbury's Laws (3rd Edn.) 227, 228, and for cases see 8 Digest (Repl.) 645, 646, *27–32*.

Cases referred to:

(1) *Queensland Bank* v. *P. & O. Co.*, [1898] 1 Q.B. 567; 67 L.J.Q.B. 402; 78 L.T. 67; 46 W.R. 324; 14 T.L.R. 166; 42 Sol. Jo. 212; 8 Asp.M.L.C. 338; 3 Com. Cas. 51, C.A.; 41 Digest 478, *3108*.

(2) *Lewis* v. *Rucker* (1761), 2 Burr. 1167; 97 E.R. 769; 29 Digest 123, *760*.

(3) *Steel* v. *State Line* (1877), 3 App. Cas. 72; 37 L.T. 333; 3 Asp.M.L.C. 516, H.L.; 41 Digest 428, *2693*.

(4) *The West Cock*, [1911] P. 208; 80 L.J.P. 97; 104 L.T. 736; 27 T.L.R. 301; 55 Sol. Jo. 329; 12 Asp.M.L.C. 57, C.A.; 41 Digest 676, *5055*.

(5) *The Maori King* v. *Hughes*, [1895] 2 Q.B. 550; 65 L.J.Q.B. 168; 73 L.T. 141; 44 W.R. 2; 11 T.L.R. 550; 39 Sol. Jo. 688; 8 Asp.M.L.C. 65; 14 R. 646, C.A.; 41 Digest 446, *2797*.

(6) *Liver Alkali Co.* v. *Johnson* (1874), L.R. 9 Exch. 338; 43 L.J.Ex. 216; 31 L.T. 95; 2 Asp.M.L.C. 332, Ex. Ch.; 8 Digest (Repl.) 10, *38*.

(7) *Consolidated Tea and Land Co.* v. *Oliver's Wharf*, [1910] 2 K.B. 395; 79 L.J.K.B. 810; 102 L.T. 648; 26 T.L.R. 388; 54 Sol. Jo. 506; 15 Com. Cas. 212; 8 Digest (Repl.) 9, *35*.

(8) *Redhead* v. *Midland Rail Co.* (1869), 9 B. & S. 519; 20 L.T. 628; sub. nom. *Readhead* v. *Midland Rail Co.*, L.R. 4 Q.B. 379; 38 L.J.Q.B. 169; 17 W.R. 737, Ex. Ch.; 8 Digest (Repl.) 75, *496*.

(9) *Brown* v. *Edgington* (1841), 2 Man. & G. 279; Drinkwater 106; 2 Scott, N.R. 496; 10 L.J.C.P. 66; 5 J.P. 276; 133 E.R. 751; 39 Digest 470, *940*.

(10) *Hyman* v. *Nye* (1881), 6 Q.B.D. 685; 44 L.T. 919; 45 J.P. 554; 3 Digest 87, *211*.

(11) *Travers* v. *Cooper*, [1915] 1 K.B. 73; 83 L.J.K.B. 1787; 111 L.T. 1088; 30 T.L.R. 703; 12 Asp.M.L.C. 561; 20 Com. Cas. 44, C.A.; 8 Digest (Repl.) 46, *278*.

(12) *Rutter* v. *Palmer*, [1922] 2 K.B. 87; 91 L.J.K.B. 657; 127 L.T. 419; 38 T.L.R. 555; 66 Sol. Jo. 576, C.A.; Digest Supp.

(13) *Turner* v. *Civil Service Supply Association*, [1926] 1 K.B. 50; 95 L.J.K.B. 11; 134 L.T. 189; 8 Digest (Repl.) 5, *5*.

(14) *Fagan* v. *Green and Edwards*, [1926] 1 K.B. 102; 95 L.J.K.B. 363; 134 L.T. 191; 70 Sol. Jo. 185; 8 Digest (Repl.) 5, *6*.

(15) *Calico Printers' Association, Ltd.* v. *Barclay's Bank* (1931), 145 L.T. 51; 36 Com. Cas. 197, C.A.; Digest Supp.

(16) *Reynolds* v. *Boston Deep Sea Fishing and Ice Co., Ltd.* (1922), 38 T.L.R. 429, C.A.; Digest Supp.

Trial of preliminary issues in an action in which the plaintiff claimed damages for the loss of a consignment of bullion delivered by him to the defendants for carriage by aeroplane.

On June 2, 1932, the plaintiff delivered to the defendants at Baghdad a box containing gold coins and bullion of the value of £4,425, to be carried for reward by the defendants from Baghdad to London by air, on the terms of a consignment note signed by the agents of both parties. On the arrival of the defendants' aeroplane in London the box of gold could not be found. It was thought that it had been stolen, but nothing was actually known as to what had become of it. The plaintiff brought this action, alleging that the defendants, as common carriers, had been guilty of breach of duty, and/or negligence, or, alternatively, as bailees for reward, had been guilty of negligence.

The journey from Baghdad to London was made by stages. An aeroplane was used from Baghdad to Tiberias, then a seaplane from Tiberias to Brindisi, then the railway from Brindisi to Paris, and finally an aeroplane from Paris to London. The plaintiff alleged that by charging a special rate for the conveyance of bullion and by accepting the goods for carriage and delivery, the defendants impliedly warranted that all aeroplanes and other means of transit used would be fitted with a bullion room, reasonably fit to resist thieves, and that the goods would be carried in such bullion room, and he further alleged that no such bullion room was provided in the seaplane from Tiberias to Brindisi.

The defendants relied on a term in the consignment note (cl. 9) that the goods were accepted at the plaintiff's risk and that the defendants undertook no responsibility for loss caused during the conveyance by aeroplane. They denied that they were common carriers and that they had been guilty of negligence.

The matter now came before the court for the trial of preliminary issues, which were thus defined:

> "Whether the defendants were relieved from liability by the terms of the contract of carriage, assuming (a) that the seaplane had not a compartment suitable for the carriage of bullion and reasonably fit to resist thieves; (b) that the goods were lost by reason of the lack of such a compartment; and/or (c) that the goods were lost by reason of the negligence of the defendants' servants."

Clause 2 of the conditions printed on the back of the consignment note was as follows: "The air traffic companies reserve the right to refuse to accept any goods for carriage." Clause 9 was as follows:

> "The air traffic companies, their employees, and the undertakings and individuals which the air traffic companies employ in the performance of their obligations, accept freight for carriage only at the risk of the senders or their authorised agents. No responsibility is accepted for loss, damage or delay caused directly or indirectly during the conveyance by aeroplane or otherwise in connection therewith. This refers to all obligations of the company either in respect of carriage, storage or any other operation in connection with goods."

A. T. Miller, K.C., and *W. L. McNair* for the plaintiff.

W. N. Raeburn, K.C., and *H. G. Robertson* for the defendants.

The arguments appear from his Lordship's judgment.

MACKINNON, J.—This is a very interesting case. The plaintiff claims damages for breach of duty and/or contract in relation to the carriage of bullion from Baghdad to London. The points of claim allege that the plaintiff delivered to the defendants at Baghdad a box of gold for carriage to London on the terms of a consignment note. Paragraph 2 alleges that:

> "In breach of the contract contained in the said consignment note and/or of their duty in the premises as common carriers or alternatively as bailees for reward the defendants have failed to carry the said goods safely or alternatively carefully and have wholly failed to deliver the said goods at London or at all. The plaintiff will if necessary rely upon the fact of non-delivery as evidence of negligence."

By para. 3:

> "Further or alternatively by accepting the said goods for such carriage and delivery as aforesaid the defendants impliedly warranted that all air vessels or other means of transport used in the carriage of the said goods would be fitted with a compartment or compartments suitable for the carriage of bullion and reasonably fit to resist thieves, and that the said goods would be carried only in such a compartment as aforesaid. In breach of the said warranty the seaplane *Satyrus*, into which the said goods were laden at Tiberias, had no compartment so suitable or so fit, but the said goods were placed in a compartment which was not fitted with any proper means of securing the same."

The plaintiff claims £4,425 damages.

The defence relies on the terms of the consignment note, it admits that the box was not delivered, and alleges that the defendants are not common carriers. It makes no admission as to any of the allegations contained in para. 3, and finally it alleges that under the terms of the said consignment note they are not liable for the loss.

Those being the pleadings, as the circumstances in which this box of gold was lost were, I believe, wrapped in considerable obscurity, an application was made in February this year, and I made an order as follows:

> "It is ordered that the question whether the defendants are relieved from liability by the terms of the contract of carriage, assuming (a) that the seaplane *Satyrus* had not a compartment suitable for the carriage of bullion and reasonably fit to resist thieves; (b) that the goods were lost by reason of the lack of such a compartment, and/or (c) that the goods were lost by reason of the negligence in or about their carriage or custody of some servants or agents of the defendants be tried as preliminary issue."

By reason of that order I have not heard any of the facts, but there is no dispute that the method of conveyance from Baghdad to London was that the box was taken charge of by the defendants at Baghdad, sent by aeroplane to the lake of Tiberias, and there transferred into a seaplane or flying-boat, which was in fact the *Satyrus*, which is mentioned in the pleadings and was then lying on the lake of Tiberias. That seaplane or flying-boat would then rise from the water and fly to Athens, where it would stop to refuel, and would go on from Athens to Brindisi. From Brindisi to Paris the cargo of the *Satyrus* would be transported by railway, and from Paris to Croydon by aeroplane.

I think it is clear from the language used in the points of claim that the gentleman who drafted it had heard of a good many what are called commercial cases. Particularly in para. 3 there is a reference to a compartment suitable for the carriage of bullion. I think that would hardly have been drafted in those terms if he was not very familiar with *Queensland Bank* v. *P. & O. Co.* (1). For my part, I have been thinking in this case, as I have also thought before, that when one talks of the commercial law one ought to remember that in truth what is commonly called commercial law is really part of the law of contract. In almost every case that arises, commercial cases so-called are really concerned with ascertaining the proper construction of various commercial documents. I have always thought that that aspect of it was emphasised in the labours of LORD MANSFIELD, whom one rightly says was the founder of commercial law. In his day, and practically before his day, none of the regular forms of commercial contract had come before the courts and been considered, and LORD MANSFIELD's task was really one of construction to ascertain and lay down what was the meaning of these forms of contract. You see that nowhere more clearly emphasised than in the great case which he decided called *Lewis* v. *Rucker* (2), which was to determine the method by which, under a marine insurance policy, a claim for damage to goods should be assessed. Strictly speaking, the question ought to have been: What does the contract say about it? The contract says absolutely nothing, neither then nor now. LORD MANSFIELD had to ascertain what by the understanding of the city, conveyed to him no doubt by the assistance of his special jurymen, had been the implied term in the ancient marine insurance policies.

Bearing that in mind, the question before me is, and is only, a question of the construction of the contract, called the consignment note, under which these goods were accepted by the defendants at Baghdad for conveyance to London. I am asked to say that there was a certain warranty in that contract, that is to say, that I ought to hold that that contract contained an implied term which is not expressed in it.

The principle was adumbrated in early cases, and it was held quite clearly and definitely for the first time in *Steel* v. *State Line* (3) that in any contract of carriage in a ship there is what is called a warranty of seaworthiness, that is to say, it is an implied term of the contract of carriage that the shipowner guarantees that his ship is seaworthy, not merely that he has done his best or used reasonable care to make her so. Bearing on my view of these being matters of implied contract, some question has at times been debated whether this warranty of seaworthiness with regard to ships is a rule of law, or is merely a matter of construction, an implied term of the contract between the parties. Kennedy, L.J., in *The West Cock* (4) ([1911] P.D. at p. 229) says he thinks that is a difficult question. I do not myself feel assisted in dealing with the question by considering whether or not such a warranty, where it is implied, is to be treated as arising from an obligation under the contract or arising from a common law duty. I may say, looking at the authorities, that it is very difficult to say which of the two views is the more correct. Personally, I think that the true view is that it is not a rule of law, but a matter of construction, an implied term of the contract, and I think Lord Esher was right when, with regard to that, he said in *The Maori King* v. *Hughes* (5) ([1895] 2 Q.B. at p. 554):

> "The implication arises in the way in which all implications are made by law and in the only way they can be made, namely, that the court can see that the implied obligation must have been in the contemplation and intention of both parties to the contract."

That original obligation to provide a ship that is in fact seaworthy has been, as we all know, very much extended. It has been extended so that a seaworthy ship means also a cargo-worthy ship, and in respect of that aspect of the undertaking it has been extended so that in some cases a particular form of receptacle and its fitness has been promised by the contract. With regard to that, I think it is desirable to bear in mind that in each case it turned upon the particular nature of the contract and the nature of the type of ship that was in question. In *The Maori King* v. *Hughes* (5) the obligation was, it might be said, extended to the undertaking to supply a refrigerator chamber that was in fact fit and cargo-worthy; but it is quite clear that that did not arise by reason of the fact that it was a frozen cargo. It arose by reason of the fact that the vessel notoriously was supplied with refrigerator chambers and the bill of lading was headed "refrigerator bill." In *Queensland Bank* v. *P. & O. Co.* (1), which I suggested was, perhaps, the inspiration of the form of the pleading in para. 3 of the points of claim about the bullion room, there again the implied warranty or undertaking that the bullion room was so constructed as to be reasonably fit to resist thieves arose from the nature of the ship and the nature of the contract. As A. L. Smith, L.J., points out, the whole decision was based by Mathew, L.J., upon the assumption that the vessel

> "like others of her class was fitted with a receptacle for bullion or valuables usually called the specie room, and that the contract in the bill of lading was entered into with the knowledge and upon the footing that this receptacle had been provided for the safe carriage of the gold mentioned in the bill of lading."

A. L. Smith, L.J., goes on to say:

> "The learned judge was justified in the assumption he made. I conclude, then, that the contract was made in relation to the carriage of the gold in a bullion room."

In other words, that there would be no implied undertaking in an ordinary bill of lading, though it was for the carriage of gold or bullion, that there should be on board the ship a bullion room. It was only when they contracted to carry in a bullion room that there was an implied obligation to provide a proper one.

The other aspect of this sort of question with regard to ships is that, though the matter is, perhaps, left in some obscurity, they are commonly supposed to be, apart from any special conditions in their contract, if not common carriers, at any rate under the liability of common carriers. That, I think, has never been expressly laid down with regard to a shipowner, but with regard to bargeowners it was laid down in *Liver Alkali Co.* v. *Johnson* (6), where it was held that a bargeowner had incurred the liability of a common carrier, though BRETT, J., was careful to add that he was not a common carrier, but was liable as a shipowner carrying goods for hire upon the custom applicable to him as such, which custom imposed on him the liabilities of a common carrier. That doctrine is confined to the case of a man carrying on business as lighterman and professing to carry as a lighterman and carrying for all and sundry. In *Consolidated Tea and Land Co.* v. *Oliver's Wharf* (7) HAMILTON, J., with regard to a similar sort of business, but one carried on by wharfingers as incidental to their business as wharfingers, held that they were not liable to common law liability as common carriers, but were only liable for negligence.

In the present case, as I have said, the task before me is to construe the liabilities undertaken by the defendants under this consignment note, and then, having ascertained what those liabilities are, to consider how far on the facts assumed in the order under which I am now hearing the case they are protected from liability by any clause in that contract. This is not a ship. The contract is in regard to carriage by air. There is nothing about the interpolated piece of carriage by railway from Brindisi to Paris, but in fact, as I am told, that was to take place and it was probably known to both parties that it would take place, but primâ facie it is a contract of carriage by an air vessel or air vessels. Then what apart from the express terms of the contract am I to consider or hold to be the implied terms of such a contract? I see no reason why a man who carries goods by a machine that travels through the air should not be a common carrier or assume the liabilities of a common carrier if he acts in a certain way. I think the definition of the late Mr. CARVER in s. 4 of his book, "CARRIAGE OF GOODS BY SEA," is probably as accurate as one can get it:

> "A common carrier is one who engages in the trade of carrying goods as a matter of business and who holds himself out as ready to carry for anyone who may wish to employ him,"

and if a man who owned an aeroplane or a seaplane chose to engage in the trade of carrying goods as a regular business and to hold himself out as ready to carry for any one who wished to employ him so far as he had room in his airship or aeroplane for their goods, very likely he would become a common carrier or be under the various liabilities of a common carrier. But in this case the terms of the contract seem to me to be express, and I think it is only necessary to refer to parts of them. On the front of the consignment note there is a passage where the sender who signs the document says:

> "The sender hereby declares that the above particulars are correct and agrees that goods are accepted by the carrier only subject to the conditions printed on the back."

Among those conditions on the back seem to be two passages which are very material in this respect. First of all, in cl. 2 it is provided: "The air traffic companies reserve the right to refuse to accept any goods for carriage." Therefore, they do not hold themselves out to carry the goods of anybody. Secondly, there is a passage at the end of the conditions which, I am told and can quite understand, is added by the defendants to the general form of consignment note used by all air companies in Europe, air companies of varying nationalities. This is added by the defendants as an English company with special reference to the adoption of English law about common carriers, which I am told, and can well believe, is not part of the law of most other European countries. The passage so inserted reads thus:

> "All goods subject to the general transport conditions for air freight service set out above which are received by or in the custody of Messrs. Imperial Airways, Ltd. (who are not common carriers and do not accept the obligations or liability of common carriers) or their agents for carriage or otherwise,"

and then it goes on to provide with regard to the lien for all money due.

In those circumstances, with regard to this contract I think that it is impossible to hold that the defendants are common carriers or under a liability of common carriers. They are, from the point of view of English law, bailees to carry these goods for hire, and are therefore, as bailees, liable for negligence. Counsel for the plaintiff, in one part of his extremely ingenious argument, argued that inasmuch as cl. 9 disclaims any liability for negligence, if they are only liable for negligence and that excludes it, then there is no form of loss for which they can be made liable, and that, therefore, it is impossible to give any meaning to cl. 12, which speaks about the time in which claims are to be brought forward, and cl. 15, which makes provision for the time within which an action shall be brought against the company in respect of loss or damage. I think there might be a good deal more force in that observation if it were not apparent that these conditions are general conditions for air freight services, and, as I am told, are general conditions uniformly adopted by all the air companies throughout Europe. Counsel for the defendants points out, and I think it may very likely be the fact, that under the jurisprudence of the various countries over which these goods have to be carried and in which they may be lost or their owners may be in a position to bring actions, there may be rules of law which impose some liability on a carrier by aeroplane otherwise than for negligence, or which make stipulations such as cl. 9 of limited or no validity. I think it is quite sufficient, bearing in mind the possibility of such proceedings in other countries, to see why cl. 12 and cl. 15 are inserted in this document, though it may be true to say that in regard to litigation or legal liability in this country it may be difficult to see any opportunity for cll. 12 or 15 having any effective sphere of operation. That is my view with regard to their liability, whether as common carriers or not. I think they are not common carriers nor under the liability of common carriers, but are bailees liable for negligence under the contract of carriage.

The other aspect of this case which has been debated is what form of implied undertaking as to the structural fitness for carriage of the airship or aeroplane is to be implied in this contract. I have said this is not a ship; therefore, I am quite clear that I ought not to import the warranty of seaworthiness or fitness that was imported into a contract relating to a ship in *Steel* v. *State Line* (3), and extended by later cases, though as I have pointed out, if it were a ship I should not import any warranty about a bullion room that was implied in the particular case of the *Queensland Bank* v. *The P. & O. Co.* (1). If this is not a ship it is a vehicle provided for the carriage of goods, and so far as its fitness goes I think that one can find guidance by such cases as we have had with regard to similar undertakings.

In *Redhead* v. *Midland Rail. Co.* (8), a question arose as to how far the railway company warranted the fitness for the purpose of a carriage in which a railway passenger was to travel. It was held that the railway company did not warrant absolutely that the carriage was fit for its purpose, as the shipowner warranted absolutely that his ship was fit, but that there was an undertaking that the railway company should use care and skill in order to make it fit. That was decided by a Court of Exchequer Chamber consisting of six learned judges from the Court of Common Pleas and the Court of Exchequer. The case came from the Court of Queen's Bench, and they affirmed the judgment of the Court of Queen's Bench, Blackburn, J., dissenting. It is interesting to see that Blackburn, J., thought the true rule was one based on *Brown* v. *Edgington* (9). He said:

> "The principle which I understand to be laid down in *Brown* v. *Edgington* (9) is this, that when one party to a contract engages to select and supply an article for a particular purpose and the other party has nothing to do with the selection, but relies entirely upon the party who supplies, it is to be taken as part of the contract implied by law that the supplier warrants the reasonable sufficiency of the article for that purpose."

Then he refers to one of the shipping cases, a case about a lighterman. That reasoning of LORD BLACKBURN would assimilate the obligation of the railway company with regard to the supply of the carriage to the passenger to the obligation of a shipowner in regard to his ship supplied for the carriage of goods. But the other members of the Court of Exchequer Chamber differ from that view of BLACKBURN, J., and hold that there was only the less strenuous obligation that I have indicated.

The same sort of question was debated in *Hyman* v. *Nye* (10). That was the case of a jobmaster who for a specified journey hired a carriage and pair of horses and a driver. There was a defect in the carriage so that it was upset, and the plaintiffs were injured. It was held that it was the duty of the defendant to supply a carriage as fit for the purpose for which it was hired as care and skill could render it. LINDLEY, J., said (6 Q.B.D. at p. 687):

> "A person who lets out carriages is not, in my opinion, responsible for all defects discoverable or not; he is not an insurer against all defects; nor is he bound to take more care than coach proprietors or railway companies who provide carriages for the public to travel in; but, in my opinion, he is bound to take as much care as they; and although not an insurer against all defects, he is an insurer against all defects which care and skill can guard against. His duty appears to me to be to supply a carriage as fit for the purpose for which it is hired as care and skill can render it; and if whilst the carriage is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it out to show that the breakdown was in the proper sense of the word an accident not preventable by any care or skill."

I think, having regard to the law of this country, that there was some implied undertaking with relation to the nature of the aeroplane. I think there was clearly an implied undertaking that the defendants had exercised care and skill to make the aeroplane reasonably fit to fly, and, as they were proposing to carry goods in it, I think there was an implied promise that they had used, and would use, reasonable care and skill to make the aeroplane fit for the carriage of the goods. I think it might be put that there is in this contract an implied undertaking to provide by the exercise of reasonable care and skill, and so far as it is consistent with the construction of an aircraft, a vehicle reasonably safe for the carriage of goods of that nature. But I need hardly say that, in my view, there certainly was no implied undertaking to provide any special compartment for the carriage of bullion.

If those are the obligations of the defendants in regard to this contract, namely, to be liable for negligence, and to be liable for a breach of an implied undertaking to provide by the exercise of skill and care a vehicle reasonably safe for the carriage of goods, there remains the question how far, in the circumstances that are assumed here, the terms of the contract relieve them from the resulting liability. As I say, the circumstances are assumed, because the order under which I am hearing this, assumes

> "that the seaplane *Satyrus* had not a compartment suitable for the carriage of bullion and reasonably fit to resist thieves, [and] that the goods were lost by reason of the lack of such a compartment."

I think those two passages must be read in the light of the implied undertaking as to the machine, which I have found has alone been written into this contract, namely, that there was an implied undertaking by reasonable care and skill to provide a vehicle safe for the carriage of valuable goods such as are in question in this case. Secondly, one must assume that these goods were lost because of a breach of that implied undertaking, namely, because the defendants had not exercised reasonable care and skill to provide a vehicle so reasonably safe. The alternative assumption is

> "that the goods were lost by reason of the negligence in or about their carriage or custody of some servants or agents of the defendants."

The clause on which the defendants rely is cl. 9:

> "The air traffic companies, their employees and the undertakings and individuals which the air traffic companies employ in the performance of their obligations, accept freight for carriage only at the risk of the senders or their authorised agents. No responsibility is accepted for loss, damage or delay caused directly or indirectly during the conveyance by aeroplane or otherwise in connection therewith. This refers to all obligations of the company either in respect of carriage, storage or any other operation in connection with goods."

One is sometimes led to think that in a pure question of construction of a particular clause in a contract it would be a happy thing if our system of reporting cases had never come into existence. There are a vast number of cases now—I am sorry to say a vast number—with regard to the particular terms of clauses of exemption from liability and to whether such clauses in their terms do or do not exempt a contractor from liability for the negligence of himself or his servants. There is, I think it is true to say, a great line of cases about ships, charterparties and bills of lading, and in the decision of those cases reference used to be made from one to the other until there had grown up a fairly settled rule of construction that, unless such a contractor used very clear terms to negative his liability for negligence, general words did not so avail him. Meanwhile, concurrently with that line of authorities, there was another line of authorities, largely in regard to railways, in which a rather different principle had been applied, and owing to the fact, no doubt, that members of the Bar confined their practice to one particular line of cases, I think there are at least two streams of authority which for a very considerable time never mingled or met; but they did mingle and meet, with a considerable resulting shock of confusion, in *Travers* v. *Cooper* (11).

Since the decision in *Travers* v. *Cooper* (11) it seems to me there has been rather a re-consideration of the whole position, perhaps a re-settlement of the principles. But I think one resulting principle that has been laid down is well illustrated in four cases. Chronologically, the first one is *Rutter* v. *Palmer* (12). Then comes *Turner* v. *Civil Service Supply Association* (13); and *Fagan* v. *Green and Edwards* (14). The result is the enunciation of a principle which I think is perhaps most clearly summarised by Scrutton, L.J., in *Calico Printers' Association, Ltd.* v. *Barclay's Bank* (15). He refers to two cases that have been decided, of *Reynolds* v. *Boston Deep Sea Fishing and Ice Co., Ltd.* (16), where there was a steam trawler on a slipway, there was a clause of exemption from liability, and somebody was injured. The question was whether the defendants were exempted from liability by the clause. His Lordship said:

> "It came before my brother Greer in the first instance, and he approached the matter in this way. He says: What was the liability? If there were no contract of the owners of the slipway they were liable to use reasonable care in dealing with the vessel on the slipway, but then they say: 'No liability whatever shall attach to the company for any accident on the slipway.' What must they have been meaning to except? There was no absolute liability as in the case of common carriers, so you could not limit the clause to that. The only thing they were liable for was for negligence, and when they say: 'No liability whatever shall attach to the company,' they were referring to something for which the owners of the slipway would be liable—negligence. The case went to the Court of Appeal, where all three judges—I was the junior member of the court then—while expressing it in our own terms, adopted the judgment of my brother. That is the state of the authorities as at present. First of all, you construe the whole words that are used and not a portion of them. Then you

> look to see what could be the suggested liability without the clause which purports to exempt from liability." A

Then he goes on to apply that to the particular case.

Applying that principle to the present case, I have found, apart from this particular clause, that in view of the nature of this contract the defendants would be liable only for negligence in carriage, and that with regard to the supply or the nature of the vehicle they would only be liable for the exercise of reasonable care B and skill; that is to say, if they had not done that it would be another form of negligence. I have found that they are not common carriers, and that they do not give any absolute warranty of fitness as does a shipowner on carriage by a ship. If that be the nature of their liability, I have in the light of it to consider what is the effect of this clause which aims at limiting their liability. The words, it is true, are general, and if there were any liability as a common carrier, or any C absolute undertaking of fitness, such general words would not suffice to protect the defendants, but, as the defendants are only liable for negligence, I have to give effect to these words:

> "No responsibility is accepted for loss, damage or delay caused directly or indirectly during the conveyance by aeroplane or otherwise in connection D therewith. This refers to all obligations of the company either in respect of carriage, storage or any other operation in connection with goods."

Giving the best consideration I can to it, I can come to no other conclusion than that the terms of that clause do protect the defendants from resulting liability where the claim against them is put on one or other of the only two possible grounds upon which I think it could be put, namely, that the loss was by the E negligence of one or other of their agents in connection with the carriage, or that it was because they had broken the obligation to use reasonable care and skill in providing a proper vehicle. In the result, I think, whatever the facts which may be proved at the trial, this claim must fail, and, as I understand, this is by way of demurrer.

Solicitors: *Wm. A. Crump & Son*; *Beaumont & Son.* F

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

G. H. RENTON & CO., LTD. *v.* CORNHILL INSURANCE CO., LTD.

[KING'S BENCH DIVISION (Roche, J.), April 26, 1933]

[Reported 149 L.T. 280; 49 T.L.R. 414; 18 Asp.M.L.C. 407]

Insurance—Marine insurance—"Deckload"—Goods damaged before loading and subsequently carried as deckload.

Policies of marine insurance warranted "deckload free from particular average." Cargo which was subsequently carried as deckload was damaged while in course of transit to the ship.

Held: the warranty was only applicable to cargo while actually being carried as deckload, and did not protect the underwriters from liability for damage sustained prior to loading by cargo which was subsequently carried on deck.

Notes. As to measure of loss for which insurers are liable, see 22 HALSBURY'S LAWS (3rd Edn.) 127 et seq., and for cases see 29 DIGEST 236 et seq.

Action tried by ROCHE, J., without a jury.

The plaintiffs, who were importers of timber, claimed under policies of marine insurance the sum of £91 19s. 5d. in respect of a cargo shipped from Mesane, on the White Sea, to Grimsby. There were in all three policies, each of them incorporating the Timber Trade Federation Insurance Clauses, of which cl. 12 provided:

> "Deckload warranted free from particular average unless the vessel or craft be stranded, sunk, or burnt, but the assurers are to pay the insured value of any portion of the cargo which may be totally lost by jettison and washing overboard, or in loading, transhipment or discharge. . . ."

The practice of loading at Mesane was that the cargo was taken in lighters to the steamer, the shipper giving instructions to the lighterman as to whether or not the goods were to be carried on deck, and the lighterman passing on those instructions to the ship's officers. While the timber insured by these polices was in course of transit to the steamer, part of it was damaged by perils of the seas. The plaintiffs claimed under the policies a total amount of £1,220, and the insurers admitted the claim except as to £91 19s. 5d., which represented part of the cargo damaged in the course of the transit and subsequently shipped on deck to Grimsby. Loading instructions had been given that this part of the cargo should be loaded on deck, and the insurers contended that it must be treated as "deckload" from the moment when the policy began to operate, that is to say, from the time of leaving the premises of the shipper, and, therefore, that it was free from particular average. The plaintiffs said that the mere fact that goods were subsequently carried on deck did not relieve the insurers from liability for damage incurred before shipment.

Porter, K.C., and *Stranger, K.C.*, for the plaintiffs.
Willink for the insurers.

ROCHE, J.—The plaintiffs are the buyers of certain wood goods which were shipped at a Russian port and carried to this country. They are the assured under certain policies of insurance, of which the defendants are the underwriters. The policies protect the assured against loss or damage by the usual perils, and they contain certain clauses attached to the policies known as the Timber Trades Federation Insurance Clauses. The second clause is one which extends the time and area of protection beyond that which is granted or effected by the body of the policy. It is called a warehouse to warehouse clause and provides for the goods being covered from the time they leave the mill or warehouse at the port of loading to the time they reach the port of discharge on the ocean voyage in the steamship *Kem*, which is mentioned in the policy, and thence by transhipment or other carriage until the goods reach the final destination, either at the port of discharge or in the interior.

The other material clauses to be mentioned are that there is a memorandum in the body of the policy warranting the goods free from average under £3, per cent., unless it is general, or the ship be stranded, sunk, or burnt. The Timber Trades Federation Insurance Clauses, by cl. 12, extend and amplify that warranty and stipulate that the deckload is warranted free from particular average, unless the vessel or craft is stranded, sunk, or burnt—that is to say, it is free of average, whether the amount mentioned in the memorandum is exceeded or not. Then there are further limitations upon that exclusion of deckload from cover by stipulations that, if there is an actual loss of part of the deckload through various causes, such as washing overboard, then the underwriters are to be liable.

Those being the stipulations of the policy, the point between the parties can best be described by stating what occurred. While the goods were being loaded in lighters at the port of loading on board the steamship *Kem*, or were in course of transit from the mill to the steamship *Kem*, some of them were lost and some of them were damaged. The defendant underwriters admit they are liable for the goods lost, and have paid for them. But they say: "As a matter of principle we are not liable for the damage to the goods at that stage, as opposed to the loss of the goods at that stage, because the damaged goods became part of the deckload upon the *Kem*, and, that being so, we are not liable for particular average at all in respect of that part of the cargo unless the particular average consists of a partial loss." Whether that contention is right may depend upon an examination of cl. 12 of the Timber Trades Federation Insurance Clauses. There are other clauses, particularly cl. 1, which throws some light on the question, but the determination mainly turns upon cl. 12.

I think the difference between the parties can be put in this way. The plaintiffs say that the deckload is warranted free from particular average sustained by it as a deckload, unless the vessel or craft on which it is a deckload at the time when it sustains particular average is stranded, sunk, or burnt. The defendants say that goods which, though, when they were damaged, were not deckloads on any vessel or craft, became deckloads upon the *Kem*, are altogether free from particular average unless it be that either the *Kem* or some other craft on which they were carried be stranded, sunk, or burnt.

The construction of the plaintiffs seems to me a much more natural construction than that of the defendants. This is a clause for the protection of the underwriters, and upon general principles the underwriters must satisfy me that the words used are clear enough to excuse them from liability. These words do not satisfy that condition. I think the more natural construction is that put upon them by the plaintiffs, and if one looks at such other parts of the clauses as throw light on the question, particularly cl. 1, it seems to me that the conclusions which the defendants have asked me to arrive at are resisted. Clause 1 is a provision as follows:

> "Each raft, or craft, or deckload, or bill of lading, or deckload of each bill of lading, to be deemed a separate insurance if required by assured."

I think the only natural construction of that is to read it as: "Each raft, or each craft, or each deckload, or each bill of lading, or each deckload of each bill of lading is to be deemed a separate insurance if required by the assured." I think that contemplates and means that goods may be deckloads at various stages of the transit, and that, if required, they may be treated, during that part of the transit, as a separate insurance. This is not a question whether the assured did so require in this particular case; that is not the point. The point is: What does the clause mean?, and I think it means that goods are not deckload once and for all according as they are deckload on board the *Kem*, but that they are, or are not, deckload according as they are or are not deckload on the *Kem* or any other vessel or craft, and that the whole scope of the insurance, including the exceptions, is to free the underwriters from liability in the case of damage sustained while the goods are deckload, and yet to make them liable for damage sustained while goods are not deckload, although they may become deckload at some subsequent period of the voyage.

For these reasons I think that the plaintiffs' contentions prevail, and I give judgment for them with costs.

Solicitors: *Waltons & Co.*; *William A. Crump & Son.*

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

PREMIER CONFECTIONERY (LONDON) CO., LTD. *v.* LONDON COMMERCIAL SALE ROOMS, LTD.

[CHANCERY DIVISION (Bennett, J.), May 24, 25, 26, June 20, 1933]

[Reported [1933] Ch. 904; 102 L.J.Ch. 353; 149 L.T. 479;
77 Sol. Jo. 523]

Landlord and Tenant—Assignment of tenancy—Consent—Refusal—Injury to landlord's adjacent property—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 19 (1).

Under a tenancy agreement with the landlords the assignor became tenant for a term of years of a tobacconist's shop. Subsequently under another tenancy agreement with the same landlords the assignor became tenant of a kiosk adjoining the shop for a term of years. In each agreement there was a covenant that the assignor should use the premises as a tobacconist's shop only, and that the assignor should not assign the premises without the previous consent of the landlords. The assignor subsequently agreed to assign to X. the kiosk for the remainder of the term. In spite of the references being satisfactory and in spite of X.'s intended use of the kiosk being that of a tobacconist's shop only, the landlord refused to give the necessary consent on the ground that the occupation of the two shops by separate tenants would be detrimental to the property.

Held: in spite of the fact that the intended use of the premises was not forbidden by the terms of the tenancy agreement, nor by any rule of law, nevertheless a landlord could rightly withhold his consent on the ground that he objected to the use of the premises to which the assignee intended to put them (e.g., that that use would depreciate the value of adjacent property belonging to the landlord), and, therefore, the landlords were entitled to withhold their consent on the ground that the separation of the kiosk from the shop might injuriously affect the property, and, accordingly, the consent was not unreasonably withheld.

Notes. It will be seen that the principle laid down in *Houlder Bros. & Co., Ltd.* v. *Gibbs* (1), [1925] Ch. 575 was applied in this case. It should be noted that the language of TOMLIN, J., was doubted in *Viscount Tredegar* v. *Harwood* (2), [1929] A.C. 72, but the decision remained binding, see *Lee* v. *Carter*, [1948] 2 All E.R. 695; *Re Swanson's Agreement*, [1946] 2 All E.R. 628.

As to the withholding of consent to assignments of leases, see 20 HALSBURY'S LAWS (2nd Edn.) 351, 352, and for cases see 31 DIGEST (Repl.) 424–427, *5515–5536*. For Landlord and Tenant Act, 1927, see 13 HALSBURY'S STATUTES (2nd Edn.) 883.

Cases referred to:

(1) *Houlder Bros. & Co., Ltd.* v. *Gibbs*, [1925] Ch. 575; 94 L.J.Ch. 312; 133 L.T. 322; 41 T.L.R. 487; 69 Sol. Jo. 541, C.A.; 31 Digest (Repl.) 425, *5523*.

(2) *Viscount Tredegar* v. *Harwood*, [1929] A.C. 72; 97 L.J.Ch. 392; 139 L.T. 642; 44 T.L.R. 790, H.L.; 31 Digest (Repl.) 400, *5297*.

(3) *Young* v. *Ashley Gardens Properties, Ltd.*, [1903] 2 Ch. 112; 72 L.J.Ch. 520; 88 L.T. 541, C.A.; 31 Digest (Repl.) 431, *5575*. A

(4) *Premier Rinks, Ltd.* v. *Amalgamated Cinematograph Theatres, Ltd.* (1912), 56 Sol. Jo. 536; 31 Digest (Repl.) 427, *5532*.

(5) *Governor of Bridewell Hospital* v. *Fawkner and Rogers* (1892), 8 T.L.R. 637; 31 Digest (Repl.) 423, *5510*.

(6) *Shanly* v. *Ward* (1913), 29 T.L.R. 714, C.A.; 31 Digest (Repl.) 423, *5512*. B

(7) *Bates* v. *Donaldson*, [1896] 2 Q.B. 241; 65 L.J.Q.B. 578; 74 L.T. 751; 60 J.P. 596; 44 W.R. 659; 12 T.L.R. 485, C.A.; 31 Digest (Repl.) 424, *5521*.

Action.

By an agreement dated July 26, 1927, the defendants agreed with one Abraham Singer to let to him a tobacconist's shop for a term of fourteen years from Sept. 29, 1927. The agreement contained a covenant by Singer C

> "to use the said premises as a tobacconist's shop only, and not to assign, underlet, or part with possession of the said premises or any part thereof without the previous consent in writing"

of the defendants. On Sept. 14, 1928, the defendants entered into another agreement with Singer under which a room commonly known as "the kiosk" in the D same block of buildings as that which contained the tobacconist's shop was let to Singer for a term of fourteen years from Dec. 25, 1928, and this agreement also contained a covenant the terms of which were identical with those of the covenant contained in the first-mentioned agreement. In September, 1932, Singer agreed to assign the tenancy of the kiosk to a Mrs. Kramer, and she applied to the defendants for their consent. In spite of the references of Mrs. Kramer being satis- E factory, and in spite of her intended use of the kiosk also being satisfactory, the defendants refused to grant the licence, on the ground that the occupation of the two shops by separate tenants would be detrimental to the property.

Fergus Morton, K.C., and *J. G. Strangman*, for the plaintiffs, referred to *Young* v. *Ashley Gardens Properties, Ltd.* (3), *Houlder Bros. & Co.* v. *Gibbs* (1), *Viscount* F *Tredegar* v. *Harwood* (2), *Premier Rinks, Ltd.* v. *Amalgamated Cinematograph Theatres, Ltd.* (4), *Governor of Bridewell Hospital* v. *Fawkner and Rogers* (5), and *Shanly* v. *Ward* (6).

A. F. Roxburgh, K.C., and *Cyril J. Radcliffe*, for the defendants, referred to *Young* v. *Ashley Gardens Properties, Ltd.* (3).

BENNETT, J., stated the facts and continued: By virtue of s. 19 (1) of the G Landlord and Tenant Act, 1927 the agreement for the lease of the kiosk of Sept. 14, 1928, is to have effect as if the parties had agreed that in the lease to be granted pursuant thereto the covenant by the tenant, to be contained therein, not to assign or underlet or part with the possession of the premises or any part thereof without the previous consent in writing of the defendants was subject to the provision that such consent is not to be unreasonably withheld. H

The plaintiffs' case is that, in refusing their consent to the assignment of the kiosk on the grounds stated on their behalf, the defendants are unreasonably withholding their consent. The argument was that the defendants in withholding their consent have taken into consideration and acted upon matters which as a matter of law they have no right either to consider or act upon. The proposition of law upon which the plaintiffs rested their case was stated in these terms: "No lessor I is entitled to withhold his consent to assignment unless (a), the proposed assignee is objectionable for some personal or financial reason, or (b), the proposed user of the premises to be assigned is detrimental to the lessor in respect of the same premises." They contended, and I think rightly, that no objection could be taken to the proposed assignee for personal or financial reasons, and they argued that, as in the present case the premises to be assigned can only be used for one purpose, namely, as a tobacconist's shop, it was not open to the landlords to object to their use for that purpose. The authority for the proposition upon which they based their case was the decision of the Court of Appeal in *Houlder Brothers & Co., Ltd.* v. *Gibbs* (1).

The facts of the present case are singular. The premises comprised in the agreement of Sept. 14, 1928, are a very small part of a large building used almost entirely by persons of the male sex. The building is in a part of the city of London where there are not many shops, and the evidence given by Mr. Stanley, a surveyor of very great experience, and whose knowledge of the uses to which real property in the city of London can be put is probably unrivalled, was clear that the purposes for which the shops in the defendants' building could be used were very few. The district is one in which the male sex still predominates. The trades which can be carried on in the shops in the defendants' building are trades in articles which persons of the male sex need. Mr. Stanley made this fact perfectly plain, and his evidence on this point was not challenged.

There is also no question as to the good faith of the defendants. They withheld their consent to the assignment of the kiosk because in their belief a separation of the kiosk from the shop might be detrimental to the property they own and of which the kiosk and the shop both form a part, and for no other reason. They do not desire to get possession of the shop and kiosk or either of them before the end of the representative terms for which they are let. Their only wish is that the two shall continue to be held as they have hitherto always been held by one and the same tenant, because of their belief that their occupation by separate tenants is a bad thing for their property, particularly if the kiosk is used until Dec. 25, 1942, for the sale of tobacco. It is true, of course, that Abraham Singer is bound to the defendants as the tenant of the shop until Sept. 27, 1941, and that he can be compelled until that date to pay the rent reserved by the agreement of July 26, 1927. But it is clear from the evidence (a) that the rent of the shop is high, while the rent of the kiosk is low, and (b) that the kiosk takes a substantial part of the trade which, before it was opened as a tobacconist's shop, was done at the shop. It is beyond question, in my judgment, that any one trading in tobacco and cigarettes at the kiosk will always be a formidable competitor of any one carrying on the same trade at the shop. It is clear, in my judgment, that it is very unlikely that anyone can be found who will take an assignment of the agreement for a lease of the shop if the kiosk is separately occupied by a tobacconist. Mr. Singer may, of course, be able to pay the rent of the shop for the residue of the term for which the defendants have agreed to grant him a lease, but, on the other hand, he may not, and I have no doubt, after hearing all the evidence, in concluding that, if the shop were to come into the possession of the defendants during the continuance of the agreement relating to the kiosk, the defendants would have the greatest difficulty in finding a tenant for it at anything approaching the rent which is now reserved.

If the defendants have in law the right to consider the possible effect upon their property of the shop and the kiosk being in the occupation of different tenants, I have no doubt that in withholding their consent to the assignment of the kiosk to Mrs. Kramer, they did not act unreasonably. They acted as a reasonable man might have acted in the circumstances. The real question is whether as a matter of law the defendants, for the purpose of determining whether or not they would give their consent to the assignment, had the right to consider the effect upon their property, and, in particular, upon the shop which is a part of it, of the kiosk being occupied separately from the shop, and by a tenant bound to carry on there a trade which will compete with the trade for which the shop is best suited. In my judgment, they have.

In *Houlder Brothers & Co., Ltd.* v. *Gibbs* (1) the Master of the Rolls, WARRINGTON and SARGANT, L.JJ., all accepted and acted upon the reasoning of A. L. SMITH, L.J., in *Bates* v. *Donaldson* (7). SARGANT, L.J., in particular proceeded upon the footing that the statement of A. L. SMITH, L.J., that the covenant in question in that case was inserted

> "in order to protect the lessor from having his premises used or occupied in an undesirable way, or by an undesirable tenant or assignee," A

was a statement which shows the limits which are to be put upon such a clause as the clause in question. If a reasonable man might think that the proposed user of the premises, or the proposed occupation of the premises will be undesirable, then, in my judgment, it is within the right of the landlord to withhold his consent to an assignment which will result in that undesirable use or occupation. The B defendants in this case have withheld their consent because they in good faith think that in all the circumstances the occupation of the kiosk by Mrs. Kramer is undesirable.

Counsel for the plaintiffs contended that the defendants are really seeking to consolidate the two agreements, and that, if they had intended that the shop and the kiosk should always be in the occupation of one tenant, they should have inserted C a stipulation to that effect in the agreement of Sept. 14, 1928. The argument (if I followed it rightly) was that it was not reasonable for a landlord to withhold his consent to a proposed assignment if the subject-matter with regard to which the proposed assignment was objected to might have been made the subject-matter of an express stipulation at the time the tenancy was created. In my judgment, this is not the law. It is, in my judgment, clear from the judgments delivered by the D members of the Court of Appeal in *Bates* v. *Donaldson* (7) and in *Houlder Brothers & Co., Ltd.* v. *Gibbs* (1), that a landlord may withhold his consent to an assignment because he objects to the use the proposed assignee intends to make of the premises proposed to be assigned, although that use is not forbidden by the terms of the tenancy, or by any rule of law.

I decide this case in favour of the defendants for the following reasons: E (a) Because the proposed assignment will result in the kiosk being occupied separately from the shop; (b) because that is a matter which the defendants are entitled to consider in determining whether or not they will give their consent; (c) because the defendants believe that the separation of the kiosk from the shop may injuriously affect their property; and (d) because that opinion is one which may be entertained by reasonable persons and is not wholly unreasonable. Accordingly, I F dismiss the action with costs.

Solicitors: *Zeffertt & Heard*; *Coward, Chance & Co.*

[*Reported by* J. H. G. Buller, Esq., *Barrister-at-Law.*]

A

Re MATTHEW ELLIS, LTD.

[COURT OF APPEAL (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), January 11, 1933]

B [Reported [1933] Ch. 458; 102 L.J.Ch. 65; 148 L.T. 434; 77 Sol. Jo. 82; [1933] B. and C.R. 17]

Company—Winding-up—Debenture issued within statutory time limit—"Cash paid" to company—Payment to company conditional on payment by company of debt—Advantage to person making payment to company—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 266.

C A sum of money paid to a company in consideration of the creation in favour of the payer of a floating charge on the property of the company is "cash paid" to the company within s. 266 of the Companies Act, 1929, although it is paid on the condition that it be applied in discharge of an existing liability of the company, even though the liability be to a firm in which the payer is interested.

D A company obtained most of their stock from the firm of A.T. & Co., A.T. a member of the firm, being a director of the company. The terms of credit dealings between the company and the firm were that goods supplied in one month should be paid for in the next month, but to keep the business of the company going the firm had allowed the debt to run, and in March, 1932, the amount owing was £1,954 4s. The company was then in difficulties, and A.T. E took a debenture creating a floating charge on the company's property for £3,000 on the condition that the debt of £1,954 4s. should be paid to the firm, in which case the firm would continue to supply goods to the company on credit. Out of the money paid for the debenture the company paid £1,954 4s. to the firm of A.T.; used £750 to satisfy the claims of their bank, thereby getting further credit from the bank; and applied the balance of £300 to enable it to go F on trading. On July 11 a compulsory order was made for the winding-up of the company, and the liquidator claimed that the payment of the £1,954 4s. was a fraudulent preference of the company and asked for a declaration that the floating charge was invalid under s. 266 of the Companies Act, 1929, to the extent of the £1,954 4s.

Held: the transaction must not be severed, but must be regarded as a whole, G its substance, and not merely the form, being considered, and furthermore, it must be looked at from the business point of view; it then appeared that the money was received by the company, and the company, by paying the debt outstanding to the firm of A.T. out of it, secured a valuable advantage in the continuation of the supply to it on credit of goods by the firm, which enabled it to continue to carry on its business; and, therefore, the money was to be H regarded as "cash paid" within s. 266, and the charge was valid.

Re Hayman, Christy & Lilly (1), [1917] 1 Ch. 283, not approved.

Notes. Section 266 of the Companies Act, 1929, has been replaced, with immaterial amendment, by s. 322 (1) of the Companies Act, 1948.

Referred to: *Re Destone Fabrics, Ltd.*, [1941] 1 All E.R. 545.

I As to floating charges, see 6 HALSBURY'S LAWS (3rd Edn.) 685, 686, and for cases see 10 DIGEST (Repl.) 770 et seq. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

(1) *Re Hayman, Christy and Lilly, Ltd., Christy* v. *The Company* (*No. 1*), [1917] 1 Ch. 283; 86 L.J.Ch. 255; 116 L.T. 283; 33 T.L.R. 167; [1917] H.B.R. 80; 10 Digest (Repl.) 774, *5033*.

(2) *Re Orleans Motor Co., Ltd., Smythe* v. *Orleans Motor Co., Ltd.*, [1911] 2 Ch. 41; 80 L.J.Ch. 477; 18 Mans. 287; 104 L.T. 627; 10 Digest 772, *5017*.

Appeal against an order of Eve, J.

By a summons which came before Eve, J., the liquidator of Matthew Ellis, Ltd., sought, first, a declaration that the payment of a sum of £1,954 4s. made by the company to a firm of Arthur Tipper & Co. on or about March 29, 1932, was an undue and fraudulent preference of those creditors of the company, and, accordingly, invalid. Alternatively, the liquidator asked for a declaration that a floating charge contained in a debenture for £3,000 and interest dated March 24, 1932, created by the company and issued to Mr. Arthur David Tipper, a member of the firm in whose favour it was said the undue preference was made, was invalid under s. 266 of the Companies Act, 1929, to the amount of £1,954 4s., being the amount which was in fact paid to the firm.

Lionel Cohen, K.C., and *J. A. Reid* for the appellant, A. D. Tipper, the respondent to the summons.

A. F. Topham, K.C., and *J. G. Strangman* for the liquidator.

The arguments sufficiently appear from the judgments.

LORD HANWORTH, M.R.—This appeal must be allowed. It raises an interesting point under s. 266 of the Companies Act, 1929. The facts are short. The company, which is Matthew Ellis, Ltd., was carrying on business until 1932, and on July 11 a compulsory order was made for the winding-up of the company. When the affairs of the company were looked into the liquidator found that on March 24, 1932, £3,000 had been lent to the company by one, Mr. Arthur Tipper, and that £3,000 had been used in this way. The company, in carrying on its business, required certain goods to be supplied to it, and they obtained those goods from a firm of Arthur Tipper & Co. In March, 1932, a considerable debt had accrued to the firm of Arthur Tipper. The terms on which the goods were supplied by the firm to the company were payment one month after delivery, but Messrs. Arthur Tipper, in order to facilitate the company's business, had stood aside, and by March, 1932, had allowed their debt to reach the sum of £1,954.

The question was whether the company could continue its business. There were two directors of the company at that time, Mr. Arthur Tipper and Mr. Joseph Turnbull. Mr. Arthur Tipper was also a partner with two other persons in the firm of Messrs. Arthur Tipper. The two other persons were a Mr. Fred Taylor and Mr. Tipper's son (Mr. Harry Tipper). The interests of the partners inter se are not disclosed. Mr. Arthur Tipper had come to the assistance of the company in its difficulties before March, and no question arises as to what happened in reference to a loan which he had made to it. But it is said that this debenture of £3,000 of March, 1932, is bad, because it falls within the purview of s. 266, inasmuch as the company at the time of the creation of the charge was not solvent, and hence the debenture is invalid except to the amount of any cash paid to the company at the time or subsequently to the creation of and in consideration for the charge. Eve, J., came to the conclusion that the debenture is invalid except as to the amount of £1,050, because the balance of the £3,000, namely, £1,954, was used to discharge the debt at that time accruing due to Messrs. Arthur Tipper. Eve, J., based his decision in effect upon a decision of Parker, J., in *Re Orleans Motor Co., Ltd.* (2), and we have to determine whether or not we agree with the view that Eve, J., has taken, and the law which he has applied.

I agree with Eve, J., to the extent that I think this case and other cases under this section must, each of them, depend upon their own facts. It is very difficult to lay down a precise test which shall bring a case within or without the section. It is wiser to adhere to the clear words of the section, which require that the sum in respect of which the debenture is valid is the amount of any cash paid to the company. One has, therefore, to look at the facts and see whether or not in substance there was cash paid to the company. No question is raised but that payment may be by a cheque or by a transaction the equivalent of cash among business men. I, therefore, come to examine the facts which are before us relating to this transaction.

A We find those facts in three affidavits. The first is an affidavit of Mr. Tipper himself, and he states:

> "The company carried on the business of hardware merchants, and, after I had acquired shares in it, the firm of Arthur Tipper, of which I, together with Fred Taylor and my son Harry Tipper, both of whom are respondents to this summons, are the partners, supplied it with large quantities of goods. According to the usual credit terms in this class of trade, goods supplied in one month should be paid for in the course of the ensuing month, but, notwithstanding this, between June, 1931, and February, 1932, Messrs. Arthur Tipper supplied to the company goods to the total value of £2,386 11s. 10d. against which they received payments only to the amount of £432 7s. 10d., leaving a balance of £1,954 4s. outstanding on Feb. 29, 1932. In the latter part of March, 1932, the company's financial position was difficult, though not, as I thought, desperate. I was confident that if further money were provided it would overcome its difficulties. My co-director and I carefully discussed the matter, and on March 24, 1932, we decided that it was worth while to continue the business. We arranged, therefore, that I should advance to the company a sum of £3,000 upon the security of a third debenture. With respect to the disposal of this money we felt that, as my firm of Arthur Tipper had stood aside and continued to supply goods during the nine months down to and including February, 1932, without being paid according to the usual credit terms, in order that other creditors of the company might be paid, it was only reasonable, if, as was intended, they were to continue to supply goods to the company, that they should be paid for goods supplied down to the end of February, 1932."

E Mr. Turnbull, the other director, gives an account which is to be found in his affidavit. He makes this relevant observation:

> "Moreover Messrs. Arthur Tipper were the company's principal suppliers of goods and were the only firm to which the company could safely look for the supply of goods for the purposes of its business on the usual credit terms. Mr. Tipper and myself were confident that the company's business was worth preserving for the benefit of its creditors generally, and that with Mr. Tipper's assistance we should be able to carry the company through its difficulties and re-establish its position, and the payment of Messrs. Arthur Tipper was made in pursuit of that object and not to give that firm a preference."

In the affidavit of the two partners, Mr. Fred Taylor and Mr. Harry Tipper say:

> G "We told him [Mr. Tipper] that the amount due to Messrs. Arthur Tipper ought to be paid out of the first moneys to be provided by him as Messrs. Arthur Tipper had stood aside for so many months while payments were made to other suppliers. We also pointed out to him that if the company wished Messrs. Arthur Tipper to continue to supply goods on credit it would clearly be necessary for the company to pay the amount due for goods down to date. As a result of the discussion between the partners of Messrs. Arthur Tipper it was arranged that if Mr. Tipper advanced a sum of £3,000 on debenture to the company, the amount due to Messrs. Arthur Tipper for goods supplied down to the end of February, 1932, should be paid and that if this amount was paid Messrs. Arthur Tipper should continue to supply goods on credit to the company in order to keep the business of the company going."

I It is important to observe that Eve, J., has found that there was no fraudulent preference in the present case by the payment of the £1,954 to Messrs. Arthur Tipper. That was an alternative case which was presented by the liquidator. He has, therefore, found, and, indeed, in express terms has said, that it was a case to which the word "fraud" could not be attached. This is, therefore, to be looked at as an ordinary transaction between business men based on sound business views, and after reading those paragraphs what is the summary of the position? It is this: (i) That the company's business was worth saving; (ii) that in order to continue its business it must still have goods supplied to it; (iii) that Messrs. Arthur Tipper and Sons were the firm from which further goods could be obtained on credit; and (iv) that, if that credit was to be obtained, and if Messrs. Arthur Tipper should continue to supply goods on credit in order to keep the business of the company going, it was right that the debt then owing down to the end of February to Messrs. Arthur Tipper should be paid. The result is that it was not merely a payment to Messrs. Arthur Tipper to their satisfaction; it was a business transaction in which by this payment the company secured the goodwill of Messrs. Arthur Tipper and the advantage of their continuing to supply goods on credit to the company to keep the company's business going. In fact, that course of business was adopted, and we are told that down to the time of July when the liquidator was appointed a further debt of some £500 in respect of goods sold and delivered by Messrs. Arthur Tipper and Sons to the company had been incurred. The £3,000 was paid upon the delivery of the debenture by Mr. Arthur Tipper to the company, and the company carried out the proposal agreed upon. They paid over to Messrs. Arthur Tipper £1,954, and they had in hand £1,050 odd. They used £750 of that to satisfy the claims of the bank, and thereby secured, as I understand it, further credit from the bank. They left themselves with another £300 with which they were able to go on trading, and they did succeed in going on trading from March until July.

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What is said against this debenture is that, if you separate the transaction into two, you will find that there was a payment in cash to the company of £1,050, and there was a payment to the advantage of the company, though not *to* them, of £1,954. In other words, you may say that the £1,954 was paid through the company, who acted merely as a conduit pipe, and it was a payment direct from Mr. Arthur Tipper to Messrs. Arthur Tipper, the firm, for which Mr. Arthur Tipper, by this stratagem, secured the liability of the company to him. I do not think it is right to sever the transaction or to segregate it into portions. One must look at it from the business point of view as it was regarded at the time when it was entered into, in March, by the persons who were concerned. It seems that the company did secure a valuable advantage in the continuation of the supply of goods, which was to be given by Messrs. Arthur Tipper to them, and you must take the whole transaction as one and not split it up. In other words, you must take the substance of the case: Was this a payment in cash made to the company? The answer, I think, must be: "Yes, it was," and when the money had been so received it was used, and prudently used, by the company in the payment of a debt then outstanding whereby they were able to secure the continuance of supplies from Messrs. Arthur Tipper, the firm. With regard to the rest there is no question that it is a payment in cash, but it does not seem right to separate the transaction into two parts. It was all one transaction. £3,000 would enable the company to go on, one important limb of that being a continuation of the supply of goods on credit from Messrs. Arthur Tipper & Son.

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That, to my mind, on an examination of the facts from that point of view, is sufficient to answer the claim now made by the liquidator, but it is said that two cases show that the interpretation that I have suggested for this section is not a valid one. The first, *Re Orleans Motor Co., Ltd., Smythe* v. *The Company* (2), came before PARKER, J., as he then was. To my mind, that case must be examined in relation to the facts which were before the learned judge. It was a case in which certain cheques passed through the company's hands but were never part of the company's assets to do what it liked with, since the company was under an obligation to hand them to the bank in discharge of an overdraft. The debentures, therefore, were to be issued to secure an antecedent independent transaction. They were to be issued on account of the guarantee. In truth and in fact, the company never became possessed of this money which passed through their account. But the learned judge makes an observation about the section:

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> "It was designed apparently to prevent companies on their last legs from creating floating charges to secure past debts."

With that part I respectfully agree. It was to prevent in effect transferring security to one creditor by a device. Then he goes on: "or for moneys which do not go to swell their assets and become available for creditors." I doubt very much whether the learned judge intended to say that you must test the transaction by seeing whether the assets are swollen and are available for creditors, because the creditors would be creditors existing at that time to whom debts had already been incurred. It appears to me that the whole passage is one giving an illustration of the general purposes of the section, but when analysed I think it would not be right to treat it as an authoritative exposition of the section beyond the words which say that it was to prevent companies from creating floating charges to secure past debts and only that. In the present case that was not what happened. It did not merely secure past debts; it secured the advantage of being able to continue their business as they had done before.

The later case, *Re Hayman, Christy & Lilly, Ltd.* (*No. 1*) (1), before Astbury, J., is one in which that learned judge translated the observation of Parker, J., into more exact words. He used the words of Parker, J., as meaning "except to the amount of any cash absolutely and unconditionally paid to the company." In association with Eve, J., I do not accept that interpretation of Parker, J.'s words or of the section. I hold the same view as Eve, J., does, that Astbury, J.'s definition ought not to be accepted. But I prefer, as I have said already, to treat the case as one in which the facts must be examined in the light of the terms of the section itself. You have got, in transactions which may even be complicated and difficult, to come to a conclusion whether in substance there has been cash paid to the company. If there has been, although it may be used by the company for the purpose of meeting a liability already incurred, if that was cash paid to the company, then the security stands good, in spite of the observation or criticism which may be passed upon the particular interpretation of Parker, J.'s words.

For these reasons I have come to the conclusion that we are not able to accept Eve, J.'s decision, and the order will be that the application of the liquidator be dismissed.

SLESSER, L.J.—I am of the same opinion. The question which has here to be considered is whether the £1,954 4s. 0d., part of the £3,000 on which the floating charge was granted, was in respect of any cash paid to the company, because to the amount of any cash paid to the company, by s. 266 of the Companies Act, 1929, the floating charge may be valid, notwithstanding that it might otherwise be invalid in that it had been created within six months of the commencement of the winding-up. Attempts have been made to give some strict legal limitation to the words "to the amount of any cash paid to the company." Astbury, J., in *Re Hayman, Christy & Lilly, Ltd.* (1) ((1917), 1 Ch. at p. 285) says:

> "I think the expression 'except to the amount of any cash paid to the company' means except to the amount of any cash absolutely and unconditionally paid to the company."

If that be a correct view of the meaning of the words, I think that it would be right in this case to say that there was here such a condition as to the use of this money that it could not be said to be absolutely and unconditionally paid to the company. But I follow Eve, J., in being unable to see on what principle Astbury, J., placed that limitation upon the plain language of the section. He purports to come to the conclusion that that limitation should be read in by reason of what was said by Parker, J., in *Re Orleans Motor Co., Ltd., Smythe* v. *The Company* (2). I agree with what my Lord has said about the facts of that case, how the learned judge was dealing with an independent transaction, and forbear to repeat what he has said beyond this, that I do not find in anything that Parker, J., said in *Re Orleans Motor Co.'s Case* (2) any authority for the limitation that the amount of cash must be absolutely and unconditionally paid as suggested by Astbury, J. But then Eve, J., as I read his judgment, having declined to follow the limitation imposed by Astbury, J., himself imposes another limitation, A and it is on the limitation which he applies to the words, which he then applies to the facts of this case, that he has come to his conclusion. In his judgment he says this:

> "Now that being so, what does the section mean? I think it means exactly what it says, that you have to measure the security by the amount of the cash received from the lender at or subsequent to the creation of the charge and in relation, therefore, to the amount which is to be applicable for the then future B purposes of the company—not for discharging antecedent debts, and certainly not for returning to the lender a large portion of the money either in payment for a former advance or past consideration or for any other consideration. Now that really disposes of the matter which I have to consider here, because it is not denied that the £1,954, although it may pro forma have passed through the hands of the company, was debited from the beginning and was intended to C be applied in payment of a past debt, the result of which would have been, if it was good and the security was good, that the unsecured debt of the Tipper partnership would have been converted into a secured debt in the hands of Mr. Tipper."

I understand and I follow what the learned judge indicates when he speaks of it D not being a payment to the company if it was a case of returning to the lender a portion of the money he had paid, but here, as he points out, the person who is owed the money is the Tipper partnership, not the lender, but three persons the nature of whose holdings we are not told; Mr. Tipper, senior; Mr. Tipper, junior; and a Mr. Fred Taylor—a different firm from Mr. Tipper himself. It is not a case, on the evidence, of a transaction to return the money to the lender. But, apart E from that, I cannot for myself read into the section the limitation that money cannot in any circumstances be cash paid to the company if it is in discharge of an antecedent debt. It may or may not be. It appears to me that, reading the language, one has to consider whether there was cash paid to the company—a substantial payment of cash—and, excluding the limitation which EVE, J., has imposed upon himself that he cannot take this matter into consideration because F it was in relation to an antecedent debt, it appears to me on the evidence and for the reasons which my Lord has stated, that here there is no reason why this court should hold that this was not a cash payment to the company. The company was indebted to the firm of Tipper and money was paid for them to satisfy that indebtedness. Certain considerations, certain advantages—the payment of that indebtedness and the anticipation of a supply of further goods—were only secured G by that payment of money lent by Mr. Tipper personally on the security of his debenture. I think on the evidence before us it is clear, when those two limitations suggested by ASTBURY, J., and EVE, J., are removed, and the question is considered as one of fact: Was there in fact a cash payment to the company? That there clearly was, and therefore the case falls within the excluded matter of s. 266, and therefore to that extent the floating charge is a valid one, and therefore this H appeal should be allowed.

ROMER, L.J.—I have arrived at the same conclusion. We have heard a certain amount of argument as to the true construction to be placed upon s. 266 of the Companies Act, 1929. For myself I have never been able to understand how any question of construction arises on that section. The words of it appear to be quite plain, and I can see no justification whatsoever for excepting from the words "cash I paid" in the section payments of cash made conditionally as to their mode of application. ASTBURY, J., in *Re Hayman, Christy & Lilly, Ltd.* (1), excepted from those words cash payments as to which any condition was imposed by the lender. EVE, J., has given what, in my opinion, appears to be conclusive reasons for not adopting that construction. He has, however, himself, as I read his judgment, excluded from the words any payments of cash made upon the condition that the cash shall be applied in discharge of an existing liability of the company. For myself, I am unable to impose any such restriction upon the plain words of the section. Where, therefore, a man advances money to a company on the security of a debenture on the terms that the money so advanced is to be applied by the company in discharge of one of its existing liabilities or in the acquisition of some asset which the company does not at the moment possess, the money paid by the lender does not, in my opinion, cease to be cash paid to the company merely by reason of the imposition of that condition. There are, of course, certain considerations for the issue of a debenture which plainly do not amount to payments in cash. Where, for instance, an existing creditor of a company takes a debenture from the company to secure the amount of his debt on the terms that he shall not immediately press for payment of his debt, or where he takes a debenture for the amount of his debt on the terms that the debt itself is to be extinguished, obviously no cash passes from the debenture holder, the lender, to the company. If in such a case the lender goes through the form of drawing a cheque in favour of the company for the amount of his debt on the terms that the company shall forthwith itself hand to him in exchange a cheque for the same amount in one sense it might be said there has been a payment in cash—that is to say, that in form there has been a payment in cash. But in such a case there has not been a payment in cash if one looks at the substance and not at the form, and in considering whether there has been a payment in cash within the meaning of s. 266 it is always the question of substance that must be regarded and not the question of form. **PARKER**, J., as he then was, had a case under the section of the earlier Act which corresponds to s. 266 of the present one—*Re Orleans Motor Co., Ltd.* (2) —and there he found that directors of a company who had guaranteed the company's overdraft were being pressed by the bank, as, indeed, was the company, for repayment of the overdraft. £1,500 was the amount that the bank required to be paid. The company was liable for it as principal debtor and the directors were liable for it as guarantors. The company being unable to pay, the obvious thing to do would have been for the guarantors, the directors, to pay the £1,500 and have done with it, in which case they would have been unsecured creditors of the company for that amount. Instead of that, they went through the form of handing a cheque or cheques for £1,500 to the company on the terms that the company should hand those cheques over to the bank, and they then said that they had paid cash to the company. **PARKER**, J., was not misled by such a transparent subterfuge as that, but held that there had not in fact been any cash paid. The directors had not parted with any cash to the company and never intended to part with any cash. The company never received any cash from the directors and never contemplated receiving any cash from the directors. All that had happened was that the directors had, using the company as a conduit pipe, paid £1,500 cash to the bank. Of course, that debenture was held invalidated by the section.

Therefore, in the present case, if I am right, all that has to be considered is whether as a question of substance—looking at the substance and not at the form —Mr. Tipper did pay cash to the company. I can well understand that, if facts had transpired which showed that the two persons whom Mr. Tipper refers to as his partners were mere figures holding no real interest in the partnership, and that the partnership was only another name for Mr. Tipper himself, it might have been suggested, and, indeed, held, that here there was no payment in cash and never intended to be a payment in cash. But there is no such evidence; indeed, the evidence that has been given strongly suggests to my mind that these other two partners were real persons with a live interest in the partnership firm, negotiating on its behalf. Then we find this, that Mr. Tipper, the debenture holder, has parted with £1,900 odd of cash out of his private estate and that that cash has been handed over by the company to the firm of which indeed Mr. Tipper is a partner, but of which he is not the only partner, and in which he does not hold the only interest or even a controlling interest, so far as I know. Why, in those circumstances, it should be said that this was merely a subterfuge to make it appear there had been a payment in cash when there was in fact no payment in cash, I do not know. The circumstances appear to me to point strongly in favour of the

A conclusion that here there was in truth and in fact, in substance and not merely in form, a payment of cash by Mr. Tipper to the company.

For these reasons I have come to the conclusion that this appeal should be allowed.

Appeal allowed.

B Solicitors: *Stibbard, Gibson & Co.*, for *Maycock & Hayward*, Birmingham; *Syrett & Sons.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

C

D

Re PATRICK AND LYON, LTD.

[CHANCERY DIVISION (Maugham, J.), March 14, 16, 1933]

[Reported [1933] Ch. 786; 102 L.J.Ch. 300; 149 L.T. 231; 49 T.L.R. 372; 77 Sol. Jo. 250; [1933] B. & C.R. 151]

E *Company—Winding-up—Fraudulent preference—"Intent to defraud"—"Fraudulent purpose"—Debenture issued within statutory time limit—"Solvency" of company—Ability to pay debts when due—Onus of proof—Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 265 (1), *s.* 266 *and s.* 275 (1) *and* (2).

F The applicants, who were creditors of P. & L., Ltd., a company in liquidation, sought a declaration that the respondent, a director of the company, was responsible for the debts and other liabilities of the company on the ground that he had been a party to carrying on the company's business with intent to defraud its creditors, in that he had carried on the business of the company and delayed liquidation for six months after the issue of certain debentures to himself, in order to deprive the unsecured creditors of the company of the right to challenge those debentures under s. 266 of the Companies Act, 1929.

G **Held:** "intent to defraud" and "fraudulent purpose" in s. 275 connote actual dishonesty, involving, according to current notions of fair trading among commercial men, real moral blame; on the facts, applying that interpretation of the section, the business of the company had not been carried on by the respondent for a fraudulent purpose or to defraud creditors; and, therefore, the declaration would not be made.

H **Per Maugham, J.:** The onus of proving that the business of a company has been carried on with intent to defraud creditors is on the person who makes good the charge, whether he be the official receiver, or the liquidator, or a creditor, or a contributory, but the onus of proving, under s. 266, that a company is solvent lies on the debenture holder who is endeavouring to support his floating charge. A company is not solvent within the meaning of s. 266 I unless it can pay its debts as they become due. It is not solvent merely because, on the figures shown in its balance sheet, its assets exceed its liabilities.

Notes. The Companies Act, 1929, s. 265 (1), s. 266, and s. 275 (1) have been replaced by s. 320 (1), 322 (1) and 332 (1) of the Companies Act, 1948, which are in the same terms with some immaterial amendment.

As to fraudulent preference and floating charges, see 6 HALSBURY'S LAWS (3rd Edn.) 682–686, and for cases see 10 DIGEST (Repl.) 770 et seq., 1029 et seq. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

A Cases referred to:

(1) *Re William C. Leitch Bros., Ltd.* (*No. 2*), [1933] Ch. 261; 102 L.J.Ch. 81; 148 L.T. 108; 49 T.L.R. 74; 76 Sol. Jo. 888; [1933] B. & C.R. 31; 10 Digest (Repl.) 953, *6559*.

B (2) *Re Mathew Ellis, Ltd.*, ante, p. 583; [1933] Ch. 458; 102 L.J.Ch. 65; 148 L.T. 434; 77 Sol. Jo. 82; [1933] B. & C.R. 17, C.A.; 10 Digest (Repl.) 773, *5028*.

(3) *Re Hayman, Christy and Lilly, Ltd.*, [1917] 1 Ch. 283; 86 L.J.Ch. 255; 116 L.T. 283; 33 T.L.R. 167; [1917] H.B.R. 80; 10 Digest (Repl.) 774, *5033*.

C (4) *Re William C. Leitch Bros., Ltd.* (*No. 1*), [1932] 2 Ch. 71; 101 L.J.Ch. 380; 148 L.T. 106; 10 Digest (Repl.) 953, *6555*.

(5) *Ex parte Russell* (1882), 19 Ch.D. 558; 51 L.J.Ch. 521; 46 L.T. 113; 30 W.R. 584, C.A.; 5 Digest 848, *7140*.

(6) *London and Counties Assets Co.* v. *Brighton Grand Concert Hall and Picture Palace, Ltd.*, [1915] 2 K.B. 493; 84 L.J.K.B. 991; 112 L.T. 380; [1915] H.B.R. 83, C.A.; 9 Digest (Repl.) 555, *3670*.

D **Summons** taken out by J. C. Fox, Gamble & Son, a firm of solicitors, who were creditors of Patrick and Lyon, Ltd., a company in liquidation.

The company was incorporated in June, 1929, with an authorised capital of £2,000 divided into £1 shares, of which £1,251 had been issued for cash. The first respondent was at all material times a director of the company, and his wife E was also a director. The business of the company had never resulted in a trading profit. The balance sheet of the company for the period ending Dec. 31, 1931, showed that, if the assets of the company had been turned into cash at the balance sheet figures, they were then sufficient to discharge all liabilities, but not to pay anything substantial in respect of issued capital. The position of the company was, from a commercial point of view, worse than appeared from the balance sheet F figures, as there was practically no cash in hand, and, consequently, the company was not in a position to pay its current debts, and creditors were pressing for payment. In January and February, 1932, judgments for very small sums were obtained against the company. On Feb. 3, 1932, a board meeting was held at which the first respondent, his wife, and son, and the company's accountant and solicitor were present, and it was duly resolved that the directors be authorised to G issue ten debentures of £100 each. On Feb. 12, four debentures of £100 each were issued to the first respondent, who gave a cheque for £400 in payment. The bulk of this sum was handed back to the first respondent or his wife. A cheque was drawn by the company in favour of the first respondent for £339 16s. This payment was made in respect of various sums advanced by him from time to time to the company, and also included a sum alleged to be due in respect of H director's fees, which, owing to the fact that the company had never agreed to pay these fees, was not legally due. The company at the same time drew a further cheque in favour of the first respondent's wife for £51 8s. 4d. in payment of money lent to the company by her and interest. In the spring of 1932 the trade in which the company was involved went from bad to worse, and from about the end of March the company embarked, in effect, on a process of liquidation in that I it was endeavouring to liquidate stocks by sales and was not making any purchases. On July 22 the first respondent retired from his directorship, and on Aug. 13 he appointed the second respondent to be receiver under the debentures. On the same day notices were sent to the company's creditors convening a meeting for Aug. 22 to consider a resolution to wind-up. The second respondent was appointed liquidator by the shareholders, and at the meeting of Aug. 22, 1932, this appointment was confirmed by the creditors. The liquidation was disastrous. The ordinary creditors got nothing, the debenture holders, including the first respondent, being paid in full.

In these circumstances it was alleged that the business of the company had been carried on after Feb. 12, 1932, when the debentures were obtained, in order to deprive the creditors of the company of the right to challenge the debentures under s. 266 of the Companies Act, 1929. The applicants sought relief under s. 275 of the Companies Act, 1929, and asked by their summons for (inter alia) (i) A declaration that the first respondent was personally responsible without any limit of liability for all the debts or other liabilities of the company, or for such part thereof as the court might direct on the ground that he had been a party to carrying on the company's business with intent to defraud its creditors; (ii) that provision might be made that any such liability be made a charge on any debt or obligation due from the company to the first respondent; and (iii) that the second respondent, the liquidator, might be directed to do all such things as might give effect to any order under para. (i) or (ii) of the summons. The first respondent denied all the allegations made against him. The second respondent submitted to act in all respects as the court might direct.

The Companies Act, 1929, provides:

> "Section 265 (1): Any conveyance . . . or other act relating to property which would, if made or done by or against an individual, be deemed in his bankruptcy a fraudulent preference shall, if made or done by or against a company, be deemed, in the event of its being wound-up, a fraudulent preference of its creditors and be invalid accordingly.
>
> "Section 266: Where a company is being wound-up, a floating charge on the undertaking or property of the company created within six months of the commencement of the winding-up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except to the amount of any cash paid to the company at the time of or subsequent to the creation of, and in consideration for, the charge, together with interest at the rate of 5 per cent. per annum.
>
> "Section 275 (1): If in the course of the winding-up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or . . . for any fraudulent purpose, the court on the application of the official receiver, or the liquidator or any creditor or contributory of the company may, if it thinks proper so to do, declare that any of the directors, whether past or present of the company who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.
>
> "Sub-section (2): Where the court makes any such declaration, it may . . . make provision for making the liability of any such director under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him, or any company or person on his behalf. . . .
>
> "Sub-section (6): . . . . Where the declaration under sub-s. (1) of this section is made in the case of a winding-up in England, the declaration shall be deemed to be a final judgment within the meaning of para. (g) of sub-s. (1) of section one of the Bankruptcy Act, 1914."

A. Grant, *K.C.*, and *E. Milner Holland* for the applicants.—The object of keeping the company alive after the issue of the debentures to the first respondent was to validate them and prefer the first respondent. This transaction is a fraudulent preference within s. 265 of the Companies Act, 1929.

J. Norman Daynes, *K.C.*, and *Philip J. Sykes* for the first respondent.—Section 275 of the Companies Act, 1927, is directed against fraudulent trading. There is no evidence here that the business was carried on with intent to defraud. [They referred to: *Re William C. Leitch Bros., Ltd.* (*No. 2*) (1), *Re Mathew Ellis, Ltd.* (2), and *Re Hayman, Christy, and Lilly, Ltd.* (3).

A *G. O. Goldstream* for the liquidator.

MAUGHAM, J.—Section 275 of the Companies Act, 1929, under which relief
is claimed, is a very remarkable section, and one which is by no means easy to
construe. I have myself dealt with one aspect of it in *Re William C. Leitch Bros.,
Ltd.* (*No. 1*) (4), and my brother EVE has dealt with a second branch of it in *Re*
B *William C. Leitch Bros., Ltd.* (*No. 2*) (1). Without repeating anything which my
brother EVE has said, or I said, in either of those cases, I will express the opinion
that the words "defraud" and "fraudulent purpose," where they appear in the
section in question, are words which connote actual dishonesty involving, according
to current notions of fair trading among commercial men, real moral blame.
No judge, I think, has ever been willing to define "fraud," and I am attempting
C no definition. I am merely stating what, in my opinion, must be one of the
elements of the word as used in this section. In my opinion, it is not used in the
same sense as that in which the word "fraud" is used in s. 265 of the Act. There,
following the example set by s. 44 of the Bankruptcy Act, 1914, and by s. 92 of
the Bankruptcy Act, 1869, both of which deal with the avoidance of fraudulent
preferences, the legislature has thought fit to state that certain acts are to be
D deemed a fraudulent preference and to be invalid accordingly. A fraudulent preference
within the meaning of the Companies Act, 1929, or the Bankruptcy Act,
1914, whether in the case of a company or of an individual, possibly may not
involve moral blame at all. For example, there may be a discrimination between
creditors, irrespective of pressure, on grounds with which most people would
sympathise. Again, there is nothing in the language of s. 266 of the Companies
E Act, 1929 (which enables a floating charge created within six months of a winding-up
to be attacked in certain circumstances) to indicate that the legislature took the
view that the creation of such a charge when the company is insolvent is fraudulent,
however blameworthy it may be. That appears from the fact that the right to
attack such a floating charge is limited to cases where the company goes into
liquidation within six months of the creation of it. Coming to the present case, I
F think that in exercising jurisdiction under s. 275 the court, however little it may
approve of the conduct of the director who is being attacked, is bound to consider
whether he has been guilty of a dishonest fraud, and it is hardly necessary for me
to point out that the onus is upon the person who seeks to make good the charge,
whether he be the official receiver, or the liquidator, or a creditor, or a contributory.

A question has been raised as to what "solvent" means in s. 266 of the Com-
G panies Act, 1929. It is to be observed that the onus of proving the company's
solvency lies upon the debenture-holder who is endeavouring to support his floating
charge. It is not necessary to say that "solvent" there is limited to one meaning;
but, in my opinion, a company is not solvent within the meaning of s. 266 unless
it can pay its debts as they become due. It has been urged that "solvent" means
"commercially solvent," and that if, upon balance sheet figures, a company's
H assets exceed its liabilities, the company is solvent. I do not accept that view,
and in support of my rejection of it I will refer to *Ex parte Russell* (5) and *London
and Counties Assets Co.* v. *Brighton Grand Concert Hall and Picture Palace,
Ltd.* (6). The word "solvent" is used in s. 266 of the Companies Act, 1929,
immediately after a section dealing with fraudulent preference, and in construing it
the court has to bear in mind s. 44 of the Bankruptcy Act, 1914, where the prefer-
I ence is defined in relation to a thing done or suffered by a person "unable to pay
his debts as they become due from his own money." My opinion, therefore, is
that under s. 266 the debentures in the present case might well have been attacked
if the liquidation had commenced at a date within the period of six months from
their creation, and there is evidence to support the view that during the latter
part of the period in question the persons in charge of the company's destinies
were deliberately delaying sending out notices to wind-up the company in order
that the period of six months should so expire. That is, no doubt, not a high-minded
course of action. On the other hand, it is not high-minded for a person

who is forming a company to form it with a very small share capital and to cause the company to purchase his stock in trade by an issue of debentures to himself; but that has never yet been held to be fraud, and for some reason, which I do not understand, it has not been prohibited by the Companies Acts.

The question which I have to determine is whether, within the meaning of s. 275 of the Companies Act, 1929, and construing the reference therein to fraud as I construe it, the business of the company was carried on for a fraudulent purpose. In my opinion, on the whole, I am not justified in coming to such a conclusion. The business of the company, so far as it was carried on during the latter part of its career, was carried on in order to clear up the position by getting in debts and by effecting sales of stock, and not with a view to securing purchases on credit assets available as security for debentures. I am not clear in my mind that the first respondent was deliberately intending to carry out any fraudulent purpose or to defraud creditors. That is a matter which cannot be left to conjecture. I must be perfectly satisfied that there is enough evidence to justify the charge. To my mind the case has not been made out, and I dismiss the summons.

With regard to the costs, I do not accept all the first respondent's answers. He was defending himself, but the precise truth would have been better than rash statements. Further, it was not a proper act on his part to procure payment of his director's fees by an issue of debentures when the company could not pay even small sums to its creditors. Accordingly, it seems to me a case in which the summons should be dismissed as regards him without costs. The applicants, however, must pay the liquidator's costs.

Solicitors: *J. C. Fox, Gamble & Son*; *Collyer-Bristow & Co.*, for *Forsyth, Bettinson & Co.*, Birmingham.

[*Reported by* Miss B. A. Bicknell, *Barrister-at-Law.*]

CUTLER *v.* UNITED DAIRIES (LONDON), LTD.

[Court of Appeal (Scrutton and Slesser, L.JJ., and Eve, J.), May 30, 31, 1933]

[Reported [1933] 2 K.B. 297; 102 L.J.K.B. 663; 149 L.T. 436]

Negligence—Defence—Volenti non fit injuria—Novus actus interveniens—Voluntary act by spectator to stop runaway horse.

Animal—Tame—Wild—Liability of owner for damage done by animal.

If a person keeps a dangerous animal, e.g., a tiger, he is responsible for any damage the animal does; the owner of a tame animal is not liable for the results of its ordinary habits unless he knows that the animal has some particular vice.

If a horse bolts on a highway and a spectator runs out to stop it and is injured, there is no liability on the owner of the horse who can avail himself of the defences of volenti non fit injuria and novus actus interveniens.

The defendants' carman left the defendants' horse and van, with a chain round one of the wheels, in the highway, while he delivered milk at a house. The horse, startled by the noise of holidaymakers on a river steamer, bolted with the van along the highway and thence into a meadow, where it stopped, but was followed by the carman, who arrived in an excited state, calling out "Help! Help!" The plaintiff, a spectator, who had seen the horse when running away, passed through a gate from a garden into the meadow, where he was asked by the carman to hold the horse's head. He went to do

A this when the horse plunged and the plaintiff was injured. The plaintiff brought an action against the defendants based on negligence, and evidence was given that the horse had bolted on one or two previous occasions. The jury found that (i) the plaintiff did not freely and voluntarily, with full knowledge of the risk he ran, impliedly agree to incur it; (ii) the defendants were guilty of negligence in employing that horse to draw the van; and (iii) such B negligence was the cause of the accident. They awarded the plaintiff damages, and judgment was entered for him.

Held: on the assumption that the second finding of the jury—that the defendants were negligent in employing that horse—could stand, there was no evidence to support the first and third findings of the jury.

Per SLESSER, L.J.: There might be a case where a man saw his child in great C peril in the street and moved by paternal affection dashed out to hold the horse's head to save his child, where there would be no novus actus interveniens. Certainly a man would be entitled, to save himself, to attempt to arrest a runaway or restless horse. But, here the plaintiff, of his own motion, came through the hedge in response to an invitation from the driver and so imperilled his life. His voluntary act was the cause of the accident, in the legal sense, and D nothing else.

Notes. This case must be read with reference to *Haynes* v. *Harwood*, [1934] All E.R.Rep. 103, where certain passages in the judgment of SCRUTTON, L.J., were criticised. The defence of common employment, mentioned in the judgments in the present case, was abolished by the Law Reform (Personal Injuries) Act, 1948.

E Explained and distinguished: *Haynes* v. *Harwood*, [1934] All E.R.Rep. 103.

Referred to: *Dann* v. *Hamilton*, [1939] 1 All E.R. 59.

As to the liability of owners of animals, see 1 HALSBURY'S LAWS (3rd Edn.) 663 et seq., and for the defences of volenti non fit injuria and novus actus interveniens see 23 HALSBURY'S LAWS (2nd Edn.) 715 et seq. and 594–596. For cases, see 2 Digest 223 et seq., and 36 Digest (Repl.) 150 et seq., 40 et seq.

F Cases referred to:

(1) *Manton* v. *Brocklebank*, [1923] 2 K.B. 212; 92 L.J.K.B. 624; 129 L.T. 135; 39 T.L.R. 344; 67 Sol. Jo. 455, C.A.; Digest Supp.

(2) *Buckle* v. *Holmes*, [1926] 2 K.B. 125; 95 L.J.K.B. 547; 134 L.T. 743; 90 J.P. 109; 42 T.L.R. 369; 70 Sol. Jo. 464, C.A.; Digest Supp.

(3) *Osborne* v. *London and North-Western Rail. Co.* (1888), 21 Q.B.D. 220; G 57 L.J.Q.B. 618; 59 L.T. 227; 52 J.P. 806; 36 W.R. 809; 4 T.L.R. 591; 36 Digest (Repl.) 156, *822*.

(4) *Yarmouth* v. *France* (1887), 19 Q.B.D. 647; 57 L.J.Q.B. 7; 36 W.R. 281; 4 T.L.R. 1, C.A.; 36 Digest (Repl.) 135, *710*.

Appeal by defendants from a verdict and judgment in an action tried by HORRIDGE, J., and a special jury.

H From the evidence given at the trial, it appeared that the plaintiff, who was an actor, was at 10 a.m. on Aug. 26, 1930, seated on the verandah of a dwelling-house known as "The Owleries," Walton Bridge, Shepperton. The tow-path ran between the front of "The Owleries" and the River Thames and the verandah overlooked the tow-path. The defendants owned a horse and van driven by one of their servants, William Arthur Leeds. While Leeds was delivering milk from I this van to a house abutting on the tow-path, he left a chain upon the wheel of the van. The horse, frightened by the noise of a pleasure steamer upon the river, bolted with the van past the verandah coming to the back of the garden of "The Owleries." The driver followed his runaway horse and van. The plaintiff, seeing the horse and van pass "rather quickly" without the driver, became apprehensive about his children. He went through the house to the back garden, where he found his children in safety. He then went to the fence at the back of the garden, and, in the adjoining meadow, he saw the horse, van and driver. The driver was very excited and shouted: "Help! Help!" The plaintiff got over the fence, and the driver asked him to hold the horse's head. When the plaintiff went to do this, the horse plunged, the plaintiff was thrown over, the van went over him, and he sustained personal injuries. The plaintiff in cross-examination said that when he saw the horse over the fence it was stationary and breathing heavily; it struck him then it was a runaway horse. He had little knowledge of horses, and was frightened because it looked dangerous, but he overcame his fear. It was proved that this horse had on one previous occasion, or, possibly, two previous occasions, bolted, on one occasion because his nosebag and bridle had come off.

The plaintiff, by his statement of claim, alleged that the defendants negligently drove or failed to control a heavy horse van, so that it came into collision with the plaintiff, and by his particulars of negligence he alleged that the defendants employed a horse to draw the van which they knew, or should have known, was an uncontrollable, vicious, and dangerous animal; that they did not take any, or, alternatively, sufficient, precautions to control the horse; and that the driver left the horse unattended, or, alternatively, that he so drove or managed or failed to manage or control the horse that it bolted into the meadow. By their defence the defendants pleaded (inter alia) that the plaintiff volunteered to hold the horse, well knowing that the horse had just bolted, and they relied upon the doctrine volenti non fit injuria. Counsel for the defendants submitted that there was no case to go to the jury, but the learned judge said there was a case for the jury and left to them the following questions, which they answered as stated:

> (i) "Did the plaintiff freely and voluntarily with full knowledge of the nature of the risk he ran, impliedly agree to incur it?"—A. "No." (ii) "Were the defendants guilty of negligence in employing the horse to draw the van?"—A. "Yes." (iii) "Was such negligence the cause of the accident?"—A. "Yes."

The jury awarded the plaintiff £520 damages and judgment was entered for him for that amount. The defendants appealed.

Joy, K.C., and *G. J. Paull* for the defendants.
H. Infield and *Ivan Cruchley* for the plaintiff.

SCRUTTON, L.J.—This is an interesting case which has been very well argued. The appeal is by the defendants, the United Dairies (London), Ltd., against a judgment entered for the plaintiff on the verdict of a common jury, based on certain findings by them, adverse to the defendants in respect of an accident, and the defendants' complaint is directed against those findings. The learned judge asked the jury:

> (i) "Did the plaintiff freely and voluntarily with full knowledge of the nature of the risk he ran, impliedly agree to incur it?"—A. "No." (ii) "Were the defendants guilty of negligence in employing the horse to draw the van?"—A. "Yes." (iii) "Was such negligence the cause of the accident?"—A. "Yes";

and they awarded the plaintiff £520 damages.

We have come to the conclusion that there was no evidence on which the jury could reasonably answer "No" to the first question or "Yes" to the third question. In arriving at that conclusion I appreciate fully that, if there was evidence, it is irrelevant that I myself should have come to a different opinion. If there was evidence, it is for the jury and not for the Court of Appeal; but, if there was no evidence on which a reasonable jury could have come to the conclusion at which they arrived, it is the duty of the Court of Appeal to do what, in my opinion, the learned judge should have done when there was a submission of no case. He should have withdrawn the case from the jury on the ground that there was no evidence on which they could reasonably answer the first question in the negative and the third in the affirmative.

The facts are these—I am dealing only with admitted facts, or where there is a dispute on the facts, taking the version of the facts most favourable to the plaintiff, because the jury may have accepted the evidence favourable to the plaintiff and rejected the evidence that was unfavourable to him. The United Dairies (London), A Ltd., who carry on the business of supplying milk over a large area, do so, as is usual with milk companies, by means of a morning round with their horses and carts, and a milkman who delivers the milk at various houses. On Aug. 25, 1930, the plaintiff, who has no connection or contractual relations with the company, was staying at a house in Shepperton where there was a road between the house and the river. His children were playing in the back garden at the time, and there B passed him, as he saw from a verandah, a horse and van galloping, or going past rather quickly, without a driver. He became apprehensive about his children, for he did not know where they were. He went out through the house and into the back garden, where he found his children playing in safety quite close to the house. The driver called out: "Help, help," from a field at the back of the garden where the horse and van then were, and the plaintiff went to the hedge dividing the C garden from the field. The plaintiff went over the fence and into the field to hold the horse's head, the horse plunged and knocked him down, and his leg was injured.

This was the evidence of the plaintiff:

> "I saw a horse and milk cart pass rather quickly. I went through to the back to see after my children. The children were in the garden. At this time the D horse and cart were at the back, the horse being about three yards from the fence. The horse and cart were standing diagonally with the horse's head looking slantwise towards the house—that is, in the field off the highway. . . . The driver was standing on the near side of the cart. Horse was facing south-west. The driver was very excited, and shouted: 'Help, help!' . . . By the time I got over the fence the driver had moved a little towards the fence and E seemed very, very upset, and he asked me to hold the horse's head. . . . I had a fear for my children, and when he asked me to hold the horse's head I am rather ashamed of having felt a little afraid for myself. I feel ashamed because I was afraid of getting hurt. I was frightened for my children; then when he asked me I was afraid for myself and I overcame that fear. . . . I just wandered to the back to be sure my children were there. I had no fear in my mind of F danger to them if they were in the back. The children were playing about 40ft. from the house out of about 300ft. I think I saw the horse and children at the same time the horse had arrived. The horse was then stationary, breathing heavily. It struck me then it was a runaway horse. I thought I had left my children quite safely while I went up to the hedge. I was frightened because the man looked in an awful state and because I had no great knowledge G of horses. I attempted to hold the horse. I was frightened because it looked dangerous, but overcame my fear. I had not enough knowledge of horses to know if after running away they are in a very nervous condition."

Re-examined:

> "I know very little about horses. I did not know enough to be either afraid or H not afraid."

That, of course, is quite contrary to what he said in cross-examination.

The driver said in evidence:

> "I had been holding the horse for five minutes before Cutler, the plaintiff, came out. I was trying to pacify the horse, which was very restless. Succeeded a I little, but not much. When Cutler came out, still restless. You cannot say still liable to bolt. Nothing to indicate to anyone coming up that the horse was liable to bolt. I would not have asked him to hold the head, nor would I have gone to the head myself if I thought the horse was liable to bolt."

I ought to have added, for, apparently, it is not disputed, that what had started the horse off was that, when it was left outside a customer's house while the driver went to deliver milk, with a chain on the wheel to prevent the horse from moving away, a pleasure steamer came up the river making the noise which some people think necessary when they go on a holiday, and that the noise from the pleasure steamer had startled the horse and made it bolt or run away. I think I have read everything which is in the plaintiff's favour in either the driver's evidence or in the plaintiff's evidence.

The jury have found that the defendants were guilty of negligence in employing that horse to draw the van. I will assume that that was so, although, but for the other findings which I am dealing with, I should have had considerable doubt whether there had been a proper direction to the jury on this point. The evidence on which the jury may have arrived at that finding is that once or twice—it is not clear whether once or twice, but I will assume they found that twice—before this horse had bolted, once because his nosebag and bridle had come off, and that startled him. The law on this subject has been investigated very fully and recently, and I only refer to the cases in which it has been investigated.

In *Manton* v. *Brocklebank* (1), a mare was put into a field to graze, with a horse, and she kicked the horse; the owner of the mare was held not liable for the damage to the horse. There is a very elaborate discussion of the liability of owners of animals in that case, particularly in the judgment of ATKIN, L.J. ([1923] 2 K.B. at p. 230). Then there was *Buckle* v. *Holmes* (2), where A.'s cat ate B.'s pigeon, and B. sued A. for damage done by his cat, and it was held by the Court of Appeal that, as it was notorious that any cat would eat a small bird, anyone who kept a cat was not liable for the consequences which followed from the ordinary nature of the cat, and the plaintiff who had lost his pigeons had judgment given against him. As I understand the law, it distinguishes between two classes of animals, dangerous and tame. You have the dangerous class, of which the tiger is the common illustration; if people keep a tiger they must be responsible for the damage that the tiger does. But there is, secondly, the class of tame animals; and as to those animals the owner is not liable for the results of their ordinary habits. It is in the interests of the public that tame animals should be kept; but, if the animal has any particular vice and the owner knows of it, he then becomes liable for the damage that that animal does. The doubt that I have had in this case is this. I cannot believe that there is any horse in England which has not at some time or other shied at something. I cannot believe that it is not the ordinary habit of horses, being nervous animals, to shy frequently at sights and noises to which they are unaccustomed, extrinsic to their own affairs, and I doubt very much whether that aspect of the case was sufficiently explained by the learned judge to the jury. Because I am rather startled to hear that, if once a horse has shied, and the owner knows it, he is responsible for any damage the horse may do subsequently by shying in the course of its career. I only mention that to say that I doubt whether that part of the case was properly explained to the jury by the learned judge. I will assume, however, that the verdict of the jury that there was negligence in employing this horse, which had twice shied or bolted before, to draw this milk van, was correct. There is no complaint, as counsel for the plaintiff said, of negligence in the driver himself. The negligence found is the negligence of the defendants in employing a horse which to their knowledge had twice shied or bolted before.

What is the legal result of the evidence, assuming where there is any dispute about the facts that the plaintiff's version is correct? Suppose a horse bolts along a highway and a spectator runs out to stop it and is injured. Is there any legal liability in that case on the owner of the horse which has bolted? It seems to me that the answer, on those facts and no more, is that there is no such liability. The damage is the result of the accident; the man who is subsequently injured in running out to stop a runaway horse must be presumed to know the ordinary consequences of his action; and the ordinary and natural consequences of a man trying to stop a runaway horse is that he may be knocked down and suffer injury. There is no duty on the man to run out and stop someone else's horse, and if he chooses to do an act, the ordinary consequences of which are that damage may ensue from it, the damage must be his own affair, and not that of the owner of the horse. That result is sometimes put as following from the legal maxim volenti non fit injuria; no injury is done to a willing person. It is sometimes explained by saying that a new cause has intervened between the original liability, if any, of the owner of the horse when it runs away. That new cause is the action of the plaintiff himself, and that new cause intervening prevents the owner of the horse that runs away becoming liable.

Now add another item to the facts I have supposed. Suppose the horse runs away and a man who is standing on the pavement hears a call, "Stop him!" from the driver. Does that involve the liability of the owner of the horse? At the moment that that happens the unfortunate man who is knocked down finds himself in a legal difficulty. The driver has called out "Stop him!" Has the driver any authority from his employer, the owner of the horse, to employ other people to run risks? And if he has such authority, does not the man whom he employs to run risks find himself in common employment with the driver; for the defence of common employment is part of the law of England, that one servant, one person employed, cannot complain of the negligence of another servant of the employer. In the present case, instead of the accident taking place on the highway, it took place in a field into which the horse has run from off the highway, and the plaintiff acted in response to a request from the servant.

I have come to the conclusion that there was no evidence here on which the jury could answer the question:

> "Did the plaintiff freely and voluntarily with full knowledge of the nature of the risk he ran, impliedly agree to incur it?"

by saying "No." The plaintiff himself said he knew that the horse was dangerous. He was afraid to go at first because he thought the horse was dangerous. He saw that the horse had run away; he saw that the driver was very excited about it, and that the horse was out of breath and apparently exhausted. It appears to me that the ordinary and natural consequence that any man must foresee if in such circumstances he goes to try and hold a restless horse that has run away is that he may be injured by the horse's rearing or plunging or running away, and that the damage that he sustains is the damage resulting from his own intervention—an intervention which may very likely lead to damage. It seems to me that it is immaterial to say: "I did not know how much he would hurt me, or how much he would plunge." The horse which had run away was in a restless condition, and the driver was shouting out, was very excited, and was apparently very anxious as to what would happen if the horse was not controlled. I quite agree with the statement made by WILLS, J., in *Osborne* v. *London and North-Western Rail. Co.* (3) (21 Q.B.D. at p. 224), when he said, in reference to certain observations of LORD ESHER, M.R., in *Yarmouth* v. *France* (4):

> "Those observations go far to make it hard for a defendant to succeed on such a defence as that relied on here, for it is probable that juries would often find for plaintiffs on the ground that they had not full knowledge of the nature and extent of the risk, but that cannot be helped."

It can be helped in clear cases; and it appears to me that where the plaintiff must have known and is presumed to know the ordinary consequences of his action, he cannot then successfully say: "You are under a liability to me; I did not understand the risk I was taking." The plaintiff was under no duty to go and hold the horse. He was not the servant of the defendants, and he is in the difficulty that I have indicated—a point on which I am not deciding the case—that either he has to show authority in the driver to employ him, or if he does show authority in the driver to employ him, he is in common employment with him.

The same reasoning, or somewhat similar reasoning applies to the answer of "Yes" by the jury to the question "Was such negligence the cause of the accident?" It is true that, if the horse had not been put into the cart, he would not have run away; and if he had not run away, the plaintiff would not have tried to stop him, or tried to hold him, and the accident would not have happened. But again, to diverge into Latin, post hoc is not propter hoc. There is a celebrated passage in the book Rejected Addresses, where the question is asked: "Who fills the butchers' shops with large blue flies?'' and the answer is ''Napoleon''; because Napoleon had been campaigning on the Continent, and the blue flies had come into England. It does not in the least follow that the negligence of the owner in employing an improper horse must make him liable for everything that happens afterwards. If, therefore, that which happens is the result of a new cause intervening, such as the plaintiff himself intervening when he had no duty to act, you cannot say in point of law that the negligence of the owners was the cause of the accident.

For these reasons, and without deciding in any way the question about the negligence except to say that I think the judge might very properly have given more careful direction to the jury on the liability of owners of animals, and without deciding any of the questions raised about common employment, I think there was no evidence on which a reasonable jury could answer the first and third questions in favour of the plaintiff, and that, therefore, this appeal must be allowed, with costs here and below.

SLESSER, L.J.—I agree that this appeal must be allowed. In my opinion, it was not possible for the jury in this case to answer the question: ''Was such negligence the cause of the accident?'' in the affirmative. The direction which the jury received on this matter was very meagre. The learned judge at first omitted this question altogether and proceeded to the question of damages. But being reminded by counsel for the plaintiff that there was this third and I think essential question, HORRIDGE, J., said this:

> ''I forgot. I ought to have said the third question is: 'Was such negligence the cause of the accident?' You have got all the facts. If this horse had not been employed in the way in which it was, and was a horse of quiet character, do you think it would have bolted again a second time? That is the plaintiff's case. The defendants' driver would not have the word that it 'reared,' but it 'plunged.' Do you think that would have happened if it had not been a horse of this kind—if it had not been a horse of this kind that they had no right to employ? It is entirely for you. You would very likely think, or you may very likely think, that the accident would not have happened unless the horse had been of that character and employed as it was. Therefore the third question is, 'Was such negligence the cause of the accident?' ''

In that construction the learned judge, if I may also be permitted the use of another Latin phrase, has gone no further than the question of the causa sine qua non. The problem which ought to have been considered, namely, whether, if the owners of the horse had been negligent (in view of the fact that it had previously bolted), the plaintiff had not by his own act put himself within the zone of the peril which caused the accident—was one to which I think the jury's attention was not directed or not sufficiently directed. But with the evidence here as we have got it, it seems to me plain that the essential cause of the accident—the causa causans—was the act of the plaintiff himself in acceding to a request to hold the horse's head, and nothing else.

There may be cases, the illustration is a possible one, where a man sees his child in great peril in the street, where he is so immediately moved by paternal affection that he dashes out and holds a horse's head to save his child. It may be there that there is no novus actus interveniens. Certainly a man will be entitled in order to save himself to attempt to arrest a runaway or restless horse. But this is a case where a man of his own motion came through a hedge, in response to an invitation or to the words ''Help, help,'' or whatever it may be, which he heard from the driver, came through the hedge, and himself imperilled his own life and limb by going up to hold the horse. In such a case, however heroic may have been his action, and, however laudable, I cannot think that it can properly be said that his own action, his voluntary act, was not the cause of the accident in the legal sense and nothing else; and for that reason I have come to the conclusion that the jury could not return here a finding that the negligence of the owners of the horse, which I will assume to have existed, was the cause of the damage. Therefore, in that respect the plaintiff failed at the threshold, and failed to prove that which he has to prove; that the negligence of the owners of the horse caused the damage of which he complained. But it is equally right to say that, if that view be not taken, even though there be negligence and the damage was caused originally by the defendants' negligence, the defendants may properly say that the plaintiff agreed here to accept freely and voluntarily, with full knowledge of the risk he ran, the chances of the damage which he incurred. I do not repeat the reasons which my Lord has already stated with regard to that view, and I do not think it was open to the jury here to hold that this was not a case of volenti non fit injuria.

We have heard an argument on the question of common employment. The plea of common employment is not upon the record, and the learned judge refused to accept a defence on that head. I do not, therefore, deal with it.

But in this case as it stands, because the negligence of the owners of the horse could not properly be held to have caused the damage to the plaintiff, and because the plaintiff in any event voluntarily and with full knowledge incurred the risk by which it was caused, this appeal must be allowed.

EVE, J.—I agree, and in order not to fall behind my learned brethren, I express my conclusion in this way, that the plaintiff's injuries were due to a cause which he adopted ex mero motu.

Appeal allowed.

Solicitors: *Cole & Matthews*; *A. R. Lord.*

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

R. *v.* COULTHREAD

[COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Avory and Branson, JJ.), January 31, 1933]

[Reported 148 L.T. 480; 97 J.P. 95; 31 L.G.R. 138; 24 Cr. App. Rep. 44; 29 Cox, C.C. 598]

Evidence—Corroboration—Complaint of sexual offence—Evidence of consistency of complainant's story.

It is a misdirection to refer to a complaint by a person against whom a sexual offence is alleged to have been committed as corroboration of the complainant's testimony. Such a complaint may be evidence of the consistency of the complainant's story, but it is not to be treated as corroboration in the proper sense of that term.

Proviso to s. 4 (1) of the Criminal Appeal Act, 1907, applied on the ground that in the circumstances of the case there had been "no substantial miscarriage of justice."

Notes. As to corroboration and complaints, see 10 HALSBURY'S LAWS (3rd Edn.) 458–462, 468, 485, and for cases see 15 DIGEST (Repl.) 829 et seq., and ibid., vol. 14, 452 et seq.

Appeal against conviction and sentence.

The appellant, who was a scout-master, was convicted before GODDARD, J., at Leeds Assizes of indecent assault on a boy named Bullen, one of the boy scouts under his charge, aged thirteen years, and was sentenced to eighteen months' imprisonment. It was alleged that the offence had been committed at a scout camp in a tent in which the appellant and Bullen were occupying the same bed, and other boy scouts other beds. There was evidence that on the next day some of the other boys who had been in the tent had asked Bullen questions and that then and on subsequent occasions Bullen had made complaints with regard to the appellant's conduct during the night. The judge told the jury that, having regard to the nature of the offence and the age of the boy, they ought not to convict unless they found corroboration of the boy's story, and he referred to several matters which they were entitled to regard as corroboration, including the complaints made by the boy subsequent to the alleged offence.

J. Willoughby Jardine, K.C. (*N. Grattan-Doyle* with him), for the appellant.

G. B. Streatfeild for the Crown.

The judgment of the court was delivered by

AVORY, J.—This appellant was found Guilty at Leeds Assizes on a count of an indictment which charged him with an indecent assault upon one Sydney Bullen, a boy of the age of thirteen years, and he was sentenced to eighteen months' imprisonment. His counsel has properly called the attention of the court to the summing-up, but, before we consider the complaints made with reference to that, it is necessary to bear in mind what the general nature of the case was.

The boy Bullen was a boy of perfectly good character, and had expressed a desire to join the boy scouts. He was introduced to the appellant with that view. There was in the indictment a further charge of an indecent assault alleged to have been committed in May, 1932, in a room where, it was said, the appellant had made an examination of the boy on the occasion of his enrolment. The judge, however—in the opinion of this court, quite properly—withdrew that charge from the jury, and the charge upon which the appellant was tried and convicted related to an assault alleged to have been committed on June 4, 1932, in a tent to which the boy had been taken by the appellant after the appellant had inquired whether the boy had any equipment of his own, and, on being told that he had none, had said that in the circumstances they would have to sleep together. There was evidence that after the boy arrived at the camp where the tent was he was the last to go to bed in the tent, the other scouts having been already told to go to bed; that after that the boy was left by the camp fire with the appellant eating buns which had been given him; that then he went to bed upon a mattress on the ground 2ft. 6in. in width and the appellant soon afterwards got on to the same mattress and under the same blankets; that soon afterwards some suggestion was made by the appellant that the boy should change his position, and the boy objected and said he preferred to remain as he was; that about that time one of the other boys in the tent was heard to say: "What's the matter, Bullen? Are you frightened?" The jury were entitled to infer from that that something was taking place to which the boy was objecting. The boy himself gave evidence of an indecent assault committed upon him, consisting in interference with his private parts. There was evidence that one of the other boys asked the boy Bullen on the following morning: "How did you get on last night with Mr. Coulthread?" and that Bullen on that occasion made a complaint against the appellant. There was evidence also that at a later date Bullen made a complaint against the appellant to his uncle.

The learned judge properly told the jury that, in view of the nature of the offence and the age of the chief witness, it was a case where they ought not to convict unless they found corroboration of the boy's story. It was not a case where corroboration was required by statute, but one where, according to the practice laid down by this court, having regard to the nature of the offence and the youth of the witness, the jury ought to be warned that they should look for corroboration of his evidence before they convicted. In the opinion of this court, there was corroboration of the boy's story. Apart from any observations made in the tent at the time of the offence, there was evidence that on the next day the boy's private parts were in a condition which indicated that there had been some interference with them.

A It now becomes necessary to consider the criticisms directed against the summing-up. To pass over minute criticisms and deal with the two substantial ones which undoubtedly require consideration, the judge referred to what had taken place on the following morning when the boys were round the camp fire and very pointedly said to the jury that, whether it was or was not Longden who had asked the question, some boy asked Bullen how he had got on with the appellant during the
B previous night, and Bullen replied that the appellant had behaved in an improper way. There was evidence that the patrol leader who was there treated this as a dirty joke and the judge, commenting on the fact that the patrol leader had treated the matter in that way when Bullen was making a charge of that kind, said:

> "Did he give the boy a cuff over the head or a box on the ear for talking filthy talk and making a foul charge against the scoutmaster? Apparently not.
> C Why? Why? You may think it was because that answer was not unexpected."

That was an unfortunate observation and may well have created in the minds of the jury the impression that they might infer that the appellant had been guilty of similar conduct either with Longden or with the other boys in the camp. We
D think that it is to be regretted that the judge made that observation and that it should not have been made.

The next complaint is that the judge, having warned the jury that they should look for corroboration, said:

> "Members of the jury, you may find corroboration there in these things that were said, the immediate answer of the boy in the morning and the things that
> E were said to have been overheard—these questions in the night and in the morning and this answer in the morning."

Undoubtedly that statement that the things which were said in the morning might be treated as corroboration of the boy's story is in direct conflict with the view of this court, expressed in more than one case, that a complaint of this sort, though it may be evidence of the consistency of the complainant's story, is not corrobora-
F tion in the proper sense in which that word is understood in cases of this kind. We think that it was incorrect of the judge to say that anything said on the following morning might be corroboration. On the other hand, it is not disputed by counsel for the appellant that all the boy said on the next day was evidence which showed the consistency of his story.

In the result, although we think that there were these errors in the summing-up
G which may properly be said to have amounted to misdirection, we have come to the conclusion that we should in this case apply the proviso to s. 4 (1) of the Criminal Appeal Act, 1907:

> "The court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually
> H occurred."

The appeal, therefore, will be dismissed. The sentence will stand, but, as leave to appeal was given, it will run from the date of conviction.

Appeal dismissed.

Solicitors: *W. B. Siddons*, Sheffield; *J. C. McGrath*, Wakefield.

I [*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

R. *v.* MINISTER OF TRANSPORT. Ex parte UPMINSTER SERVICES, LTD.

[Court of Appeal (Lord Hanworth, M.R., Lord Russell of Killowen, and Romer, L.J.), October 19, November 8, 1933]

[Reported [1934] 1 K.B. 277; 103 L.J.K.B. 257; 150 L.T. 152; 98 J.P. 81; 50 T.L.R. 60; 32 L.G.R. 61]

Road Traffic—Appeal to Minister—Need for Minister to act judicially—Limit of power to revoke road service licence—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 74 (1), *s.* 81 (1) (*a*), (2).

The Minister of Transport, in exercising his jurisdiction as an appellate tribunal in connection with licences for public service vehicles and road service licences under s. 81 of the Road Traffic Act, 1930, must act judicially. His decision must be confined to the question before him and only if that question and decision involve or necessitate the revocation of a licence can he revoke the licence under s. 81 (2).

In July, 1932, the appellant company were granted a road service licence by the Metropolitan Traffic Commissioners, and the licence was backed by the Eastern Area Traffic Commissioners. On Aug. 15, 1932, the company began to carry on a service from Aldgate to Upminster, Essex. Subsequently, the company, finding they were not able to comply with a condition of the licence that no fare of less than 1s. should be charged, appealed to the Minister of Transport, under s. 81 (1) of the Road Traffic Act, 1930, against the condition, and at the same time the Green Line Coaches, Ltd., and the London, Midland and Scottish Rail. Co. appealed, claiming that the licence and backing should be revoked on the ground that the service was unnecessary. On Jan. 23, 1933, the Minister made the following orders: (i) that the Metropolitan Traffic Commissioners should revoke the licence as soon as provision was made for road services between Upminster and London; and (ii) an order to a similar effect with regard to the backing. On a rule nisi obtained by the company to quash these orders,

Held: the Minister had attempted to usurp the original jurisdiction to revoke which was conferred on the commissioners by s. 74 of the Act, and, therefore, he had no power to make the orders.

Notes. As to appeals to the Minister, see 31 Halsbury's Laws (2nd Edn.) 743, 744, and for cases see Digest Supp., case 76v et seq. For Road Traffic Act, 1930, see 36 Halsbury's Statutes (2nd Edn.) 795.

Cases referred to:

(1) *Board of Education* v. *Rice*, [1911] A.C. 179; 80 L.J.K.B. 796; 104 L.T. 689; 75 J.P. 393; 27 T.L.R. 378; 55 Sol. Jo. 440; 9 L.G.R. 652, H.L.; 19 Digest 602, *290*.

(2) *Royal Agricultural Hall Co.* v. *Islington Assessment Committee*, [1918] A.C. 525; 87 L.J.K.B. 793; 119 L.T. 165; 82 J.P. 217; 62 Sol. Jo. 547; 16 L.G.R. 473; sub nom. *R.* v. *Westminster Assessment Committee*, *R.* v. *Islington Assessment Committee*, 2 B.R.A. 639, H.L.; 38 Digest 643, *1611*.

Appeal from an order of a Divisional Court.

The facts are shortly stated in the headnote, and, together with the material sections of the Road Traffic Act, 1930, are fully set out in Lord Russell's judgment.

Stuart Bevan, K.C., *A. S. Comyns Carr, K.C.*, *P. B. Showan* and *Nyholme Shawcross* for the appellant company.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *W. Bowstead* for the respondent.

The arguments sufficiently appear from LORD RUSSELL's judgment.

Cur. adv. vult.

Nov. 8. The following judgments were read.

LORD HANWORTH, M.R.—I have had the opportunity of reading the judgment which LORD RUSSELL has written, and he has expressed so completely my own opinion upon the case that it would be of no service for me to write an independent one, and I will only add a few words upon one or two points.

The appellate jurisdiction which is given to the Minister by s. 81 of the Road Traffic Act, 1930, is set in motion by certain specified persons or authorities, within certain limits, and to obtain certain results. Thus, an applicant who is aggrieved by the refusal of the grant of a licence, or with the conditions imposed upon any such grant, may, under sub-s. (1) (a), appeal to the Minister; and any holder of a public service vehicle licence, or a road service licence, who is aggrieved at the revocation or suspension of it, may under sub-s. (1) (c) appeal to the Minister.

The Minister must act judicially upon the hearing of such an appeal. That is plain from the very nature of the jurisdiction conferred. It is confirmed by the terms of the regulations made by the Minister under s. 94 for the purpose of enabling him to carry out his duties and to decide what his order shall be. In doing this he must, as LORD LOREBURN said in *Board of Education* v. *Rice* (1) ([1911] A.C. at p. 182):

> "act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything."

In the present case, the Minister has treated the licence as good, and it is, by his order, to remain good until upon a future contingency the opportunity for and possibility of revoking the licence shall arise, and the revocation is to be exercised by the commissioners after consultation with the Traffic Commissioner for the Metropolitan Area.

The decision of the Minister came as a surprise to the applicants. They had not been called upon to discuss and repel an order of revocation, yet the order was made under a power which it is claimed is held by the Minister under sub-s. (2), in vacuo. I agree that some limitation is to be placed upon the apparently wide words in sub-s. (2): "including an order revoking a licence." They must be read as conferring that power when it would be appropriate to exercise it. The words cannot apply to sub-cll. (a), (c), or (e), and, therefore, must be read subject to an implied limitation such as "where it is appropriate that it should be exercised." The revocation cannot be super-added to any order of any sort made by the Minister if he is minded to make such an addition. For the reasons, therefore, stated by LORD RUSSELL, and herein, I agree that the appeal must be allowed with costs here and below and the rule made absolute.

LORD RUSSELL.—The question for decision on this appeal is whether two orders, each dated Jan. 23, 1933, and purporting to have been made by the Minister of Transport under the Road Traffic Act, 1930, were orders which he had power to make under the Act; or whether the orders, if intra vires, were, in the circumstances of this case, improperly made by reason of a failure by the Minister to exercise his powers judicially.

The relevant facts must be stated. The appellant company, Upminster Services, Ltd., was incorporated on June 15, 1932, with the object of entering into and carrying into effect an agreement referred to in the memorandum of association. This was an agreement (eventually dated July 7, 1932) by which a company called Fairway Coaches, Ltd., and a Mr. Hillman (both claiming as rival purchasers from a company called Eastward Coaches, Ltd.) sold to the appellant company the right title or interest of the Fairway company and Mr. Hillman in the goodwill of Eastward Coaches, Ltd., including therein the preferential right to apply for road traffic licences, and also the right title and interest of Mr. Hillman in the goodwill created by his having run a service of motor coaches on the route hereinafter mentioned, and all such rights, if any, to apply for road traffic licences as Mr. Hillman might have thereby acquired. The route in question was from Aldgate to Upminster via Ilford, along which Eastward Coaches, Ltd., had, under licences from the then proper authorities, been running a service of motor omnibuses or coaches. There is no evidence to show when this sale to the appellant company was completed, but the company commenced to operate the route under the road service licence hereinafter mentioned on Aug. 14, 1932.

Immediately on its incorporation, the appellant company applied under s. 72 of the Act to the Metropolitan Traffic Commissioner for a road service licence and to the Traffic Commissioner for the Eastern Area for a backing of the licence. This two-fold procedure was necessitated by the fact of the route running from one jurisdictional area into another. At the hearing of these two applications Green Line Coaches, Ltd., and the London, Midland and Scottish Rail. Co. appeared as objectors. The licence and backing were both granted, but certain conditions were attached thereto including a condition as to minimum fares, and a condition as to stopping-places. The licence is dated July 29, 1932, and the backing is dated Sept. 2, 1932.

The appellant company appealed against the conditions specifically referred to above. Green Line Coaches, Ltd., and the railway company appealed against the grant of the licence and backing, the grounds of their appeals being such as to indicate that the licence and backing should not have been granted by the commissioners at all. Under the Act these appeals are appeals to the Minister, who directed that an inquiry should be held by an official of the Ministry, who was to report to the Minister. In the result the Minister made no order on the appellant company's appeals except as to costs; but upon the appeals of Green Line Coaches, Ltd., and the railway company, he made the two orders which are the subject of the present proceedings. The first one is the Road Service Licences (Appeals) Order (No. 6), 1933, and it is in the following terms:

> "WHEREAS the London, Midland and Scottish Rail. Co. and Green Line Coaches, Ltd., have appealed to the Minister of Transport (hereinafter referred to as 'the Minister') under the provisions of s. 81 of the Road Traffic Act, 1930, against the decision of the Traffic Commissioner for the Metropolitan Traffic Area (hereinafter referred to as 'the commissioner') to grant a road service licence to Upminster Services, Ltd., of Stratford, London, in respect of an application to provide a service of stage carriages between Aldgate and Upminster via Ilford (which application has been designated in the publication of Notices and Proceedings issued by the commissioner as application T.N.R. 1215/1. AND WHEREAS the Minister has caused an inquiry to be held into the subject-matter of the said appeals. NOW THEREFORE the Minister in exercise of the powers vested in him under or by virtue of the Road Traffic Act, 1930, and of all other powers in that behalf vested in him, hereby orders as follows: (1) The commissioner shall revoke the said licence so soon as he is satisfied, after consultation with the Traffic Commissioners for the Eastern Area, that adequate provision has been made for road services between Upminster and London. (2) This Order may be cited as 'The Road Services Licences (Appeals) Order (No. 6), 1933.'"

The second order relates to the Eastern Area and the appeals against the grant of the backing, and is in the same terms mutatis mutandis. The operative part runs thus:

> "NOW THEREFORE the Minister in exercise of the powers vested in him under or by virtue of the Road Traffic Act, 1930, and of all other powers in that behalf vested in him hereby orders as follows: (1) The commissioners shall revoke the said backing so soon as they are satisfied, after consultation with the Traffic Commissioner for the Metropolitan Area, that adequate provision has been made for the road services between Upminster and London. (2) This Order may be cited as 'The Road Services Licences (Appeal) Order (No. 7), 1933.'"

It is essential at this point to consider the purport and effect of these two orders of the Minister, in relation to what the orders call "the subject-matter of the said appeals." The subject-matter of the appeals referred to in those orders was (in the one) the question whether the Metropolitan Traffic Commissioner ought, on July 29, 1932, to have granted a road service licence to the appellant company and (in the other) whether the Eastern Area Commissioners ought on Sept. 2, 1932, to have granted a backing to that licence. No other question was submitted by those appeals for the determination of the Minister under his appellate jurisdiction.

The question submitted for his determination by the appellant company's appeals was whether the licence and backing should be subject to the particular conditions. Those appeals must be taken to have failed. But what about the appeals upon which the Minister made his orders? It appears to me that they must be taken to have failed also, because the orders treat the licence and backing as having been properly granted, and as remaining in full force and effect until the happening of a future and uncertain event, namely, the authority for each area being satisfied (after consultation with the authority for the other area) that adequate provision had been made for road services between Upminster and London. That event might conceivably never happen; but, at any rate, until it did happen the appellant company's licence and backing are recognised as a licence and backing properly granted under the Act. The orders, however, provide that, if and when the specified event happens, the licence and backing are to be revoked by the respective commissioners.

As will be seen from the provisions of the Act, there is no power in the Minister to make any such order, namely, an order ordering commissioners to revoke. The power of the commissioners to revoke is a power given by s. 74 and is to be exercised by them on application made to them and in accordance with their discretion, after hearing the parties and considering the matter; and it is difficult to understand how the Minister can have considered himself entitled to dictate to the commissioners how they were to exercise this discretionary power which is vested in them by way of original jurisdiction. The parties, however, seem to have treated these orders as though they provided for revocation by the Minister, and I think that the matter must be dealt with here on that footing, namely, as if the Minister himself had ordered that upon the happening of the event specified the licence and backing were to be revoked. But even upon this footing the orders remain orders which recognise the propriety of the grants of the licence and backing, but which purport to revoke them upon the happening of a future contingent event. The orders, in so far as they affirm the propriety of the grants, would seem to be an undoubted exercise of an appellate jurisdiction; but in so far as they purport to revoke a validly granted licence and backing they would appear to be an attempted exercise of original jurisdiction.

I now proceed to consider whether the Minister had any power to revoke the licence and backing, and for this purpose attention must be drawn to the relevant provisions of the Act.

Section 72 deals with the grant by the commissioners of road service licences, i.e., licences to provide such a road service as may be specified in the licence. Subsection (3) provides that the commissioners,

> "in exercising their discretion to grant or to refuse a road service licence in respect of any routes and their discretion to attach conditions to any such licence,"

shall have regard to a number of special matters, including the extent to which the proposed service is necessary or desirable in the public interest. Section 73 provides for the backing by the commissioners of one traffic area of a road service licence granted by the commissioners of a different traffic area. The power of revoking and suspending road service licences is given to the commissioners by s. 74 (1) which runs thus:

> "A road service licence may be revoked or suspended by the commissioners who granted the licence on the ground that any condition subject to which the licence was granted has not been complied with: Provided that the commissioners shall not revoke such a licence unless, owing to the frequency of the breach of conditions on the part of the licensee, or to the breach having been committed wilfully, or to the danger to the public involved in the breach, the commissioners are satisfied that the licence should be revoked or suspended."

The only other provisions which appear to be relevant are the first two subsections of s. 81, which deals with appeals to the Minister. They are in the following terms:

> "(1) Any person who (a) being an applicant for the grant of a public service vehicle licence or road service licence, is aggrieved by the refusal or failure of the commissioners to grant the licence, or with any condition imposed by the commissioners; or (b) being a local authority which, or a person providing transport facilities who, has opposed the grant of a road service licence, is aggrieved by the grant thereof or by any condition or by any variation of the conditions attached thereto; or (c) being the holder of a public service vehicle licence or road service licence, is aggrieved at the revocation or suspension thereof by the commissioners, or by any variation of the conditions attached thereto; or (d) being the holder of a public service licence, is aggrieved by the refusal of a certifying officer to remove the suspension thereof; or (e) being the applicant for or the holder of a certificate of fitness, is aggrieved by the refusal of a certifying officer to issue such a certificate or by the limitation of its duration proposed by the certifying officer or by the revocation of a certificate; may within the prescribed time and in the prescribed manner appeal to the Minister. (2) On any such appeal the Minister shall have power to make such order as he thinks fit (including an order revoking a licence), and any such order shall be binding upon the commissioners or certifying officer."

It is sought to justify the Minister's orders here under the wide words of sub-s. (2), which it is said entitle the Minister upon the occasion of any appeal under the section to make any order which he thinks fit to make in regard to the licence, and, in particular, an order revoking the licence even though the question of the revocation of the licence is not raised directly or indirectly by the appeal which is brought to him under the section.

I cannot so read the subsection. The words, though wide in form, must necessarily receive some limitation from the context in which they occur. "Such order as he thinks fit" must necessarily be limited to orders in reference to the subject-matter of the appeal; similarly the words "including an order revoking a licence" cannot apply to all appeals under the section. They cannot, for instance, apply to appeals under (a) from a refusal by the commissioners to grant a licence, or to appeals under (c) against the revocation of a licence, or to appeals under (e) as to certificates of fitness. The wide words accordingly must be cut down to some extent.

But it is said (and truly) that there is no right of appeal from a refusal by the commissioners to revoke a licence; it is, therefore, argued that the words must apply to some or one of the appeals specified in s. 81 (1). I agree that that is so; they certainly apply to an appeal against the grant of a licence. But it is further contended that they apply to all appeals in cases where a licence granted by the commissioners is in fact in existence, and enable the Minister, if he so wishes, to revoke the licence even though the propriety of the grant of the licence is not the subject-matter of the appeal. With that contention I disagree. I cannot accept this interpretation of a section, the object of which is to confer an appellate jurisdiction. Any order may be made under the section, the making of which is involved in or necessitated by the Minister's decision upon the question which is submitted to his review on appeal. Thus, if his decision upon that question involves the view that the licence should never have been granted, he could in the exercise of his appellate jurisdiction order the revocation of the licence. The

A express reference to revocation was probably inserted to make it clear that, notwithstanding s. 74, the Minister could revoke in the exercise of his appellate jurisdiction under s. 81. But he may not, in my opinion, under s. 81 exercise original jurisdiction (which is given to the commissioners under s. 74) by revoking a licence which was originally rightly granted.

This is what he has done in the present case, for by his orders the licence is
B treated as and remains good until a future contingent event, upon the happening of which he (according to the way in which the parties have construed and treated the orders) revokes the licence. This, in my opinion, is not a revocation within the power given by s. 81, but is an attempt by the Minister to usurp the original jurisdiction which by s. 74 is conferred, not upon him, but upon the commissioners. The orders are, in my opinion, beyond the competence of the Minister to make.

C So far I have dealt with the matter solely upon a consideration of the terms of the orders, and without reference to the letter of Jan. 24, 1933. If this letter may be properly referred to, it makes the position all the clearer, for it is evident from its contents that the causes of the attempted revocation are or include illegal and improper operation of the service by the appellant company—in other words, that the reason or one of the reasons for the revocation is the alleged fact that con-
D ditions subject to which the licence was granted have not been complied with, i.e., the very ground which founds the jurisdiction of the commissioners under s. 74.

A further point was urged on behalf of the appellant company, namely, that, even assuming that s. 81 conferred power upon the Minister to make the orders here in question, they were, nevertheless, bad because he had not acted judicially in that the appellant company had not been in any way heard upon the alleged grounds of
E revocation. I do not think it necessary to say anything upon this contention, except to point out that while this unjudicial procedure may very easily take place if the Minister's construction of s. 81 is correct, it could not occur if his power to revoke is restricted to cases where his decision upon the point under appeal necessarily involves the view that a licence should never have been granted. It follows from what I have said that, in my opinion, the order nisi should have been made
F absolute.

It was said, however, that the grounds set forth in the order nisi were insufficient to justify the contention that the orders were beyond the powers of the Minister under s. 81. I do not agree. I think that the point is covered by the allegation that, in revoking the licence and backing, the Minister acted ultra vires and contrary to law.

G From the brief judgments of the Divisional Court it does not appear that the essential distinction between original and appellate jurisdiction has been considered. Indeed, HUMPHREYS, J., seems to treat the matter to a great extent as though the appellant company had been applying to the Minister for the grant of a licence. The matter was disposed of in the Divisional Court upon the footing, as it seems to me, that under the wide words of s. 81, the Minister had a power
H to revoke a licence which had properly been granted by the commissioners. This, for the reasons which I have indicated, he had no power to do.

In my opinion, the appeal succeeds. The order discharging the order nisi should be discharged, and, in lieu thereof, it should be ordered that the order nisi be made absolute and a writ of certiorari be directed to issue to the Minister accordingly. The Minister must pay the appellant company's costs here and below.

I

ROMER, L.J.—The first question to be determined on this appeal, and one that goes to the root of the whole matter, is whether the Minister of Transport was acting within his powers in revoking the road service licence granted to the appellant company on July 29, 1932. As a matter of fact the Minister did not himself revoke the licence. He merely ordered the Traffic Commissioner for the Metropolitan Traffic Area to revoke it on the happening of a certain event. This distinction, however, was not one of the grounds upon which the appellants obtained the rule nisi, and the matter was, therefore, argued before us on the footing that the Minister, by his order of Jan. 23, 1933, himself had revoked the licence conditionally upon the happening of the event. Whether or not he had power so to do depends upon the proper construction of s. 81 of the Road Traffic Act, 1930. By sub-s. (2) of that section the Minister is given power on any such appeal as is referred to in sub-s. (1) to make such order as he thinks fit, and such an appeal was, no doubt, before him when he made the order in question. But the appeal was that of the Green Line Coaches, Ltd., and the London, Midland and Scottish Rail. Co. and was brought against the decision of the commissioner to grant the road service licence. The appeal was based on the ground (in effect) that there was no further need for the service referred to in the licence, which was a service between Upminster and London. The appellants urged, in other words, that there was already adequate provision for such a service. This allegation they failed to establish, for the Minister by his order makes it quite plain that at that time no such adequate provision had, in fact, been made. The appeal, therefore, was unsuccessful, and the decision of the commissioner to grant the licence, which was the decision appealed from, should, one would think, have been affirmed. The Minister nevertheless conditionally revoked the licence, and seeks to justify his action on the ground that s. 81 (2) of the Act enabled him to make any order that he thought fit.

I am not prepared to take this view of the subsection. Plainly some limit must be placed upon the generality of the words used. No one can suppose that the legislature intended to create a dictatorship in the person of the Minister of Transport if and whenever an appeal happened to be brought before him under the section. It is equally incredible that the subsection should have been intended to give the Minister power to make any order he might think fit relating to road transport in general, or even road transport in the area affected by the matter brought before him on the appeal. The subsection, after all, is not one dealing with the powers of the Ministry of Transport as such. It is dealing with his powers as an appeal tribunal exercising quasi-judicial functions, and the orders that he may make as such. The most natural, and, in my opinion, the proper, meaning of the subsection is that the Minister may give such decision on the questions raised by any particular appeal as he may think right, and give such directions as may be necessary for giving effect to that decision. But his decision must be confined, as in the case of other judicial or quasi-judicial tribunals, to the questions brought before him on the appeal, and he must not travel outside them.

This seems to be in accordance with the view taken by Lord Shaw as to the meaning of somewhat similar words in s. 47 (6) of the Valuation (Metropolis) Act, 1869. That subsection, in dealing with objections to a provisional list brought before the assessment committee, enacts that the committee "may make such order as they think fit." In *Royal Agricultural Hall Co.* v. *Islington Assessment Committee* (2) ([1918] A.C. at p. 539), Lord Parmoor, dealing with these words, said:

> "The powers of the assessment committee under the subsection are limited to the determination of the particular objection."

So, too, in the present case the powers of the Minister of Transport are limited to the determination of the particular questions raised on the appeal before him.

It is urged, however, on the part of the Minister that such a limitation of the powers given him by the subsection is ruled out by reason of the words "including an order revoking a licence." For no appeal to the Minister appears to lie from the refusal of a commissioner to revoke a licence, and, therefore, the words in question, so it is argued, show that his powers are not limited to dealing with the particular questions brought before him on appeal. It is said that once an appeal comes before the Minister he may revoke a licence though nobody has asked him to do so by the notice of appeal or otherwise. This, if true, may lead to strange results. If an applicant for a road service licence, for instance, feels aggrieved by the imposition of a particular condition and appeals to the Minister to have it removed, he may find his licence revoked altogether, or he might find his public service vehicle licence or even his own driving licence revoked. For the words "a licence" would on this argument seem to include any licence, or, at any rate, any licence granted under the Act. Nor can I see why an appellant appealing against the granting of a road service licence to a rival line should not find his own licence or licences revoked. I am not prepared to adopt a construction that gives rise to results so extravagant if the words are capable of a more reasonable meaning. And, in my opinion, they are. For it must often happen, as, indeed, it happened in the present case, that a licence will have already been actually granted before the appeal is heard. In such a case should the Minister on an appeal against such grant decide in favour of the appellant, it would be necessary, in order to give effect to that decision, that the licence should be revoked. In my opinion, this is the reason for the insertion of the words in question. They do not give the Minister power to travel outside the particular question brought before him on the appeal. They merely empower him to revoke a licence when such revocation is necessary for the purpose of giving effect to his decision upon that question.

For these reasons (as well as for the reasons given by my Lords whose judgments I have had the opportunity of reading) I am of opinion that this appeal should be allowed.

Appeal allowed.

Solicitors: *Daybells*; *Treasury Solicitor.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

McARDLE *v.* EGAN AND OTHERS

[COURT OF APPEAL (Lord Hewart, C.J., Lord Wright and Slesser, L.J.), October 19, 1933]

[Reported 150 L.T. 412; 98 J.P. 103; 30 Cox, C.C. 67]

Arrest—Arrest without warrant—Suspicion of felony—Reasonable cause to suspect commission of felony and guilt of person arrested—Question for judge.

A constable is justified in arresting a person without a warrant if at the time of effecting the arrest he has reasonable and probable cause to suspect that a felony has been committed and that the person arrested is guilty of it, whether the reasonable grounds for suspicion are matters within his own knowledge or are facts stated to him by another.

The question whether the constable has reasonable and probable cause for making the arrest is for the judge and not for the jury.

Per Lord Wright: Circumstances in which the constable may take into consideration the fact that the person arrested has been previously convicted and is well known to the police.

Notes. Referred to: *Diamond* v. *Minter*, [1941] 1 All E.R. 390.

As to arrest without warrant, see 10 HALSBURY'S LAWS (3rd Edn.) 342 et seq., and for cases see 14 DIGEST (Repl.) 194 et seq.

Cases referred to:

(1) *Lister* v. *Perryman* (1870), L.R. 4 H.L. 521; 39 L.J.Ex. 177; 23 L.T. 269; 35 J.P. 4; 19 W.R. 9, H.L.; 33 Digest 503, *449*.

(2) *Panton* v. *Williams* (1841), 2 Q.B. 169; 1 Gal. & Dav. 504; 10 L.J.Ex. 545; 114 E.R. 66, Ex. Ch.; 33 Digest 502, *441*.

(3) *Beckwith* v. *Philby* (1827), 6 B. & C. 635; 9 Dow. & Ry. K.B. 487; 4 Dow. & Ry. M.C. 394; 5 L.J.O.S.M.C. 132; 108 E.R. 585; 14 Digest (Repl.) 195, *1601.*

Appeal by the defendants from a verdict and judgment at the trial of an action at Liverpool Assizes by Lawrence, J., and a common jury.

The plaintiff claimed damages for false arrest. He had been arrested without a warrant on the instructions of a chief constable (one of the defendants) on a charge of stealing clothing from a reformatory school of which he had formerly been an inmate. It was admitted that he was not guilty of that offence, and the issue in the action was whether the chief constable, when ordering the arrest, had reasonable and probable grounds for suspecting that a felony had been committed and that the plaintiff was guilty of it.

The chief constable, in giving evidence, gave the following reasons as justifying him in ordering the arrest: (i) the object of the plaintiff's visit to the school, namely, to obtain clothing; (ii) that he was unsuccessful, although he said he was "down and out," and his request for his train fare was refused; (iii) the time of his arrival at the school—7.45 p.m.; (iv) the break was made into the tailor's shop, where the plaintiff had previously been interviewed by the tailor; (v) only clothing was stolen; (vi) the clothing would fit the plaintiff, but would not fit the majority of the other inmates; (vii) clothing left by the thief was identified by the tailor and headmaster as that worn by the plaintiff on the previous day; (viii) the opportunity that the tailor and headmaster had of identifying the clothing, as they had examined it on an occasion when the plaintiff asked for new clothing; (ix) he knew by inference that the plaintiff had been convicted more than once of crime, and had seen a report which described him as well known to the Liverpool police; (x) he regarded the tailor as an expert witness on this subject; (xi) the plaintiff was not at home on the day after the crime was committed.

Singleton, K.C., *W. Clothier*, and *G. Glynn Blackledge* for the defendants.
G. J. Lynskey, K.C., and *J. W. Morris* for the plaintiff.

LORD HEWART, C.J.—This appeal, which has been very ably argued, is from a verdict and judgment at the trial before Lawrence, J., and a common jury at Liverpool, dated April 28 of this year. The case was one of false arrest. There was a time when malicious prosecution was alleged, but that was dropped. It appears to me that the appeal in this case, with all respect to the learned judge, must be allowed.

The law is very concisely stated in the well-known third edition of Bullen and Leake at p. 795, note:

> "A constable is justified in arresting a person without a warrant, upon a reasonable suspicion of a felony having been committed and of the person being guilty of it."

Here, I think, on the evidence there was more than sufficient ground to entitle this constable to suspect that the plaintiff was indeed the person who had committed a felony. The reasons are set out in the judge's notes. Some are stronger than others, but when one takes them altogether I think there was more than sufficient material entitling him to act. The question whether there is reasonable and probable cause is a question for the learned judge, and, in my opinion, the learned judge, on the materials which were before him, ought to have decided that there was reasonable and probable cause for the defendants to act as they did. I think, therefore, this appeal must be allowed, with the usual consequences.

LORD WRIGHT.—I agree and I should add nothing to what has fallen from my Lord were it not that we are differing from the judgment of the learned judge on this question, which is a question to be decided on the facts admitted and uncontroverted, or any specific findings of the jury which are relevant to the matter. The question which the judge has to discuss, as my Lord has stated, is that which is set out in Bullen and Leake (3rd Edn. at p. 795, note):

> "A constable is justified in arresting a person without a warrant, upon a reasonable suspicion of a felony having been committed. . . . [Here, of course, it had been committed] and of the person being guilty of it, although no felony has in fact been committed, and whether the reasonable grounds for suspicion are matters within his own knowledge or are facts stated to him by another."

So that the inquiry is as to the state of mind of the chief constable at the time when he ordered the arrest, and it involves that it must be ascertained what information he had at the time, even though that information came from others. Of course, the information must come in a way which justifies him in giving it credit; the suspicion upon which he must act, and, indeed, ought to act, in the course of his duty, must be a reasonable suspicion. In the present case, I am not at all clear that the learned judge has put to himself the right question, because his language is:

> "The onus rests upon the defendants to show that they had reasonable and probable cause to justify the arrest."

That may cover and involve the true question, namely, whether he had reasonable and probable cause to suspect the arrested man, or it may not; but when I examine the evidence in this case, and in particular the evidence of the chief constable, I find he gives eleven reasons.

The plaintiff, who was an old inhabitant of the reformatory, had gone on Aug. 3 to obtain further clothing. The things that were stolen were clothes, and his object in calling and seeking to get clothes had failed. But more than anything else, you have this factor, that the headmaster of the reformatory and the tailor who had interviewed the plaintiff when he called on Aug. 3 positively identified the clothes which were left in the room at the school after the theft as the clothes which this man had worn when he called there the day before. It may well be that there was nothing primâ facie to identify one set of worn and shabby clothing with another, but it has to be remembered that one of the men who made this identification was a tailor and the other was the headmaster. One had expert knowledge and the other had had occasion to take particular notice of how this man was dressed because he was asking for new clothing, and as their identification admittedly was most positive, I think the chief constable, taking all those facts into consideration, was quite entitled without more to come to the conclusion that the man was sufficiently under suspicion to justify arrest.

It is, no doubt, very important that the liberty of the subject should be preserved from undue interference, and in this case the charge has been withdrawn and it is not suggested that he was guilty of the offence. On the other hand, it has got to be remembered that, in the public interest, it is very important that police officers should be protected in the reasonable and proper execution of their duty; they should not be hampered or terrified by being unfairly criticised if they act on a reasonable suspicion. Although the amount here is very small, I think the question of principle is very important. It has to be remembered that police officers, in determining whether or not to arrest, are not finally to decide the guilt or innocence of the person arrested. Their functions are not judicial, but ministerial, and it may well be that if they hesitate too long when they have a proper and sufficient ground of suspicion against an individual, they may lose an opportunity of arresting him, because in many cases steps have to be taken at once in order to preserve evidence. I am not saying that as in any way justifying hasty or ill-advised conduct. Far from that, but once there is what appears to be a reasonable suspicion against a particular individual, the police officer is not bound, as I understand the law, to hold his hand in order to make further inquiries if all that is involved is to make assurance doubly sure.

There are two points which the chief constable gave as being in his mind when he ordered this arrest, and they have both been excluded by the learned judge from his consideration, and I also exclude them for the purpose of this judgment because I think there was quite sufficient to justify the chief constable without them. The last item which the chief constable gives in his catalogue of reasons is the fact that the man was not at home on the day after the crime was committed. I have considered the evidence, and, to my mind, there cannot be the slightest doubt that the chief constable here had information from his responsible officials that inquiries had been made and it had been ascertained that the man was away from his home. It was well known where his home was, and if the chief constable had reason to believe that he was at home, I cannot imagine for a moment why he did not make the arrest at once when he had the information that he was not at home, or why he should have issued a circular among the police of the country. The verdict of the jury, to my mind, leaves the matter in complete doubt, because, whereas the only question material was whether the chief constable, before ordering the arrest, was informed that the plaintiff was absent from home, it is not put as a separate question, but it is put as a question conditioned and qualified by a particular reason, namely, because of a row with his father. If it were necessary, I should not have been satisfied to act upon the verdict of the jury negativing the fact that the defendant had the information on this point that he said he had. But that is only a comparatively subordinate issue in so far as the chief constable's information and views are concerned.

The other point is one which might raise a more important question of principle if it were necessary to go into it in this case. The chief constable said in evidence: "I knew by inference that he must have been convicted more than once, and the report says 'well known Liverpool police.'" That point was ruled out by the learned judge as irrelevant. It is not necessary in this case to express any decided view whether that ruling was or was not right. I gather that the authorities are conflicting, and there may well be reasons why there should be a certain hesitation to treat a man who has already been convicted too readily as liable to be guilty of a further offence. What I should want to guard myself against would be to be thought to rule in any general way that evidence of previous convictions of a man should be treated as entirely irrelevant for the purpose of guiding a police official in his delicate decisions. I can conceive cases where an offence of a particular sort has been committed and it is well known that a particular individual has committed other offences of that character, and there are other strong circumstances pointing to the probability that he is the guilty man, and constituting a ground of reasonable suspicion that he is the guilty man. It may well be that the man's special character in this regard may be taken into account by a police official in his ministerial duty if his mind is just in the balance, or it may be a matter which must receive some weight, although it may never be decisive on the question whether he should be arrested or not. It may, however, be some help, and I think, without deciding it, probably it is a matter which ought to be treated as having some weight, though not, perhaps, very great weight, if the justification of a police constable in arresting a man for a felony is called into question. I agree that the appeal should be allowed.

SLESSER, L.J.—I agree that this appeal should be allowed, because I have come to the conclusion that the learned judge has arrived at his judgment upon an erroneous principle, and were it not for the conclusion at which I have arrived, I should have felt some diffidence in disturbing what is although a matter for the judge, in substance, a decision of fact. LORD CHELMSFORD, in *Lister* v. *Perryman* (1), says (L.R. 4 H.L. at p. 535):

> "There can be no doubt since the case of *Panton* v. *Williams* (2), in which the question was solemnly decided in the Exchequer Chamber, that what is reasonable and probable cause in an action for malicious prosecution, or for false imprisonment, is to be determined by the judge. In what other sense it is properly called a question of law I am at a loss to understand."

Then he goes on:

> "I should have great difficulty in overruling the opinion of the Lord Chief Baron, and the judgment of the Court of Exchequer Chamber, if I had not thought that they had proceeded upon an erroneous principle."

In another passage on the same page, he says:

> "The different views which may be entertained by judges as to whether a certain state of facts does or does not furnish a reasonable and probable cause for a prosecution is exemplified by the divided opinions of the learned judges in the Court of Exchequer in this case."

It would appear that, at any rate, before *Panton* v. *Williams* (2), this question of fact was properly left to the jury. That, at any rate, is the opinion of LORD TENTERDEN, C.J., in *Beckwith* v. *Philby* (3), where he said (6 B. & C. at p. 638):

> "Whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he had been detained in custody an unreasonable time, were questions of fact for the jury."

I only mention that, which is no longer the law, as showing that, although still it all lies within the province of fact and inference of fact, in one sense it may be said to be a question of law because it is a matter to be determined by the judge and not by the jury. As I have said, I have come to the conclusion that in the present case the learned judge has not applied the proper principle in testing this matter. What has to be considered in such a case is whether there is reasonable and probable cause for suspicion. That language dates from the earliest times. We find that in HAWKIN'S PLEAS OF THE CROWN (8th Edn., vol. 2, p. 120, s. 18), in HALE'S PLEAS OF THE CROWN (1800, vol. 2, p. 78), and in COKE'S INSTITUTES (vol. 4, p. 177), the word "suspicion" is used, or "suspected."

I do not think, with very great respect, the learned judge in this case has applied his mind to that matter. First he has accepted, as I understand the evidence, that these two witnesses had given information of very confident evidence of identification of the clothing of the suspected man and such information in due course reached the chief constable. He does not then ask himself, as I think he ought to have asked himself, whether the identification of that clothing as clothing of the suspected man, by persons more competent to judge, I suppose, than anyone else, or, at least, than many other people, was not in itself a good probable and reasonable cause for suspicion. He does not ask himself that question, and consequently arrives at no conclusion upon that.

Having found, as one might say, those facts in favour of the chief constable, he decides against him and the other defendants on the ground that the chief constable proceeded to issue orders for the arrest without making any further inquiries. If, as I think, that evidence which is contained substantially in reasons (i) to (viii) and (x) stated in the evidence of the chief constable, in itself of necessity gives a reasonable and probable cause for suspicion, I do not see the relevance of considering whether he may or may not have corroborated that suspicion by further inquiries. The question whether there was or was not a reasonable and probable cause for suspicion, in my view, was really never considered by the learned judge, and I consider the answer of the jury to the one question in dispute, first of all ambiguous, and, secondly, irrelevant to the question whether there was or was not sufficient material to justify the suspicion which the chief constable had. Because I think the learned judge has not applied the proper principle to this case and has not considered what is the test, as stated by my Lords and contained in the third edition of BULLEN AND LEAKE and in other authorities and treatises, I agree that this appeal must be allowed. There were here proved undisputed facts which of necessity lead to the inference that the chief constable and his associates had reasonable and probable cause for suspicion and to justify what they did.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, for *Town Clerk*, Southport; *Chamberlain & Co.*, for *S. S. Silverman*, Liverpool.

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

A

F. R. ABSALOM, LTD. *v.* GREAT WESTERN (LONDON) GARDEN VILLAGE SOCIETY, LTD.

[HOUSE OF LORDS (Lord Buckmaster, Lord Warrington, Lord Tomlin, Lord Russell and Lord Wright), February 16, March 3, 1933]

[Reported [1933] A.C. 592; 102 L.J.K.B. 648; 149 L.T. 193; 49 T.L.R. 350]

B

Arbitration—Setting aside award—Error of law on its face—No specific question of law referred.

Where disputes are referred to an arbitrator in the decision of which a question of law becomes material the court can interfere if and when any error of law appears on the face of the award, but in a case in which a specific question of law has been referred to the arbitrator for decision, e.g., the express submission of the true effect of a contract on the basis of undisputed facts, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside. C

Hodgkinson v. *Fernie* (1) (1857), 3 C.B.N.S. 189, applied. D

Notes. Considered: *Barton* v. *Blackburn* (1933), 150 L.T. 327; *Hitchins* v. *British Coal Refining Processes, Ltd.*, [1936] 2 All E.R. 191. Explained and distinguished: *John Gill Contractors, Ltd.* v. *Bromley Trading Co.* (1936), 52 T.L.R. 452.

As to setting aside an award, see 2 HALSBURY'S LAWS (3rd Edn.) 57–61, and for cases see 2 DIGEST 545 et seq. E

Cases referred to:

(1) *Hodgkinson* v. *Fernie* (1857), 3 C.B.N.S. 189; 27 L.J.C.P. 66; 6 W.R. 181; 140 E.R. 712; 2 Digest 527, *1645*.

(2) *Kelantan Government* v. *Duff Development Co.*, [1923] A.C. 395; 92 L.J.Ch. 307; 129 L.T. 356; 39 T.L.R. 337; 67 Sol. Jo. 437; 21 Digest 618, *2059*.

(3) *A.-G. for Manitoba* v. *Thomas Kelly, Ltd.*, [1922] 1 A.C. 268; 91 L.J.P.C. 101; 126 L.T. 711; 38 T.L.R. 281, P.C.; Digest Supp. F

(4) *Re Arbitration between King and Duveen and others*, [1913] 2 K.B. 32; 82 L.J.K.B. 733; 108 L.T. 844; 2 Digest 528, *1647*.

(5) *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London*, [1912] A.C. 673; 81 L.J.K.B. 1132; 107 L.T. 325; 56 Sol. Jo. 734; 2 Digest 522, *1599*. G

(6) *Landauer* v. *Asser*, [1905] 2 K.B. 184; 74 L.J.K.B. 659; 93 L.T. 20; 53 W.R. 534; 21 T.L.R. 429; 10 Com. Cas. 265; 2 Digest 522, *1598*.

(7) *Champsey Bhara & Co.* v. *Jiraj Balloo Spinning and Weaving Co.*, [1923] A.C. 480; 92 L.J.P.C. 163; 129 L.T. 166; 39 T.L.R. 253, P.C.; Digest Supp.

Appeal from an order of the Court of Appeal (SCRUTTON and GREER, L.JJ.), allowing the appeal of the respondents against an order of the King's Bench Division (SWIFT and MACNAGHTEN, JJ.), whereby it was ordered that the award of an arbitrator dated Dec. 19, 1931, be remitted back to him for reconsideration. H

The facts are fully set out in their Lordships' opinions.

E. W. Cave, K.C., and *Graham Mould* for the appellants.

Walter T. Monckton, K.C., and *John W. Morris* for the respondents. I

The House took time for consideration.

March 3. The following opinions were read.

LORD WARRINGTON.—The question in the present appeal is whether the award is bad by reason of error in law appearing on the face of it. This involves the further question whether the question of law decided by the arbitrator was specifically referred to him for his decision or was only one which necessarily arose in applying ascertained facts to the terms of the contract.

A The material facts may be shortly stated. By a contract in writing, dated Nov. 11, 1928, and made between the respondents (therein and hereinafter referred to as "the employer"), of the one part, and the appellants (therein and hereinafter referred to as "the contractor"), of the other part, the contractor agreed to erect for the employer certain houses at Hayes in the county of Middlesex. One T. Alwyn Lloyd was nominated as architect to the employer. The contract contained B the following material provisions:

> Clause 26: "If the contractor except . . . in cases of a certificate being withheld or not paid when due shall suspend the work . . . the architect shall have power to give notice in writing to the contractor requiring that the work be proceeded with in a reasonable manner and with all reasonable despatch. . . ."
>
> C Clause 30: "The contractor shall be entitled upon the valuation of the surveyor and under certificates to be issued by the architect to the contractor and within fourteen days of the date of each certificate to payment by the employer from time to time by instalments when in the opinion of the architect actual work to the value of £1,000 has been executed in accordance with the contract, at the rate of 90 per cent. of the value of the work so executed in the building and materials actually on the site for use on the works until the D balance in hand amounts to the sum of £2,000. . . ."

The remainder of this clause is not material to the present question.

> Clause 32: "Provided always that in case any dispute or difference shall arise between the employer or the architect on his behalf and the contractor . . . as to the construction of the contract or . . . as to the withholding by the architect E of any certificate to which the contractor may claim to be entitled then either party shall forthwith give to the other notice of such dispute or difference and such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be appointed [as in the contract mentioned] and the award shall be final and binding on the parties."

It was expressly provided that the arbitrator could have power to open up, review F or revise any certificates.

In the summer of 1929 disputes arose between the employer and the contractor and a notice of such disputes was given by the contractor to the employer. No copy of this notice has been produced, but there is no question that it was duly given and one Mr. Elgood was appointed as arbitrator. Mr. Elgood directed the parties to deliver to each other their respective claims for the purpose of formulating G the dispute. These were duly delivered—that of the contractors on Oct. 11, 1929, and that of the employer on Nov. 12, 1929. I refer to the pleadings, as I think I am entitled to do, solely for the purpose of ascertaining whether any specific question of law was in dispute, and was referred to the arbitrator for his decision. From the pleadings it is abundantly clear that the whole dispute between the parties was as to the amount due to the contractor in respect of the value of the H work done and of the materials on the site up to and including March 11, 1929, the contractor claiming that the architect should have given certificates for £11,125 1s. 11d. gross instead of for £10,482, and the employer asserting that the certificates actually given were for an excessive amount and that the contractor had been overpaid. It should be mentioned that the balance of the £10,482, after deducting £1,048 for retention money, namely, £9,434, was paid to the contractor. I On March 15, 1929, the contractor suspended work on the ground that a certificate for the proper amount had been withheld or not paid, and on March 16 the employer retaliated by a notice under cl. 26. The validity or invalidity of this notice depended entirely on the point raised by the several claims mentioned above. If the contractor was right on his figures a certificate had been withheld and the amount due had not been paid, and the employer had no right to give the notice under cl. 26. In my opinion, no specific question of construction arose; the validity or invalidity of the notice resulted from a decision as to the figures and the application of such decision to the provisions of the contract.

The arbitrator made his award dated Dec. 19, 1931. After reciting the terms of cl. 32 of the contract, and stating that disputes arose in regard to (i) the issue of certificates and (ii) the validity of the notice under cl. 26, he proceeds to award (i) that the value of the work executed and the materials on the site for use on the works up to and including March 11, 1929, amounted to £11,364 6s. 6d. and that the net value for certification on that date, after deducting £1,136 8s. 8d., the 10 per cent. retention money, amounted to £10,227 17s. 10d.; (ii) that the total amounts of certificates by the architect for payments on account up to and including March 11, 1929, amounted to £9,434. That is to say, he found that the amount of the certificates actually issued up to and including March 11, 1929, fell short of the proper amount by £793 17s. 10d., and it was, in my opinion, his obvious duty to revise the defective certificate in accordance with his finding. He, however, did not do this, but by para. 3 he awarded that, having regard to the provisions of cl. 30 as to the title of the contractor to be paid by instalments when in the opinion of the architect actual work to the value of £1,000 had been executed in accordance with the contract, the architect had up to March 11, 1929, issued to the contractor certificates in accordance with the terms of the contract. Further, as, apparently, the result of this last finding, he awarded (para. 4) that, having regard to the fact that the contractor suspended work on March 15, 1929, the notice of March 16, 1929, under cl. 26 was properly given and was valid. He then awarded that the contractor should pay the costs of the reference.

With all respect to the architect and to the learned judges in the Court of Appeal, I am at a loss to understand how he arrived at his conclusion in para. 3. Even if the effect of the provision as to the £1,000 is that it applies every time a new certificate is applied for, it could not apply to the present case in which there is no question of the issue of a new certificate for a fresh period, but merely of the revision of one already issued for a period then expired in order to make it conform to the figures already ascertained. In my opinion, no such question as that answered by para. 3 was specifically submitted to the arbitrator for his decision. At most it was incidentally involved in the general question as to the validity of the notice purporting to have been given under cl. 26. In such a case I am satisfied on the authorities the award may be set aside if there be error on its face. The arbitrator has referred to the clause, and thus, in my opinion, has incorporated it in the award, so that the error is patent on the face of it. I have already pointed out what is, in my opinion, the error he has fallen into. An order in terms shortly to be proposed from the Woolsack will carry into effect the views I have above expressed.

The reasons above given would, in my opinion, justify the reversal of the order of the Court of Appeal, but out of respect to the learned judges in that court, I have referred to *Hodgkinson* v. *Fernie* (1). There the reference was as to the amount of damages for a collision at sea. The arbitrator awarded a lump sum. The defendants sought to show by affidavit that he had included an item which they alleged ought to have been rejected. Clearly, therefore, this was not a case of error on the face of the award. I have also again read the opinions expressed in this House in *Kelantan Government* v. *Duff Development Co., Ltd.* (2), and I think it is clear that this case decides that in order to come within the rule that a decision of an arbitrator on a point of law is final, it must be shown that the point is specifically referred. It recognises the distinction between cases in which a question of law is specifically referred for decision and those in which such a question is involved incidentally as it is in the present case. I have not further discussed this and the other authorities. They are dealt with in the opinions of my noble and learned friends, LORD RUSSELL and LORD WRIGHT, which I have had the privilege of reading and with which I agree.

LORD RUSSELL.—The appellants are contractors who entered into a contract dated Nov. 11, 1928, with the respondents, by which they agreed to erect for the respondents twenty-four houses at Hayes, subject to the conditions set forth in the schedule to the contract. In the contract they are called respectively "the contractor" and "the employer," and I will refer to them accordingly.

The relevant conditions are Nos. 26, 30 and 32. Condition 26 provided (inter alia) that if the contractor should suspend the works the employer by the architect should have power to give a certain notice in writing to the contractor, from the giving of which certain consequences flowed. The clause, however, did not apply in case of a certificate being withheld. The issuing of certificates was governed by condition 30, which ran thus:

> "Condition 30. The contractor shall be entitled upon the valuation of the surveyor and under certificates to be issued by the architect to the contractor, and within fourteen days of the date of each certificate to payment by the employer from time to time by instalments, when in the opinion of the architect actual work to the value of £1,000 has been executed in accordance with the contract at the rate of 90 per cent. of the value of the work so executed in the building and materials actually on the site for use on the works until the balance in hand amounts to the sum of £2,000 after which time the instalments shall be up to the full value of the work subsequently executed. The contractor shall be entitled, under the certificate to be issued by the architect, to receive payment of £1,000, being a part of the said sum of £2,000 when the works are practically completed, and in like manner to payment of the balance within a further period of six months, or as soon after the expiration of such period of six months as the works shall have been finally completed, and all defects made good according to the true intent and meaning hereof, whichever shall last happen. The architect shall issue his certificates in accordance with this clause."

Condition 32 was an arbitration clause couched in the following terms:

> "Condition 32. Provided always that in case any dispute or difference shall arise between the employer or the architect on his behalf and the contractor either during the progress of the works or after the determination, abandonment, or breach of the contract, as to the construction of the contract or as to any matter or thing arising thereunder (except as to the matters left to the sole discretion of the architect under cll. 4, 9, 16, and 19, and the exercise by him under cl. 18 of the right to have any work opened up), or as to the withholding by the architect of any certificate to which the contractor may claim to be entitled then either party shall forthwith give to the other notice of such dispute or difference and such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be appointed on the request of either party by the President for the time being of the Royal Institute of British Architects, and the award of such arbitrator shall be final and binding on the parties. Such reference (except on the question of certificate) shall not be opened until after the completion or alleged completion of the works unless with the written consent of the employer or architect and the contractor. The arbitrator shall have power to open up, revise and review any certificate, opinion, decision, requisition, or notice, save in regard to the said matters expressly excepted above, and to determine all matters in dispute which shall be submitted to him, and of which notice shall have been given as aforesaid, in the same manner as if no such certificate, opinion, decision, requisition, or notice had been given. Upon every or any such reference the cost of and incidental to the reference and award respectively shall be in the discretion of the arbitrator, who may determine the amount thereof, or direct the same to be taxed as between solicitor and client or as between party and party, and shall direct by whom and to whom and in what manner the same shall be borne and paid. This submission shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act, 1889."

Up to and including March 11, 1929, the architect had issued certificates for payments on account amounting in the aggregate to the sum of £9,484. It would appear that the contractor claimed that the value of work executed and the materials on the site for use on the works comprised in the contract up to and including March 11, 1929, amounted to a substantially larger sum than the value upon which the sum of £9,434 was based, and that the certificate issued in relation to the above-mentioned date should have been for a substantially larger sum accordingly. The employer denied the right to any further or different certificate, whereupon the contractor stopped work. The employer then served a notice under condition 26, upon the footing no doubt that there had been no withholding of a certificate.

The quarrel between the parties having thus come to a head, they resorted to arbitration. In order to see what exactly it was that was referred to the decision of the arbitrator one ought to look at the notice which, by condition 32, one party was to give to the other. This document for some reason was not forthcoming, but it was agreed that the terms of the reference were to be ascertained from the recitals contained in the award. From this it would appear that the arbitrator was appointed to hear and determine disputes in regard to (i) the issue of certificates and (ii) the validity of the notice served under condition 26. The arbitrator made and published his award on Dec. 19, 1921, the operative part of which is as follows:

> "1. I award and judge that the value of work executed and the materials on the site for use on the works comprised in the said contract up to and including the 11th day of March, 1929, amounted to £11,364 6s. 6d. and that the net value of work for certification on that date after deduction from the said sum of £11,364 6s. 6d. of the sum of £1,136 8s. 8d. being the 10 per cent. retention provided for by cl. 30 of the said conditions amounted to £10,227 17s. 10d. 2. I award and judge that the total amounts of certificates issued by the architect for payments on account up to and including the said 11th day of March, 1929, amounted to £9,434. 3. I award and judge that having regard to the provisions of cl. 30 of the said conditions providing that the contractors should be entitled upon the valuation of the surveyor and under the certificates to be issued by the architect to the contractors within the period in that clause mentioned to payment by the employers from time to time by instalments when in the opinion of the architect actual work to the value of £1,000 had been executed in accordance with the contract at the rate therein provided the architect had up to the said 11th day of March, 1929, issued to the contractors certificates in accordance with the terms of the contract. 4. I further award and judge that having regard to the fact that the contractors suspended work under the said contract on the 15th day of March, 1929, the notice dated the 16th day of March, 1929, and given by the architect to the contractors under cl. 26 of the said conditions was properly given and was valid. 5. I further award and direct that the contractors do pay to the employers their costs of the said reference which failing agreement as to the amount thereof I direct to be taxed as between solicitor and client and that the contractors do pay the costs of this my award which I hereby determine at the sum of £68 5s."

Upon a motion by the appellants to set aside this award, a Divisional Court of the King's Bench Division (SWIFT and MACNAGHTEN, JJ.) ordered that the award be remitted back to the arbitrator for his reconsideration. The foundation of this order was the view that the award was unintelligible, in that it appeared to state that a sum had not been certified and also to state that a sum had been certified. To me this view seems unfair to the arbitrator and to his award. The document is both consistent and intelligible. By the first paragraph the arbitrator finds that the value of work executed and materials on the site up to and including March 11, 1929, was £11,364 6s. 6d., and that the net value of work for certification on that date (i.e., after deduction of the 10 per cent.) was £10,227 17s. 10d. By the second paragraph he finds that the certificates in fact issued by the architect up

A to and including that date only covered payments to the contractors of £9,434, i.e., a sum falling short of the net value of work capable of certification on that date by some £793. By the third paragraph he decides that, upon what he considers to be the true construction and effect of condition 30, the certificates actually issued by the architect (covering the payment of only £9,434) were all that the contractor was entitled to have issued up to March 11, 1929—in other words, that B no certificate had been withheld. This decision as to the true construction of condition 30 leads not unnaturally to the award which is contained in the fourth paragraph. Since no certificate had been withheld, the suspension of work by the contractor was a suspension within condition 26, and a notice could be served under that condition. Notwithstanding the adverse criticism of the Divisional Court the award is to me intelligible and consistent. Whether there is error of law upon the C face of it is another matter.

The order of the Divisional Court was set aside on appeal, with the result that the award stood; but by leave given to the contractor by the Court of Appeal, the matter now comes for consideration and decision to your Lordships' House. SCRUTTON, L.J., took the view (i) that the questions which were referred to the arbitrator involved a decision whether upon the construction of the contract the D contractor was entitled to certificates, (ii) that the arbitrator had construed a clause as meaning that where the contractor has withdrawn from the work there was no immediate right to a certificate for work then uncertified for, and (iii) that upon the authorities the arbitrator (unless a Special Case had been obtained) was the sole judge. The learned lord justice was in fact in error in his view as to the construction adopted by the arbitrator, but that is immaterial. The point of his E judgment remains, namely, that the arbitrator having been selected to decide a question of construction his decision cannot, upon the authorities, be questioned. He also held that there was no error of law appearing on the face of the award. GREER, L.J., thought that since the arbitration clause included questions of construction, the very point of construction which the arbitrator decided had been submitted to him for his decision, that his construction was thenceforth the con-F ventional meaning of the contract as between the parties to it, and that it made no difference that the submission did not expressly submit the particular question.

It is, I think, essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision. I am not sure that the Court of Appeal has done so. The authorities make a clear G distinction between these two cases, and, as they appear to me, they decide that in the former case the court can interfere if and when any error of law appears on the face of the award, but that in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one.

In *Kelantan Government* v. *Duff Development Co., Ltd.* (2) LORD CAVE made H this distinction clear, and came to the conclusion, after considering the submission and the pleadings there in question, that specific questions of construction had been submitted to the arbitrator for his decision, with the result that his decision could not be interfered with merely on the ground of its being wrong. He adds, however, that, if it was apparent on the face of the award that the arbitrator in arriving at his decision had proceeded illegally (e.g., on inadmissible evidence) that I would be ground for interference. LORD PARMOOR makes the same distinction, and so does LORD TREVETHIN when he says ([1923] A.C. at p. 421):

> "This is not a submission to arbitration of such a nature that though the law be bad upon the face of the award, the decision cannot be questioned. That happens only when the submission is of a specific question of law, and is such that it can fairly be construed to show that the parties intended to give up their rights to resort to the King's courts, and in lieu thereof to submit that question to the decision of a tribunal of their own."

The same distinction appears in the judgment of the Privy Council in *Attorney-General for Manitoba* v. *Thomas Kelly, Ltd.* (3), in which the following passage occurs ([1922] 1 A.C. at p. 283): A

> "Where a question of law has not specifically been referred to an umpire, but is material in the decision of matters which have been referred to him, and he makes a mistake apparent on the face of the award, an award can be set aside on the ground that it contains an error of law apparent on the face of the award." B

In *Re Arbitration between King and Duveen and others* (4) the question submitted to the arbitrator was whether upon a defined state of facts A. was liable under a certain agreement to pay damages to B. The arbitrator decided that he was not liable. B. moved to set aside the award on the ground that the award had C found facts which showed that upon the true construction of the agreement B. was entitled to damages, and that accordingly there was error of law on the face of the award. It was held that the award could not be set aside, because a specific question of law had been submitted to the arbitrator's decision.

On the other hand, in *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London* (5), no specific question of law had D been submitted. The matters referred were a claim for the price of goods on the one hand and a counter-claim for damages on the other. Questions of law arose which had to be decided as being material in the decision on the respective claims. The arbitrator sought for and obtained from a divisional court answers to a special case as to how the questions of law should be decided. He then published his award from which it appeared that it was based upon the answers of the divisional E court. The divisional court and the Court of Appeal refused to set aside the award; but on appeal to this House it was set aside on the ground that the answers given by the divisional court were erroneous, and that therefore there was error of law appearing upon the face of the award.

Hodgkinson v. *Fernie* (1) was an action for damages, the plaintiff's ship having been run down owing, as it was alleged, to the negligent navigation of the defen- F dant's ship. At the trial a verdict was entered for the plaintiff for damages, the amount being referred to an arbitrator. The arbitrator made an award, simply fixing the damages at a sum of £713. Upon an application to set the award aside it was attempted to show by affidavit that the £713 included a sum of £496 which had been allowed by the arbitrator owing to his having misconstrued a clause in a charterparty which had been entered into between the plaintiff and the Admiralty. G It was held that no interference with the award was possible. This was simply a case in which no specific question of law had been referred, and in which no error of law appeared on the face of the award. SCRUTTON, L.J., treats it as a case in which an error of law appeared on the face of the award. In this he is mistaken, as more clearly appears from the report of the same case in 27 L.J.C.P. 66.

The crucial question upon the present appeal appears to me to be this: To which H class of case does the present reference belong? Is it a reference in which a specific question of law was referred to the decision of the arbitrator as the sole tribunal, or is it a reference in which the questions of construction arise as being material in the decision of the matter which has been referred to arbitration? If the former the appeal must fail. If the latter it should succeed.

This is a question of some difficulty, as, indeed, it was in the *Kelantan Case* (2). I In that case LORD CAVE seems to have thought that a specific question of law had been submitted. LORD TREVETHIN thought not. LORD PARMOOR thought it unnecessary to decide that point. In the present case I have on consideration come to the conclusion that no specific question of law was referred. The primary quarrel between the parties was whether, if the value of work executed and materials on site up to and including March 11, 1929, had been truly assessed, the net value available for certification on that date was in excess of (as the contractor alleged) or less than (as the employer contended) the amount which had actually

A been certified up to and including that date, namely £9,434. Those were the disputes which were the foundation of the suspension of work, on the one hand, and the service of the notice, on the other. Those were the disputes "in regard to the issue of certificates and the validity of the notice" which were in general terms submitted to the arbitrator. No specific question of construction or of law was submitted. The parties had, however, been ordered to deliver pleadings and by B their statement of claim the contractor had claimed that the arbitrator should under his powers revise the last certificate issued so as to include therein the excess net value which they had alleged and which the arbitrator has found (though for a reduced amount) to have existed on March 11, 1929. It is at this point that the question of the construction of condition 30 arose as a question of law, not specifically submitted, but material in the decision of the matters which had been C submitted. This question of law the arbitrator has decided; but if upon the face of the award he has decided it wrongly his decision is in my opinion open to review by the court.

Is his decision erroneous? In my opinion, it is. He has construed condition 30 as though the reference therein to actual work to the value of £1,000 in some way affected or qualified the contractor's right to receive payment of the full 90 per cent. D of the value of the work executed and materials actually on the site on the relevant date, namely, March 11, 1929. In my opinion, this is wrong. The words

> "when in the opinion of the architect actual work to the value of £1,000 has been executed in accordance with the contract"

merely refer to and define the point of time before which no certificate can be given. E After that point of time has arrived, if and when a certificate is given in regard to any particular date, the contractor is entitled to receive a certificate covering the true value of the work executed in accordance with the contract on the building and materials actually on the site for use on the works up to and including that date. In certificates subsequent to the first certificate the value of work executed will only be the value of work executed since the date in reference to which the F last preceding certificate was given.

The result is that the arbitrator has misconstrued condition 30 and has thereby erred in law. He should have revised the certificate which was given in relation to March 11, 1929, in such a way as to entitle the contractor to payment thereunder of an additional sum of £793 17s. 10d. From this it would follow that paras. 3, 4, and 5 could no longer stand.

G There still remains the question whether this error of law is apparent on the face of the award. I think it is. The award recites the contract and refers in terms to the provisions of condition 30. Condition 30, accordingly, is incorporated into and forms part of the award just as if the arbitrator had set it out verbatim and had then proceeded to state the construction which he placed upon it. The court can look at it just as it looked at the answers of the Divisional Court in the H *British Westinghouse Case* (5), at the contract in *Landauer* v. *Asser* (6), and at the pleadings in the *Kelantan Case* (2). In my opinion, this appeal should succeed, and an order should be made sending the award back to the arbitrator for him to reconsider and amend so as to bring it into consonance with the true construction of condition 30. The respondents should pay the costs of the appellants of this appeal and of the proceedings in the courts below.

I **LORD WRIGHT.**—This appeal arises out of a motion by the appellant to set aside an award as (inter alia) being bad for error in law appearing on its face. There were disputes between the appellants, who were contractors, and the respondents, who were building owners, under a building contract dated Nov. 14, 1928. The appellants had protested that the architect had not issued sufficient certificates for payment as the work progressed and they had suspended the work until the proper amount was certified; the respondents had therefore given notice to proceed. The appellants disputed that the notice was justified and called for arbitration. In that arbitration the award under consideration was made. As the motion is to set aside the award for matter appearing on its face, the court is debarred from considering any matter which does not appear in the award itself or in documents incorporated in it. The award recited the contract between the parties, and referred in terms to certain conditions of the contract, namely, cll. 26, 30, and 32; though these clauses are not set out in full, they must, I think, be taken to be incorporated; the award is expressly based on the provisions of cll. 26 and 30, and hence the position here is quite different from that in *Champsey Bhara & Co.* v. *Jiraj Balloo Spinning and Weaving Co., Ltd.* (7), where the terms of the contract were held not to be incorporated. Precedents for such incorporation as I find in this case are afforded by *Landauer* v. *Asser* (6), and *Kelantan Government* v. *Duff Development Co., Ltd.* (2). It appears that pleadings were delivered in the arbitration, but as these are not referred to in the award, they cannot in strictness be considered; but as these pleadings were put before this House as well as before the Court of Appeal, I have felt entitled to look at them and find they confirm the conclusion I reached on the award by itself.

The disputes recited as having been submitted are in regard to (i) the issue of certificates, and (ii) the validity of the notice served by the architect under cl. 26 of the conditions. The arbitrator, in effect, awarded that at the date of the last certificate, issued on March 11, 1929, the amount certified was less than the work done (disregarding retention money) by about £793, but that the certificate was in accordance with the terms of the contract. He further awarded that the notice in dispute was properly given and was valid. The judges of the Divisional Court remitted the award as being unintelligible. I do not agree with this opinion; I think the award is quite clear; the arbitrator obviously took the view that, under cl. 30, on which he expressly founds, the architect was not entitled to certify 90 per cent. of the work executed or materials actually on the site for use on the works, though that is what the clause in clear terms provides, but only so much of that figure as amounts to a round sum of £1,000, leaving a balance, such as £793 in this case, to be certified when next the figure of £1,000 is again reached. In my judgment, this is contrary to the clear meaning of the clause and involves an error in law; this is an error apparent on the face of the award. The arbitrator, secondly, holds that, the appellants having suspended work on March 15, 1929, the notice given was valid under condition 26; but condition 26 in terms excludes from the cases when such a notice may be given, any case (inter alia) in which a certificate is withheld or not paid when due, and further provides that the notice shall not be unreasonably or vexatiously given, and must further fulfil certain requisites of form, thus raising a number of issues for decision.

In the Court of Appeal it was held that the award was final and must stand. Both lords justices took the view that, as the submission necessarily involved questions of the construction of the contract, the award could not be interfered with even though (a matter on which they expressed no opinion) the arbitrator had manifestly misconstrued the contract. I think (with deference) that this involves a misconception of the rule stated in *Hodgkinson* v. *Fernie* (1), which they cited. That rule, in my opinion, is not conditioned or excluded because the submission must "necessarily" require for the determination of what is submitted, the decision of some question of law. Indeed, the rule presupposes that the decision of some question of law is at the basis of the award, and must have been involved in the submission; otherwise it would be impossible to express the rule as it is stated by WILLIAMS, J., in his often quoted dictum in *Hodgkinson* v. *Fernie* (1) (3 C.B.N.S. at p. 202). After stating the general principle that the parties, having chosen their tribunal, are bound by the arbitrator's decision, he proceeds:

> "The only exceptions to that rule are cases where the award is the result of corruption or fraud; and one other, which, though it is to be regretted, is now, I think, firmly established, namely, where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award."

In *Hodgkinson* v. *Fernie* (1) there was no error of law apparent on the face of the award, but the principle stated has frequently been applied, in particular by the House in *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London* (5), where an award was set aside as containing an error on its face. Though it was expressly based on the judgment of a Divisional Court given on a consultative Case stated by the arbitrator, this House held that the judgment of the Divisional Court was erroneous in law. Lord Haldane, L.C., said ([1912] A.C. at p. 686):

> "It was further argued before your Lordships that the arbitrator was in reality made judge of law as well as of fact, and that the well-known case of *Hodgkinson* v. *Fernie* (1) was wrongly decided. I see no ground for this contention, and I am of opinion that the doctrine of *Hodgkinson* v. *Fernie* (1) to the effect that where an error of law appears on the face of the award the error can be reviewed, is a well-established part of the law of the land."

The rule was again re-stated with approval by Lord Dunedin, giving the opinion of the Privy Council in *Champsey Bhara & Co.* v. *Jiraj Balloo Spinning and Weaving Co., Ltd.* (7). I know of no authority that limits its application so as to exclude cases in which a question of law must necessarily arise; indeed, if that were so the rule would be in effect meaningless. The rule in truth applies to the ordinary case where in the words of Lord Dunedin the submission refers "to the arbitrator the whole question whether it depends on law or on fact." To be contrasted with such cases there is the special type of case where a different rule is in force, so that the court will not interfere even though it is manifest on the face of the award that the arbitrator has gone wrong in law. This is so when what is referred to the arbitrator is not the whole question whether involving both fact or law, but only some specific question of law in express terms, as the separate question submitted; that is to say, where a point of law is submitted as such, that is, as a point of law, which is all that the arbitrator is required to decide, no fact being, quoad that submission, in dispute. Such a case is illustrated by the *Kelantan Government* v. *Duff Development Co., Ltd.* (2), where Lord Cave, L.C., said ([1923] A.C. 395 at p. 409):

> "But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the court only because the court would itself have come to a different conclusion."

This House held in that case that the only questions to be determined by the arbitrator, there being no facts in dispute, were the questions of law as to the construction of the contract. That decision followed *Re Arbitration between King and Duveen and others* (4), in which Channell, J., said ([1913] 2 K.B. at p. 36), in distinguishing *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London* (5):

> "It is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside."

The learned judge shrewdly adds: "Otherwise it would be futile ever to submit a question of law to an arbitrator."

In *Attorney-General for Manitoba* v. *Thomas Kelly, Ltd.* (3), Lord Parmoor, delivering the judgment of the Privy Council, repeated and approved the distinction drawn by Channell, J.

In my judgment, the submission here falls within the rule of *Hodgkinson* v. *Fernie* (1). There is here no submission of any specific question of law as such and as a specific question of law; no doubt, incidentally, and, indeed, necessarily, the arbitrator will have to decide some questions on the construction of the building contract, but the two matters submitted are both composite questions of law and fact; there is no express submission of the true effect of the contract on the basis

A of undisputed facts, as in the *Kelantan Case* (2), or as a separate and distinct matter on facts to be separately assumed or found, as in *Re Arbitration between King and Duveen and others* (4). There is no reason to think that the parties had any specific questions of law in mind at all. What was wanted was a practical decision on the disputed issues. Even if questions of law were bound to emerge, the parties may never have envisaged them in going to arbitration. The arbitrator was not B being asked simply and specifically to decide, upon some agreed or assumed basis of fact, the true interpretation of either cl. 26 or cl. 30 of the conditions or of both together: he was being required to make an award on the two matters submitted on whatever questions of fact and law might emerge.

In my judgment, this is a case to which the principles of *Hodgkinson* v. *Fernie* (1) apply, so that the court has inherent jurisdiction to interfere with the award C because I am satisfied that on the face of the award the arbitrator has made an error in law. The proper order is to remit the award to the arbitrator with a declaration that the architect was bound, when he found actual work to the value of £1,000 duly executed, to certify to the full extent of 90 per cent. of the value of the work so executed and materials actually on the site for use, on the works, and accordingly that the notice was not valid under cl. 26. He will also reconsider D the costs of the arbitration.

The appeal, accordingly, in my opinion, should be allowed and the respondents should pay the costs in this House and in the court below.

LORD BUCKMASTER and **LORD TOMLIN** concurred.

Appeal allowed.

E Solicitors: *B. Wilkinson*; *Bentley, Taylor & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

F

R. *v.* DISNEY

[COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Avory and Talbot, JJ.), February 13, 1933]

G [Reported [1933] 2 K.B. 138; 102 L.J.K.B. 381; 149 L.T. 72; 97 J.P. 103; 49 T.L.R. 284; 77 Sol. Jo. 178; 24 Cr. App. Rep. 49; 31 L.G.R. 176; 29 Cox, C.C. 635]

Criminal Law—Indictment—Duplicity—Two offences alleged in one count—Night Poaching Act, 1828 (9 *Geo.* 4, *c.* 69), *s.* 1.

H The appellant was convicted on a count of an indictment which charged him that he "by night unlawfully took or destroyed game or rabbits in [certain] land or was in the said land by night with a gun, net, or other instrument, for the purpose of unlawfully taking or destroying game or rabbits," contrary to s. 1 of the Night Poaching Act, 1828.

Held: the count was bad in that it charged two offences in the alternative, and the conviction must be quashed. I

R. v. *Molloy* (1), [1921] 2 K.B. 364, applied.

Notes. Considered and applied: *R.* v. *Wilmot*, post, p. 628.

As to the form of indictments, see 10 HALSBURY'S LAWS (3rd Edn.) 385 et seq., and for cases see 14 DIGEST (Repl.) 252.

Cases referred to:

(1) *R.* v. *Molloy*, [1921] 2 K.B. 364; 90 L.J.K.B. 862; 85 J.P. 233; 37 T.L.R. 611; 65 Sol. Jo. 534; 27 Cox, C.C. 34; 15 Cr. App. Rep. 170, C.C.A.; 14 Digest (Repl.) 252, *2186*.

A (2) *R.* v. *Jennings* (1844), 4 L.T.O.S. 233; 1 Cox, C.C. 115; 15 Digest (Repl.) 873, *8418*.

Appeal against conviction.

The appellant was indicted at Leicestershire Quarter Sessions on an indictment containing three counts. The first count charged an offence against s. 1 of the
B Night Poaching Act, 1828, in the following terms:

> "Albert Disney on the 13th day of December in the year 1932 in the county of Leicester by night unlawfully took or destroyed game or rabbits in land at Croxton Kerrial occupied by the Belvoir Estates, Ltd., or was in the said land by night with a gun, net or other instrument for the purpose of unlawfully taking or destroying game or rabbits."

C Two previous convictions under s. 1 of the Night Poaching Act, 1828, were then alleged. The second count charged him with by night taking or destroying game or rabbits on a public road, and the third count with, between the expiration of the first hour after sunset and the beginning of the last hour before sunrise in a warren or ground then being lawfully used for the breeding and keeping of hares and rabbits, killing or taking one hare and three rabbits.

D The jury found the accused Guilty on the first count, and Not Guilty on the two remaining counts. He was sentenced to three years' penal servitude. The record was in the following form: "Verdict, Guilty to first count. Night Poaching."

J. P. Stimson for the appellant.—The main ground of appeal is that the count in the indictment on which the appellant was convicted was bad for duplicity or uncertainty in that it charged two offences in the alternative. Such a count was
E held in *R.* v. *Molloy* (1) not to be permissible. Here it was clearly possible to commit one of the offences charged in this count, apart from the other. [He was stopped.]

E. M. Ling-Mallison for the Crown.—It is permissible to allege in one count the commission of two criminal acts if they are alleged to have been done in order to further one single purpose. [He referred to *R.* v. *Jennings* (2).] Form 10 of the
F precedents for indictments appended to the rules under the Indictments Act, 1915, includes two offences, though they are joined by the word "and" instead of "or," as here. [AVORY, J.—Supposing this appellant were subsequently indicted for "unlawfully taking or destroying game," would he be able to plead autrefois convict? The answer might be, that upon this count he may only have been convicted of the offence of being in the land with a gun, &c.] It is submitted that
G entering land by night armed with a gun and in fact taking a rabbit on the land are in substance the same transaction.

The judgment of the court was delivered by

LORD HEWART, C.J.—It was urged in the court below by the learned counsel for the appellant that the first count of the indictment was bad inasmuch as it
H charged the appellant with two offences, and counsel referred to the well-known case of *R.* v. *Molloy* (1). The objection was overruled, but it seems to us that it was a sound objection. The count alleged two offences in the alternative, and the verdict was entered on the indictment as "Guilty to the first count." It is impossible to say of what the appellant has been convicted. We think, therefore, that this appeal ought to be allowed and this conviction quashed.

I It is very unfortunate that the precedent for this count appears at p. 1392 of the 28th Edn. of ARCHBOLD'S CRIMINAL PLEADING. I am told by my brother AVORY that the italics which were in the old editions have been omitted, but, at any rate, as it stands, the precedent is one of a count which includes two different offences.

Conviction quashed.

Solicitors: *Registrar of the Court of Criminal Appeal*; *Director of Public Prosecutions.*

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

R. *v.* WILMOT

[Court of Criminal Appeal (Lord Hewart, C.J., Avory and Humphreys, JJ.), May 1, 2, 1933]

[Reported 149 L.T. 407; 97 J.P. 149; 49 T.L.R. 427; 77 Sol. Jo. 372; 31 L.G.R. 189; 24 Cr. App. Rep. 63; 29 Cox, C.C. 652]

Criminal Law—Indictment—Duplicity—Dangerous driving—Driving "recklessly or at a speed or in a manner dangerous to the public"—Objection to count not taken till after verdict—Duty of court to consider—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 11 (1).

The appellant was convicted on a count of an indictment charging him with dangerous driving, contrary to s. 11 (1) of the Road Traffic Act, 1930, the particulars of the offence being stated as follows: "C.W., on the 25th day of October, 1932, on a certain road . . . in the county of Lincoln, drove a motor car recklessly, or at a speed or in a manner which was dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which was actually at the time, or which might reasonably have been expected to be, on the said road." The appellant was represented by counsel at the trial, but no objection to the count was taken till after verdict.

Held: (i) although the point as to the invalidity of the count had not been taken on behalf of the appellant at the trial, under the old practice it could have been taken on a writ of error, and, therefore, the court were bound to give effect to it on appeal.

R. v. *Molloy* (1), [1921] 2 K.B. 364, followed.

(ii) the count was bad for duplicity, in that it charged more than one offence in the alternative, and, therefore, the conviction must be quashed.

R. v. *Surrey Justices, Ex parte Witherwick* (2), [1932] 1 K.B. 450, and *R.* v. *Disney* (3), ante, p. 626, applied.

Notes. As to the form of indictments, see 10 Halsbury's Laws (3rd Edn.) 385 et seq., and for cases see 14 Digest (Repl.) 252. As to dangerous driving, see 31 Halsbury's Laws (2nd Edn.) 669–672, and for cases see 42 Digest 872 et seq. As to appeals to the Court of Criminal Appeal, see 10 Halsbury's Laws (3rd Edn.) 521 et seq., and for cases see 14 Digest (Repl.) 622.

Cases referred to:

(1) *R.* v. *Molloy*, [1921] 2 K.B. 364; 90 L.J.K.B. 862; 125 L.T. 470; 85 J.P. 233; 37 T.L.R. 611; 65 Sol. Jo. 534; 27 Cox, C.C. 34; 15 Cr. App. Rep. 170, C.C.A.; 15 Digest (Repl.) 1083, *10,722*.

(2) *R.* v. *Surrey Justices, Ex parte Witherwick*, [1932] 1 K.B. 450; 101 L.J.K.B. 203; 146 L.T. 164; 95 J.P. 219; 48 T.L.R. 67; 75 Sol. Jo. 853; 29 L.G.R. 667; 29 Cox, C.C. 414; Digest Supp.

(3) *R.* v. *Disney*, ante, p. 626; [1933] 2 K.B. 138; 102 L.J.K.B. 381; 149 L.T. 72; 97 J.P. 103; 49 T.L.R. 284; 77 Sol. Jo. 178; 24 Cr. App. Rep. 49; 31 L.G.R. 176; 29 Cox, C.C. 635, C.C.A.; 15 Digest (Repl.) 252, *2187*.

Appeal against conviction.

The appellant was charged at Nottinghamshire Assizes before Macnaghten, J., on an indictment containing three counts. The first charged him with causing bodily harm, contrary to s. 35 of the Offences Against the Person Act, 1861, and the second with driving a motor vehicle when under the influence of drink or drugs, contrary to s. 15 of the Road Traffic Act, 1930. On these two counts he was acquitted. The third count, on which he was convicted, was in the following terms:

"Statement of Offence.—Driving motor vehicle in a manner dangerous to the public, contrary to s. 11 (1) of the Road Traffic Act, 1930. Particulars of

> Offence.—Charles Wilmot, on the 25th day of October, 1932, on a certain road called Legsby Avenue, in the borough of Grimsby in the county of Lincoln, drove a motor car recklessly, or at a speed or in a manner which was dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road and the amount of traffic which was actually at the time, or which might reasonably have been expected to be, on the said road."

He was sentenced to two months' imprisonment in the second division, but was admitted to bail, pending appeal. The appellant was represented by counsel at the trial, but no objection to the indictment was taken until after verdict.

By Road Traffic Act, 1930, s. 11 (1):

> "If any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, he shall be liable . . . (b) on conviction on indictment to imprisonment for a term not exceeding six months or to a fine, or to both such imprisonment and fine."

P. E. Sandlands for the appellant.

A. M. Lyons, K.C., for the Crown.

The judgment of the court was delivered by

LORD HEWART, C.J.—The appellant was indicted at Nottinghamshire Assizes on an indictment containing three counts. On the first two he was found Not Guilty, but he was convicted on the third count, and it is important to examine the language of that count. [His Lordship referred to the statement of offence and particulars of offence as set out above, and continued:] Unfortunately, per incuriam, no objection was taken to the indictment at the trial and the indictment went to the jury in the form which I have read. Indeed, it appears from the shorthand note that when the jury were retiring the actual indictment was handed to them in order that they might read it for themselves. The argument of counsel for the appellant is that this count is bad for duplicity, and the importance of the matter is expressed, for example, by AVORY, J., in *R.* v. *Surrey Justices, Ex parte Witherwick* (2) ([1932] 1 K.B. at p. 452), where he said:

> "It is not necessary to give illustrations of how a man may be driving with due care and attention, so far as his own safety is concerned, and yet driving without reasonable consideration for other persons, but, if a person may do one without the other, it follows as a matter of law that an information which charges him in the alternative is bad."

Then follow these important words:

> "It is an elementary principle that an information must not charge offences in the alternative, since the defendant cannot then know with precision with what he is charged and of what he is convicted and may be prevented on a future occasion from pleading autrefois convict."

There is a mass of authority to that effect, and with regard to the remaining contention which has been urged by counsel for the Crown, namely, that, as this point was not taken at the trial, it cannot be taken now, it is enough to refer to the judgment of this court in *R.* v. *Molloy* (1) ([1921] 2 K.B. at p. 369), where it is said:

> "In these circumstances, although the point was not taken by the appellant at the trial, we must, now that the point is taken, decide it according to law, and in our opinion the appeal must be allowed and the conviction quashed."

It is to be observed that the words are not "we may," but "we must"; the matter is there stated as being a duty on this court in the interests of justice. Although in the present case the appellant was represented by counsel, there are many cases in which an accused person has had no counsel, and this court may have the A duty of taking a point of law which, if it had been present to the minds of those in the court below, could have been, but was in fact not, taken.

The only other case to which I need refer is *R.* v. *Disney* (3). In that case, it is fair to add, the point was taken in the court below, but was overruled. The point in the present case could not have been raised on a motion in arrest of judgment, because, as appears from the shorthand note, it was not mentioned until B after judgment had been delivered; but if writs of error had still been in existence, it might have been raised upon a writ of error. The Criminal Appeal Act, 1907, abolished writs of error, and, therefore, it is left to this court to do that which in earlier days might have been done by a writ of error. In these circumstances it seems to be clear that this appeal must be allowed and this conviction quashed.

Conviction quashed. C

Solicitors: *H. K. & H. S. Bloomer*, Grimsby; *Town Clerk*, Grimsby.

[*Reported by* T. R. Fitzwalter Butler, Esq., *Barrister-at-Law.*]

D

R. *v.* PURCY AND OTHERS

E

[Court of Criminal Appeal (Lord Hewart, C.J., Avory and Humphreys, JJ.), May 2, 1933]

[Reported 149 L.T. 432; 97 J.P. 153; 24 Cr. App. Rep. 70; 29 Cox, C.C. 657]

Criminal Law—Obstructing course of justice—Obstruction of coroner in execution of duty—Need to prove duty to hold inquest—Need to prove intent to obstruct. F

F.P., his wife J.P., and their daughter S.P., were all convicted of obstructing a coroner in the execution of his duty. Evidence was given that on Nov. 3, 1932, a male child was born to S.P.; that on several occasions during the months of January and February, 1933, the family were seen with this child, which was suffering from a bad cough; and that on Feb. 16, 1933, the dead G body of the child was found concealed in a hedge. Subsequently, both F.P. and J.P. made statements, in which they admitted having put it there, and S.P. stated that after the infant had died she had seen her parents take away the body and return without it. A medical man made a post-mortem examination of the body, and his evidence was that death was due to natural causes.

Held: the foundation of a charge of this kind was that the case was one in H which there was a duty on the part of a coroner to hold an inquest and the evidence had not established the existence of any such duty; moreover, even if that point had been established, there was no evidence that the appellants, or any of them, intended to obstruct the coroner; and, therefore, the convictions must be quashed.

Notes. As to obstruction of the course of justice, see 10 Halsbury's Laws (3rd I Edn.) 631, and for cases see 15 Digest (Repl.) 840 et seq. and 13 Digest 261. As to the duty of a coroner to hold an inquest, see 8 Halsbury's Laws (3rd Edn.) 488 et seq., and for cases see 13 Digest 241.

Appeals against conviction.

The appellants were convicted at Northamptonshire Quarter Sessions of obstructing a coroner in the execution of his duty, and were sentenced by the deputy-chairman as follows: Frederick Purcy, to three months' imprisonment with hard

A labour; Jane Purcy, to three months' imprisonment with hard labour; and Sarah Purcy, to be detained in an institution for mental defectives. The particulars of offence were in the following terms:

> "Frederick Purcy, Jane Purcy, and Sarah Purcy on a day between the 2nd day of February and the 16th day of February, 1933, in the county of Northampton, intending to prevent the coroner of the Mid Division of Northamptonshire B from holding an inquest in the execution of his duty upon view of the dead body of Albert Walter Purcy who died a violent or an unnatural death or a sudden death of which the cause was unknown or intending to obstruct the said coroner in the holding of such inquest did conceal the said body in a hedge bottom in Doddington Fields in the county of Northampton."

C Evidence was given to the following effect. On Nov. 3, 1932, a male child was born to Sarah Purcy and the birth was registered. On Jan. 9, 1933, the entire family, including this child, were admitted to a lodging-house at St. Albans "in a deplorable condition," and there stayed five days. It was observed that the child then had a bad cough. On Jan. 16 the family were admitted to a common lodging-house at Bedford, and the child then appeared to have whooping-cough. On D Feb. 2 the wife of a police officer saw the family tramping along a road at Irchester, and her attention was attracted by the fact that the child had a nasty cough and looked ill. On the same evening the family were admitted into a common lodging-house at Wellingborough, but the child was no longer with them. On Feb. 16 the body of the child was discovered in a hedge-bottom at Doddington Fields, Northamptonshire, wrapped in a bundle of clothes. A medical witness, who made E a post-mortem examination of the body, stated that the cause of death was broncho-pneumonia accelerated by lack of attention, and that the baby died from natural causes. The male prisoner made a statement when interviewed by the police in the course of which he said:

> "The baby died in the pram. Not knowing what to do with it my wife wrapped F it up in a black openwork shawl, and we went together and laid it in a hedge bottom in a rough lane. It was stiff when we put it there. I thought it died in a fit."

Sarah Purcy, in the course of a statement, said:

> "I was near the baby when it had a fit of coughing and died. I saw my mother G and dad take it up a lane, but they did not bring it back."

Jane Purcy made no statement at the time, but subsequently, after being charged, admitted having assisted her husband in putting the body in the hedge.

R. E. Manningham-Buller for the appellants.
P. E. Sandlands for the Crown.

H The judgment of the court was delivered by

LORD HEWART, C.J.—The foundation of a charge such as this must be that the case is one in which there is a duty to hold an inquest. In our opinion, it is by no means established by the evidence that this was a case in which there was a duty to hold an inquest; but, even if that be not so and that point had been made good by the prosecution, there was no evidence that the appellants or any of them I intended to obstruct the coroner in the holding of the inquest. The way in which the case was left to the jury was not satisfactory. The deputy-chairman said:

> "You have to say whether, when all the facts are considered, you think these people have been proved guilty. If you consider they knew the nature of their act then it is certainly your duty to find them guilty. What was 'the nature of their act'? It was that they put this infant in the bottom of a hedge, so that there is a clear direction that, if the appellants knew what they were about in putting the body where they did put it, they ought to be found guilty."

In our opinion, that direction was quite erroneous, and there was no evidence on which the appellants or any of them could properly be convicted. The appeals are allowed. A

Convictions quashed.

Solicitors: *Registrar of the Court of Criminal Appeal*; *Director of Public Prosecutions.* B

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

C

BULMER RAYON CO., LTD. *v.* FRESHWATER AND ANOTHER

[HOUSE OF LORDS (Lord Buckmaster, Lord Warrington, Lord Tomlin, Lord Macmillan and Lord Wright), June 30, 1933] D

[Reported [1933] A.C. 661; 102 L.J.Ch. 318; 149 L.T. 409]

Estoppel—Estoppel by record—Judgment against corporation—Second action against company in respect of acts before corporation incorporated—Merger by judgment. E

In 1925 the defendant company commenced business as makers of artificial silk at a factory near a river, on the bank of which, lower down the stream, the plaintiffs' mill was situated. In March, 1928, the defendants agreed to sell their business, as from Feb. 1 of that year, to a corporation, which had been incorporated on March 13, the corporation undertaking all liabilities, debts, contracts, engagements, and obligations of the company, and indemnifying F them against all actions and claims in reference thereto. In September, 1928, the plaintiffs issued their writ against the corporation, claiming damages for the pollution of the river. In October, 1928, the corporation accepted liability for damage caused by the company and agreed that damages in respect of it should be added to any damages recovered against them (the corporation). On Oct. 17, 1929, the corporation submitted to a perpetual injunction being granted against G them, and an inquiry was ordered as to damages which were assessed at £2,650, there being no separation of the items of damage as between the corporation and the defendant company. Subsequently, the corporation was compulsorily wound-up and no part of the damages was recovered. A writ was then issued against the company claiming damages for pollution down to May 31, 1928, and the company pleaded estoppel by reason of the judgment H against the corporation, when the purchase of the business was completed.

Held: the judgment to which the corporation submitted on Oct. 17, 1929, could not be a judgment in respect of the present cause of action against the company because the present cause of action was based on torts committed before the time when the corporation was incorporated; with reference to the agreement between the corporation and the company by which the corporation indemnified I the company against actions and claims and the agreement relating to damages between the corporation and the plaintiffs in October, 1928, there was nothing put forward to show that at any time there had been a release of the company by the plaintiffs from any liability under which they might be by virtue of their tortious acts; nor had there been any merger of the claims by virtue of the judgment; and, therefore, the action could proceed against the company.

Notes. As to estoppel by record, see 15 HALSBURY'S LAWS (3rd Edn.) 191 et seq., and for cases see 21 DIGEST 140 et seq.

Appeal by the defendant company from an order of the Court of Appeal (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), affirming a decision of Luxmoore, J.

The facts giving rise to the action, as stated by Luxmoore, J., were these: "The plaintiff, William Frederick Freshwater, is a miller and farmer. He occupies a farm and mill called Badley Mill in the county of Suffolk. The River Gipping flows through the farm, and the mill is situate on the river. The plaintiff, Eva Violet Mary Freshwater, is the owner of both the farm and the mill. The defendant company owned and occupied a factory and artificial silk works and carried on therein the manufacture of artificial silk. This factory was situate on the said river above the plaintiffs' premises. The defendant company began manufacturing artificial silk in October, 1925. The plaintiffs allege that the company, in the conduct of their business, employed processes involving the use of substances and their discharge into the river in such a manner as to pollute the water of the river and to cause a nuisance to the plaintiffs. The plaintiffs further allege that they have suffered loss and damage by reason thereof. The company say that they are under no liability because on Oct. 17, 1929, the plaintiffs recovered judgment for damages for pollution of the river in an action which they brought against the British Acetate Silk Corpn., Ltd. (hereinafter referred to as 'the corporation').

"That judgment was obtained in these circumstances. The plaintiffs in the present action issued a writ against the corporation alone on Sept. 27, 1928. By it they claimed an injunction to restrain those defendants, their workmen, servants, and agents from discharging or permitting to be discharged from the corporation's factory at or near Stowmarket, in the county of Suffolk, into the River Gipping or its tributary streams any matter so as to pollute the waters thereof or render them unwholesome or unfit for use for watering the plaintiffs' cattle or other livestock or for operating the plaintiffs' mill or so as to cause the said waters to give off any noxious or offensive fumes, gases, or odours, or otherwise to occasion a nuisance to the plaintiffs, their family, workmen, and servants or their property. They also claimed damages. In March, 1928, the corporation, who had been incorporated on March 13, entered into an agreement with the defendant company under which the latter agreed to sell and the corporation agreed to purchase as from Feb. 1, 1928 (among other things), the goodwill of the defendant company's business and the factory at Stowmarket. As part of the consideration for the sale the corporation agreed to

> 'pay satisfy and discharge and fulfil all the debts liabilities contracts engagements and obligations of the company (that is the defendant company) whatsoever in relation to the said business and at all times to indemnify the company against all actions proceedings claims costs and demands in respect of such debts liabilities contracts engagements and obligations so to be paid satisfied and discharged by the corporation.'

The agreement provided that completion should take place on May 31, 1928, and that until completion possession of the property should be retained by the defendant company, and that in the meantime that company should carry on the said business in the same manner as theretofore, and so as to maintain the same as a going concern. It also provided that the defendant company should, from Feb. 1, 1928, inclusive be deemed to have been and to be carrying on the said business on behalf of the corporation, and should account to and be indemnified by the corporation accordingly.

"On Oct. 12, 1928, after the summons for directions in the action against the corporation had been taken out, the plaintiffs' solicitors wrote to the solicitors for the corporation in these terms:

> 'Our clients' claim covers a period anterior to that at which we understand your clients took over the factory at Stowmarket. We shall be obliged if you will inform us whether your clients, when taking over the factory, undertook the liabilities of the Bulmer Rayon Co. If they did so and are prepared to

> accept responsibility in these proceedings for whatever damage may be held to have been caused to our clients by the Bulmer Rayon Co., there will be no necessity for any separate action against that company. If, however, your clients do not accept liability, it will be necessary either to add the Bulmer Rayon Co. as a defendant in these proceedings, or, alternatively, to commence a separate action against that company.'

The solicitors for the corporation replied to this letter on Oct. 25, 1928. The material part of the letter is as follows:

> 'For the purpose of calculating the amount of damage (if any) alleged to have been suffered by the plaintiffs, our clients [i.e., the corporation] are prepared to agree that, in so far as such damage is shown to have been suffered at the hands of the Bulmer Rayon Co., the amount of these damages can be added to those claimed against our clients. This agreement, however, must not be construed or taken in any way to be an admission that any damage has been suffered by your clients at the hands of the Bulmer Rayon Co. or of our clients. Further, we are instructed that your client has already had a contribution from the Bulmer Rayon Co. in respect of an engine for this mill and that this has some connection with the claim your client now seeks to make against the Bulmer Rayon Co.'

"On Dec. 7, 1928, the statement of claim in the action against the corporation was delivered. Paragraph 1 sets out the plaintiffs' title. Paragraph 2 sets out the title of the defendant corporation and states, among other things, that in or about the month of May, 1928, the corporation acquired the silk works and factory from the defendant company on the terms (among others) that the corporation acquired the rights and assumed all the liabilities of that company in respect of the silk works and factory. Paragraphs 3 and 4 contain in effect two separate allegations: (i) that the defendant company caused pollution of the river from October, 1925, or thereabouts until May, 1928 (no more precise dates were given), and (ii) that the corporation caused similar pollution from May, 1928, and were at the date of the action still causing pollution. Particulars of the damage caused by the pollution are set out in the statement of claim. The dates assigned in the particulars show that some of the damage claimed was due to the acts of the defendant company, while the rest of the damage claimed was due to the acts of the corporation. Obviously the plaintiffs had no cause of action against the corporation in respect of damage suffered by reason of the acts of the defendant company before Feb. 1, 1928, and the corporation could, to this extent and apart from the arrangement made in the letters to which I have already referred, have defended successfully the action. The corporation did not raise the defence that it was not liable for any damage caused by the defendant company, and it is, I think, obvious that the corporation did not do so because of the arrangement; and also because, having agreed to indemnify the defendant company against its existing liabilities, the corporation was bound to indemnify them in respect of any damage caused to the plaintiffs by that company.

"The action proceeded on the footing that the only matter to be determined was whether the acts of pollution had in fact taken place, and the items of damage had in fact been suffered. On Oct. 17, 1929, the corporation submitted to a perpetual injunction substantially in the terms of the writ, and to an order directing an inquiry as to what damage had been occasioned to the plaintiffs and their property by reason of the pollution by the corporation and the defendant company of the River Gipping. The order directed the corporation to pay to the plaintiffs the amount which should be certified as such damage within one month after the date of the master's certificate. The corporation also submitted to an order against it to pay to the plaintiffs the taxed costs of the action down to and including that order, but the costs of the inquiry were reserved. The inquiry was made in pursuance of the order of Master Chitty, who certified, on April 2, 1930, that the damage which had been occasioned to the plaintiffs or their property by reason of the pollution by the corporation or the Bulmer Rayon Co. of the River Gipping amounted to the sum of £2,650. There was no separation of the items of damage as between the corporation and the defendant company. I was not informed whether anything paid by that company to the plaintiffs was brought into account. The certificate was filed on April 3, 1930. The plaintiffs were unable to obtain payment of the amount certified to be due to them, and on July 24, 1930, they presented a petition for the compulsory winding-up of the corporation. This stood over from time to time to give the corporation an opportunity of arranging its affairs, but ultimately on Oct. 13, 1931, an order for the compulsory winding-up of the corporation was made. It has since transpired that the assets of the corporation are not sufficient to pay its debenture holders in full, and, consequently, there is nothing available for the unsecured creditors of the corporation in which class the plaintiffs are. The judgment of Oct. 17, 1929, is therefore wholly unsatisfied."

The Court of Appeal held, affirming the judgment of LUXMOORE, J., that the corporation had only agreed to be answerable for damages assessed against them, and, this being unsatisfied, the company were not released, and there was no merger by the judgment against the corporation, they and the company not being joint but successive tortfeasors. The company appealed.

A. F. Topham, K.C., and *A. C. Edgar* for the appellants.

N. L. C. Macaskie, K.C., and *J. B. Herbert*, for the respondents, were not called upon to argue.

LORD BUCKMASTER.—This appeal arises out of unusual circumstances. The respondents own a mill and some farm premises between Stowmarket and Needham Market, and through the mill there flows a river called the River Gipping. The appellant company, known as the Bulmer Rayon Co., Ltd., had works higher up the stream, and it is alleged that over a certain period of time before March, 1928, the Bulmer Rayon Co. had so polluted the water and the air as to cause serious damage to the respondents. For the purpose of this appeal the allegations as to damage must be accepted, though, of course, that acceptance does not prevent their being disputed at a later period, but, as alleged, they are of a very grave and serious character, and, if the Bulmer Rayon Co. are responsible, they are, no doubt, liable for a large sum of money.

It appears that another company, called the British Acetate Silk Corpn., Ltd., bought that part of the business of the Bulmer Rayon Co., Ltd., situated above the respondents' mill in March, 1928, and, as part of the contract for that purchase, it was arranged that the purchasing company should discharge and satisfy all debts, liabilities, and obligations of the Bulmer Rayon Co. In addition it was provided that the Bulmer Rayon Co. should carry on the business as from Feb. 1, 1928, for and on behalf of the purchasing company. In September, 1928, the respondents took proceedings against the purchasing company in respect of the damage they had suffered by reason of this pollution. The purchasing company had been incorporated on March 13, 1928, and it is perfectly plain that in no circumstances whatever could they possibly be liable in tort for the damages that had been occasioned to the respondents before that date, but the statement of claim followed on a correspondence which took place between the solicitors for the respondents and the solicitors for the British Acetate Silk Corpn. in which the former asked if the purchasing company was willing to accept responsibility in the proceedings then instituted for whatever damage might be held to have been caused to the plaintiffs by the Bulmer Rayon Co., the vendor company, adding that if they were not prepared to accept such liability it would be necessary to add the Bulmer Rayon Co. as defendants. The answer to that was that they were

> "prepared to agree that, in so far as such damage is shown to have been suffered at the hands of the Bulmer Rayon Co., Ltd., the amount of these damages can be added to those claimed against our clients."

Upon that the statement of claim was based; it set out the acquisition of the A
business upon the terms I have stated and concludes by saying that the plaintiffs have suffered loss and damage and asking for relief in that respect. The statement of claim is a remarkable document, for it nowhere separates the claim for damages in respect of tort from the claim for whatever rights the plaintiffs might be assumed to possess by virtue of the arrangement as to indemnity, but there can be no doubt whatever that in substance the claim was based on this—a claim in tort against B
the British Acetate Silk Corpn. for the pollution for which they had been responsible as from the time when their responsibility arose, and a claim against the corporation to indemnify the plaintiffs against whatever claim they might have against the selling company for the damages that arose before the purchasing company took over the business. Upon that claim judgment was given by consent, and, as the result, an inquiry was held as to damages and a sum of £2,650 damages was C
assessed. The purchasing corporation seems to have fallen on evil days and no part of that sum has been satisfied, nor, apparently, is it likely that it ever will be. Accordingly, the respondents, on July 4, 1931, commenced proceedings against the Bulmer Rayon Co., Ltd., who were responsible for any damage which had in fact been occasioned up to the time when the purchasing company took the business over. To the statement of claim which the respondents based on these allegations D
the appellants set up the answer that the agreement to pay and satisfy such liabilities made by the defendants in the former action, which had resulted in the judgment for £2,650, effected a complete discharge and that the judgment for £2,650 was and could only be supported upon the ground that it was a judgment for the tortious acts, complaints in respect of which were the basis of the present proceedings, so that whether it was rightly or wrongly obtained, it was in fact a E
judgment for the same cause of action as that which is now being pursued.

In my opinion, the answer to that is perfectly plain. It was not and never could have been a judgment in respect of this cause of action, because this cause of action is based upon torts committed up to and before the time when the defendants in the former action were incorporated, and by no possibility could it have been made the cause of action against them. So far as it is alleged that the same F
effect is produced by virtue of the agreement to indemnify and the letters, which I have read, the answer is that there is nothing put forward in any of the proceedings to show that there has at any time been a release of the present appellants by the respondents from any liability they may be under by virtue of their tortious acts. Unless it can be shown that there has been a release or that there has been something equivalent to a merger of the claims by virtue of the judgment, there is G
no reason why this action should not proceed. I have pointed out why it is impossible to rely upon the former judgment for the purpose the appellants seek, and it is plain no release is made out nor any release in terms pleaded. It is my opinion, therefore, that this appeal ought to be dismissed with costs.

LORD WARRINGTON.—I agree. H

LORD TOMLIN.—I also agree.

LORD MACMILLAN.—I also agree.

LORD WRIGHT.—I agree.

Appeal dismissed. I

Solicitors: *Clarke & Co.*; *Morris, Ward-Jones, Kennett & Co.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

R. *v.* ESSEX JUSTICES. Ex parte CHURCHILL

[King's Bench Division (Lord Hewart, C.J., Avory and Hawke, JJ.), January 23, 1933]

[Reported 148 L.T. 498; 97 J.P. 124; 49 T.L.R. 283; 31 L.G.R. 178; 29 Cox, C.C. 602]

Justices—Costs—Refusal to commit for trial—Right of defendant to costs—Costs in Criminal Cases Act, 1908 (8 *Edw.* 7, *c.* 15), *s.* 6 (3).

Where, at the close of the preliminary investigation, examining justices refuse to commit for trial a person charged with an indictable offence, such a refusal is a "dismissal" of the charge within the meaning of s. 6 (3) of the Costs in Criminal Cases Act, 1908, and entitles the defendant to apply for costs.

Notes. Section 6 (3) of the Costs in Criminal Cases Act, 1908, has been replaced by s. 6 (1) of the Costs in Criminal Cases Act, 1952: see also s. 6 (3) of the later Act. Section 25 of the Indictable Offences Act, 1848, has been replaced by s. 7 of the Magistrates' Courts Act, 1952. Section 27 (4) of the Summary Jurisdiction Act, 1879, has not been re-enacted.

As to costs in criminal cases, see 10 Halsbury's Laws (3rd Edn.) 370–373, 546 et seq., and for cases see 14 Digest (Repl.) 683 et seq. For Costs in Criminal Cases Act, 1952, see 32 Halsbury's Statutes (2nd Edn.) 412.

Rule Nisi for mandamus.

An information was preferred by one Mrs. Bush against Randolph Churchill and Edith Churchill for larceny of furniture and other goods, contrary to s. 2 of the Larceny Act, 1916. On April 22, 1932, the case was heard before certain justices for the county of Essex. The defendants were not asked if they desired the charge to be dealt with summarily. The evidence of the prosecutrix and other witnesses for the prosecution was heard, and the solicitor for the prosecution formally closed his case. The defendants' counsel thereupon applied that the information should be dismissed. The chairman intimated that they would not commit for trial, but the clerk to the justices said that, if further evidence was obtained by the prosecution, the summons might be proceeded with. Counsel again insisted that the defendants were entitled to have the information dismissed, but the justices, on the advice of their clerk, decided that they had no power to dismiss the information, but that they would not commit for trial. On April 25, 1932, the defendants' solicitors requested, in writing, a certificate of dismissal of the information, to which the clerk to the justices replied that "the case was not dismissed."

A rule nisi for mandamus was obtained at the instance of the defendants calling on the justices to show cause why they should not proceed to hear and determine the matter and consider the defendants' application as to costs therein. The grounds for the rule were that (i) after the prosecution had formally closed their case on the information, and after the justices had intimated to counsel for the defence that they did not wish to hear the defendants' evidence, they were wrong in not acceding to the application of counsel for the defence to have the information dismissed; (ii) by refusing to dismiss the information, and by their clerk announcing that the information was not dismissed, and that the prosecutrix, although her case was closed, could in the future bring any further evidence she liked on the said information, they precluded the defendants from applying for their costs under the provisions of the Costs in Criminal Cases Act, 1908, s. 6 (3); (iii) though the justices had held that there was no case to answer at the close of the case for the prosecution, there was still outstanding against the defendants a serious criminal charge which might remain outstanding indefinitely.

By s. 25 of the Indictable Offences Act, 1848:

> "When all the evidence offered upon the part of the prosecution against the

accused party shall have been heard, if the justice or justices of the peace then present shall be of opinion that it is not sufficient to put such accused party upon his trial for any indictable offence, such justice or justices shall forthwith order such accused party, if in custody, to be discharged as to the information then under inquiry. . . ." A

By s. 27 (4) of the Summary Jurisdiction Act, 1879:

"Where the Court have assumed the power to deal with the case summarily, and dismiss the information, they shall, if required, deliver to the person charged a copy certified under their hands of the order of such dismissal, and such dismissal shall be of the same effect as an acquittal on a trial on indictment for the offence." B

By s. 6 (3) of the Costs in Criminal Cases Act, 1908: C

"Where a charge made against any person for any indictable offence (not dealt with summarily) is dismissed by the examining justices, the justices may, if they are of opinion that the charge was not made in good faith, order the prosecutor to pay the whole or any part of the costs incurred in or about the defence. . . ."

Herbert Malone in support of the rule. D

Wilfrid Lewis as amicus curiæ for the Crown.

The justices filed an affidavit as to the facts, but were not represented.

LORD HEWART, C.J.—In my opinion, some confusion has arisen in this case because the word "dismiss" is used both in s. 6 (3) of the Costs in Criminal Cases Act, 1908, and also in s. 27 (4) of the Summary Jurisdiction Act, 1879. It is clear E that a certificate equivalent to an acquittal on indictment cannot be granted where justices are sitting as examining justices under the Indictable Offences Act, 1848. In the present case the charge was of an indictable offence not dealt with summarily, and the justices had no power to dismiss it in the sense of granting a certificate under s. 27 of the Summary Jurisdiction Act, 1879.

I think the words of s. 6 (3) of the Costs in Criminal Cases Act, 1908, mean no F more than "where there is no committal for trial." In that sense the present applicants were entitled to have it said that the case was dismissed—a very different thing from dismissal under s. 27 of the Act of 1879.

I think this rule should go, but not on the third ground, which confuses two different things—the power of examining justices, and the power of justices dealing with summary offences. G

AVORY, J.—I am of the same opinion. The whole difficulty has been removed by the concession made by counsel for the Crown as to the meaning of "dismissed" in s. 6 (3) of the Costs in Criminal Cases Act, 1908. It is clear that the meaning of the word in that section is not its proper meaning. It is inappropriate in its strict technical sense, and has given rise to this argument, for the justices have no power, such as is given by s. 27 of the Summary Jurisdiction Act, 1879, to dismiss a charge H of an indictable offence not dealt with summarily. But it is obviously necessary to give some meaning to s. 6 (3) of the Act of 1908, which will not render it nugatory. I think counsel has properly conceded that "dismissed" must mean "not sent for trial under the Indictable Offences Act, 1848." If that is conceded, as soon as it is clear that the justices refuse to commit for trial, it is open to the defendants to make an application for costs. In the present case the defendants I were precluded from making that application by the action of the justices through their clerk, and, therefore, I think the rule should be made absolute.

HAWKE, J.—With that direction, that "dismiss" means "refuse to commit for trial," I agree that the justices ought to hear the application for costs.

Rule absolute.

Solicitors: *Probyn, Dighton, & Parkhouse*; *Director of Public Prosecutions.*

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

R. *v.* BEDWELLTY URBAN DISTRICT COUNCIL. Ex parte PRICE

[King's Bench Division (Avory, Charles and Lawrence, JJ.), November 7, 1933]

[Reported [1934] 1 K.B. 333; 103 L.J.K.B. 152; 150 L.T. 180; 98 J.P. 25; 50 T.L.R. 91; 31 L.G.R. 430]

Local Government—Accounts—Inspection—"Person interested"—Inspection by agent—Public Health Act, 1875 (38 *&* 39 *Vict., c.* 55), *s.* 247.

By the Public Health Act, 1875, s. 247: "Where an urban authority are not the council of a borough the following regulations with respect to audit shall be observed, namely . . . (4) A copy of the accounts duly made up and balanced . . . shall . . . be open . . . to the inspection of all persons interested for seven clear days before the audit, and all such persons shall be at liberty to take copies of or extracts from the same, without fee or reward."

Held: a "person interested" within the meaning of the above section is entitled to inspect the accounts by an agent acting on his behalf.

Notes. Section 247 of the Public Health Act, 1875, was repealed by the Local Government Act, 1933: see now s. 224 (1) of the latter Act.

As to procedure at district audit, see 21 Halsbury's Laws (2nd Edn.) 221 et seq., and for cases see 33 Digest 39, 40. For Local Government Act, 1933, see 14 Halsbury's Statutes (2nd Edn.) 353.

Case referred to:

(1) *Norey* v. *Keep*, [1909] 1 Ch. 561; 78 L.J.Ch. 334; 100 L.T. 322; 25 T.L.R. 289; 13 Digest 302, *340*.

Rule Nisi for mandamus.

This rule nisi, which was granted at the instance of one Price, a ratepayer in the Bedwellty urban district, called on the Bedwellty Urban District Council to show cause why a writ of mandamus should not issue commanding them to permit one Phillips, an accountant acting on behalf of Price and other ratepayers within the urban district, to inspect the accounts, together with all account books, deeds, contracts, accounts, vouchers, and receipts mentioned or referred to in such accounts of the council for the year ended March 31, 1933. The grounds for the rule were (i) that Phillips was a person interested within the meaning of s. 247 (4) of the Public Health Act, 1875, as being agent for Price and other ratepayers; (ii) that Price was a person interested and was entitled to inspection by an agent acting on his behalf.

Affidavits were filed on behalf of the prosecutor to the rule and by the council in reply. Mr. Walter Price deposed that he was a ratepayer in the Bedwellty urban district and secretary of the New Tredegar and District Rent and Ratepayers' Association. The books and accounts of the council were open for inspection by all persons interested from Sept. 11 to Sept. 18, 1933, in compliance with s. 247 (4) of the Public Health Act, 1875. On Aug. 30 Mr. Price, on instructions from his association, wrote to Mr. Benjamin Llewellyn Phillips, a partner in a firm of accountants, instructing him to accompany Mr. Price, with two other ratepayers, members of the association, to inspect the books for the purpose of preparing a report to the association thereon. On Sept. 11 the deponent, with Mr. Phillips and two other ratepayers, attended at the council offices and interviewed the deputy-accountant, the accountant being away. Mr. Phillips told him who he was, and from whom and what his instructions were, and requested to be allowed to inspect the books. The deputy-accountant refused on the ground that he was not sure whether Mr. Phillips was a "person interested" within the meaning of the section. On Sept. 12 the deponent, with Mr. Phillips and one of the ratepayers, again attended the offices of the council and there saw the accountant. Mr. Phillips again asked to inspect the books, and was again refused. On the same evening, Sept. 12, the council resolved not to allow Mr. Phillips to inspect the books and accounts. On Sept. 13 Mr. Price, Mr. Phillips, and a solicitors' managing clerk again interviewed the accountant and the clerk to the council, and were informed that, in view of the resolution of the council, the request that Mr. Phillips should inspect the books and accounts could not be granted. Mr. Phillips had, accordingly, been unable to inspect the books or to give information as to them to Mr. Price or his association. The deponent ended by saying that because of the complexity of the accounts of an urban district council it was for practical purposes impossible for anyone who was not a fairly expert accountant accustomed to the accounts of local authorities to appreciate the real significance of the figures, or to explain their effect to ratepayers, and that without full knowledge of the meaning of the accounts it was impossible for a ratepayer effectively to avail himself of his right to object under s. 247 (6). Mr. Phillips swore an affidavit corroborating that of Mr. Price.

On behalf of the council, Mr. Tom Davies, the deputy-accountant, deposed that, when Mr. Price and Mr. Phillips called on Sept. 11 he informed Mr. Phillips that he could not see the books and accounts of the council on the ground that he was not a ratepayer in the area, but that there was no objection to the three ratepayers who accompanied him seeing the whole of the accounts of the authority. After communicating with the clerk to the council, who agreed with the attitude he had adopted, he suggested that Mr. Phillips should renew his application next day, when the accountant would have returned. Before leaving, Mr. Phillips cited s. 60 of the Rating and Valuation Act, 1925, and on the strength of that section claimed the right to inspect the books. He then left the office, but the three ratepayers remained and asked for the production of the general fund vouchers and cash book. Those were produced to them and they were given accommodation so that they could copy out any data they required, and they were also informed that any documents they needed would be produced immediately. Mr. John Henry James, the treasurer and accountant of the council, deposed that when Mr. Phillips called with Mr. Price and the other ratepayers on Sept. 12 he (Mr. James) told him that he understood that on the previous day Mr. Phillips had quoted s. 60 of the Rating and Valuation Act, 1925, and that immediate inspection could be given him of all books and accounts covered by that particular section, but that so far as the general accounts of the council were concerned he was not in a position to grant Mr. Phillips's request without placing his application before the council. Mr. Phillips then inspected the accounts covered by s. 60, and the two ratepayers continued the general inspection which they had begun on the previous day. Mr. Phillips was informed of the council's decision that the council were not prepared to allow any person who was not a ratepayer or owner of property in the district to inspect the general accounts, but that they had no objection whatsoever to any ratepayer or owner doing so, and that Mr. Phillips could continue his inspection of the accounts covered by s. 60. That was repeated, the deponent continued, by the clerk when Mr. Price, Mr. Phillips, and the solicitors' managing clerk called on Sept. 13. All the information requested by the ratepayers was furnished and Mr. Phillips completed his inspection of the accounts under s. 60. Mr. William David Robert Lewis, the clerk to the council, corroborated the evidence of Mr. Davies and Mr. James, and further deposed that the West Monmouthshire Omnibus Board, in which the Bedwellty Council were partners with the Mynyddislwyn Urban District Council, operated in competition with certain private companies. One of those companies with a head office at Cardiff had approached the council with a view to acquiring the council's motor omnibus business. The council considered that it was not in the interests of the ratepayers that financial particulars of the business of the board should be disclosed to an accountant who was not a ratepayer or owner of property in the district, and who might conceivably be employed professionally by that company in negotiations with the board. Similar considerations applied to the disclosure of the financial details of the council's gas and electricity undertakings.

The Public Health Act, 1875, provides:

A "Section 247: Where an urban authority are not the council of a borough the following regulations with respect to audit shall be observed (namely): (1) The accounts of the receipts and expenditure under this Act of such authority shall be audited and examined once in every year, as soon as can be after March 25, by the auditor of accounts relating to the relief of the poor. . . . (3) Before each audit such authority shall, after receiving from B the auditor the requisite appointment, give at least fourteen days' notice of the time and place at which the same will be made, and of the deposit of accounts required by this section, by advertisement in some one or more of the local newspapers circulated in the district. . . . (4) A copy of the accounts duly made up and balanced, together with all rate books, account books, deeds, contracts, accounts, vouchers and receipts mentioned or referred to in such C accounts, shall be deposited in the office of such authority, and be open, during office hours thereat, to the inspection of all persons interested for seven clear days before the audit, and all such persons shall be at liberty to take copies of or extracts from the same, without fee or reward; and any officer of such authority duly appointed in that behalf . . . refusing to allow inspection thereof, shall be liable to a penalty not exceeding five pounds. . . . (6) Any ratepayer D or owner of property in the district may be present at the audit, and may make any objection to such accounts before the auditor; and such ratepayers and owners shall have the same right of appeal against allowances by an auditor as they have by law against disallowances."

The Rating and Valuation Act, 1925, provides:

E "Section 60: (1) Any ratepayer . . . may . . . inspect and take copies of or extracts from [certain books therein mentioned]. . . . (4) For the purposes of this section the expression 'ratepayer' includes . . . any person authorised by a ratepayer to act on his behalf under this section."

R. P. Croom-Johnson, K.C. (*H. H. Roskin* with him), showed cause on behalf of the council.

F *R. M. Montgomery, K.C.* (*W. C. Howe* and *W. A. Prichard* with him), in support of the rule.

AVORY, J.—This rule, which was obtained on Oct. 24, calls on the urban district council of Bedwellty to show cause why a writ of mandamus should not issue commanding them to permit Benjamin Llewellyn Phillips, an accountant acting for G and on behalf of Walter Price and other ratepayers, to inspect the accounts, together with all account books, deeds, contracts, accounts, vouchers, and receipts mentioned or referred to in such accounts of the council for the year ended March 31, 1933. The grounds for the rule are, first, that Mr. Phillips was a "person interested" within the meaning of s. 247 (4) of the Public Health Act, 1875, as being agent of Mr. Price and other ratepayers, and, secondly, that Mr. H Price is a person interested and entitled to inspection by an agent acting on his behalf.

In my opinion, the rule should be made absolute on the second ground, without deciding whether Mr. Phillips, the accountant, can properly be described as a person interested within the meaning of s. 247. I think that Mr. Price is clearly a "person interested" and entitled to inspection by an agent acting on his behalf. I Counsel has taken several points in showing cause against this rule. First, he takes the point that the books and accounts have in fact been produced to Mr. Price and another ratepayer and that that is sufficient to satisfy the requirements of sub-s. (4) of s. 247. I think that that point is met by the last paragraph of the affidavit of Mr. Price, confirmed as it is by the similar paragraph in the affidavit of Mr. Phillips, to the effect that, owing to the complexity of the accounts of a district council it was impossible for anyone who was not a trained accountant to appreciate the significance of the figures, so as effectively to avail himself of his right to object under s. 247.

That view is expressly confirmed in the judgment of PARKER, J., in *Norey* v. A
Keep (1) ([1909] 1 Ch. at p. 565), where the learned judge dealt with a somewhat analogous provision in the Trade Union Act, 1871, as to the right of inspection of the books of a trade union by any person having an interest in the funds. He said in effect that the question is whether a right of that nature which has been conferred is a personal right or a right which can be exercised by means of an agent. He then pointed out that it is in order to determine that question that the court B
considers with what object the right was conferred, and he came to the conclusion in that case that the particular person on whom the right was conferred would be incompetent to examine the accounts and obtain information from them, and that the object, therefore, would entirely be defeated if the right of inspection were confined to an untrained person and were not extended to the employment of a skilled agent for the purpose. That case, and the reasoning in it, appear to me C
applicable here.

Two other points were taken by counsel showing cause. First, he referred to the difference between the language used in s. 14 and Sched. I of the Trade Union Act, 1871, and that used in s. 60 of the Rating and Valuation Act, 1925, which deals with the right of ratepayers to inspect and take copies of rate-books, valuation lists, &c. I do not think that the fact that a later statute passed in 1925 gives an D
express authority to the ratepayer to employ an agent is any sufficient ground for holding that the right of inspection conferred by s. 247 of the Public Health Act, 1875, is a personal right only, and, for the reasons given by PARKER, J., it appears to me that it is an answer to the point made by counsel to say that a subsequent statute has, in order to remove all doubt, expressly authorised the ratepayer to employ an agent. E

The other point was that this remedy ought not to be granted, because another remedy is provided by statute, namely, that under sub-s. (4), where it is enacted that any officer of such authority neglecting or refusing to allow inspection shall be liable to a penalty not exceeding £5. I cannot see that proceedings against a clerk of the council in this case would be an equal and appropriate remedy, because it would not follow, if a fine were imposed, that the ratepayer would be any nearer F
to obtaining the inspection which he desired, and it would not follow from the imposition of any such fine that inspection by the agent would be allowed. Therefore, I think that that argument against making this rule absolute also fails. The result is that the rule will be made absolute on the first ground.

CHARLES, J.—Mr. Walter Price was a ratepayer in the Bedwellty urban G
district, and also happened to be the secretary of the New Tredegar Rent and Ratepayers' Association, and he desired, as was his undoubted right as a ratepayer, to make an examination and inspection of the books, deeds, contracts, accounts, vouchers, and receipts referred to in s. 247 (4) of the Public Health Act, 1875. He went himself, and did make some sort of examination of these books and documents, but he discovered, as he tells us upon affidavit, that the way in which the H
accounts were made up was complicated, that he could not make any useful or satisfactory inspection of the books by himself, and that he, therefore, applied that Mr. Phillips should come with him in order that he might lend his skilled powers to examine the accounts for the association and as their agent, or for him and as his agent. When Mr. Price and Mr. Phillips arrived for the purpose of Mr. Phillips making that inspection, and of Mr. Price exercising what he believed to be his I
proper rights, the officer in charge of the books said he was doubtful whether Mr. Phillips was a "person interested" under s. 247 (4) by virtue of which the inspection was to be made. He referred them to his immediate superior, who said he considered that Mr. Phillips was not a person interested.

In that set of circumstances the matter comes before this court, and we are asked to decide whether or not in these circumstances Mr. Phillips could be called a "person interested"—that is, a person interested as the agent of Mr. Price. It has been urged upon us that there is nothing in the subsection to which I have referred which compels a local authority to produce books to an agent or to allow him to look at them, and counsel has prayed in aid in support of that argument the fact that by s. 60 (4) of the Rating and Valuation Act, 1925, the specific right is given not only to a ratepayer, but also to any person authorised under the section, to make examination of the books within that section, and we are asked to say that the allowance to a ratepayer to appear by an agent is, in the absence of any specific reference, not to be held as implied in sub-s. (4) of s. 247 of the Public Health Act, 1875.

So far as I am concerned—and I agree with the judgment given by my Lord—I think it is quite clear that the whole purpose of the section would be defeated if only the ratepayer were allowed to inspect, without a skilled person at his elbow to act as his agent in the inspection. The matter has been discussed with reference to trade union books in *Norey* v. *Keep* (1), to which we have been referred. An examination of PARKER, J.'s judgment makes it quite clear that, in his opinion, as, indeed, in my own, it is impossible to limit such inspection to a personal right if it is necessary, in order to make a proper inspection, to inspect by a skilled agent. There is nothing in the section to say that may not be done; further than that, I would say that it may be impossible for the purpose of the section to be fulfilled without the aid of a skilled person. I therefore agree that Mr. Price is a ''person interested'' and entitled to inspect by his agent Mr. Phillips.

The proposition has been urged that an alternative remedy under s. 247 (4) is a remedy which could be regarded as equally convenient and effective as the remedy now sought before this court. The alternative remedy is that the officer of such authority duly appointed, if he refuses to allow the inspection of the books within this section to a person personally interested, shall be liable to a penalty not exceeding £5. It appears to me that if that remedy were pursued to its ultimate end and the full penalty imposed, it still would not be an equally convenient remedy, but would, instead, be entirely ineffectual from the point of view of the parties now before us. I therefore agree that this rule should be made absolute.

LAWRENCE, J.—I agree, and I only desire to add this. Counsel showing cause argued that nothing compelled a local authority to produce the books more than once. I do not think there is anything in that point, and, in any event, the facts do not support it, because Mr. Phillips went with Mr. Price on the first occasion and was then refused inspection of the books. Otherwise I have nothing to add.

Rule absolute.

Solicitors: *John T. Lewis & Woods*, for *W. D. R. Lewis*, Bargoed; *Willis & Willis*, for *Gilling & Goodfellow*, Cardiff.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

R. *v.* JONES

[Court of Criminal Appeal (Lord Hewart, C.J., Charles and Humphreys, JJ.), February 27, 1933]

[Reported 149 L.T. 143; 77 Sol. Jo. 236; 24 Cr. App. Rep. 55; 29 Cox, C.C. 637]

Criminal Law—Incest—Evidence—Proof of relationship—Admission by person charged—Punishment of Incest Act, 1908 (8 *Edw.* 7, *c.* 45), *s.* 1 (1), *s.* 2.

A father was charged with incest with his daughter, and the only evidence of the relationship on which the Crown relied was a statement by the prisoner to the following effect: "G. is my daughter and I am sorry to say that I have had connection with her and I am responsible for the condition she is now in," to which he subsequently added: "I have never looked on G. as my daughter, more like a sister to me. We (i.e., G.'s mother and I) did not get married until five years after G. was born." The prisoner was convicted.

Held: there was evidence of relationship to go to the jury and the conviction must be affirmed.

Notes. Section 1 (1) of the Punishment of Incest Act, 1908, has been replaced by s. 10 (1) of the Sexual Offences Act, 1956.

As to incest see 10 Halsbury's Laws (3rd Edn.) 753 et seq., and for cases see 15 Digest (Repl.) 1024–1026. For Sexual Offences Act, 1956, see 36 Halsbury's Statutes (2nd Edn.) 215.

Appeal against conviction and sentence.

The appellant, Evan Jones, who was aged forty-two, was charged at Montgomeryshire Assizes before Sir Lancelot Sanderson, K.C., commissioner of assize, with incest with his illegitimate daughter, Gwladys Mary Jones, aged twenty-two.

At the trial the appellant's wife declined to give evidence against the appellant, and the only evidence on which the Crown could rely to prove the relationship of father and daughter was that of a police officer, who said that when he visited the appellant's house the appellant volunteered the statement: "This is a terrible business," and that, after being cautioned, the appellant made a further statement, including the following passage:

> "Gwladys is my daughter, and I am sorry to say that I have had connection with her, and I am responsible for the condition she is now in. Signed, Evan Jones. Statement was read over to me in the presence of my wife, my son and daughter and P.S. Hughes."

The police sergeant also stated that as he was leaving the house, the appellant took him into the kitchen and made the following further statement:

> "I have never looked on Gwladys as my daughter, more like a sister to me. We (i.e., Gwladys' mother and I) did not get married until five years after Gwladys was born."

The jury found the prisoner Guilty. Gwladys Mary Jones was then arraigned on a charge of incest with her father, the appellant, to which she pleaded Guilty. The appellant was sentenced to three years' penal servitude, and Gwladys Mary Jones was bound over for six months in the sum of £10 on condition that she went into a moral welfare home.

By the Punishment of Incest Act, 1908, s. 1 (1):

> "Any male person who has carnal knowledge of a female person, who is to his knowledge his granddaughter, daughter, sister, or mother, shall be guilty of a misdemeanour . . ."

By s. 2:

> "Any female person of or above the age of sixteen years who with consent permits her grandfather, father, brother, or son to have carnal knowledge of her (knowing him to be her grandfather, father, brother, or son as the case may be) shall be guilty of a misdemeanour . . ."

Francis Williams for the appellant.—There was no sufficient evidence of the relationship of the appellant and Gwladys Mary Jones. As the appellant did not marry his wife till five years after the birth of Gwladys Mary Jones, there could not in this case be any presumption of legitimacy. The only evidence of relationship was to be found in a statement made by the appellant, which he immediately qualified, and at the highest that statement was not proof of the facts to which it related, but only of the appellant's belief about those facts.

R. G. S. Bankes for the Crown.—The appellant has never denied that Gwladys Jones was his daughter. He did not seek to appeal against conviction, but only against sentence, and his notice of appeal stated: "I admit my offence." The jury were entitled to accept the appellant's own statement that Gwladys Jones was his daughter. The only qualification which he added to that statement merely related to the manner in which he had treated her.

The judgment of the court was delivered by

LORD HEWART, C.J.—This unpleasant case has been extremely well argued on both sides and we have carefully considered our conclusion. The appellant was charged before the learned commissioner of assize at Welshpool upon an indictment which alleged that he had committed incest with his daughter Gwladys. He pleaded "Not Guilty," but was convicted and sentenced to three years' penal servitude. In his notice of appeal, he asked for leave to appeal against sentence only, crossing out the words "conviction and." Leave to appeal against both conviction and sentence was granted to him, and the whole matter has now been fully argued.

The appellant is forty-two years of age and his daughter is twenty-two. To pass over immaterial facts, on Nov. 25, 1932, a police sergeant saw the appellant, who began by saying: "This is a terrible business." He was then cautioned and in the presence of his wife, his daughter Gwladys, and the police sergeant, he made a statement in the course of which he said that Gwladys was his daughter and he was responsible for her condition. That statement was written in English and was signed by the appellant. Afterwards, when the police sergeant was leaving the house, the appellant took him into the kitchen and there said: "I have never looked on Gwladys as my daughter, more like a sister to me," and he added: "We did not get married until five years after Gwladys was born." The mother did not wish to give evidence, and, therefore, the only evidence that the girl was the appellant's daughter was his own admission.

It is to be observed that at no stage in these proceedings did he allege the contrary. He did not seek to appeal against his conviction, and has never denied that he was the father of Gwladys Jones. On the contrary, if the jury accepted the evidence of the police sergeant, he said that he was her father. We have paid attention to everything which counsel has said on behalf of the appellant, and to everything which counsel has said on behalf of the Crown, and we have come to the conclusion that there was evidence to go to the jury. With regard to the summing-up, it was, in our opinion, unexceptionable. We think, therefore, that this appeal must be dismissed, but, inasmuch as leave to appeal was given, the time during which the appellant has been specially treated as an appellant will be counted towards his sentence.

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal*; *Director of Public Prosecutions.*

[*Reported by* T. R. Fitzwalter Butler, Esq., *Barrister-at-Law.*]

ARCOS, LTD. *v.* E. A. RONAASEN & SON

[House of Lords (Lord Buckmaster, Lord Blanesburgh, Lord Warrington, Lord Atkin and Lord Macmillan), November 29, December 1, 1932, February 2, 1933]

[Reported [1933] A.C. 470; 102 L.J.K.B. 346; 149 L.T. 98; 49 T.L.R. 231; 77 Sol. Jo. 99; 38 Com. Cas. 166]

Sale of Goods—Description—Need of strict compliance with contract—Goods delivered not strictly complying, but "commercially within and merchantable under contract specification"—Right of buyer to reject—Sale of Goods Act, 1893 (*56 & 57 Vict. c.* 71), *s.* 13.

By two contracts in writing, made in 1929, the appellants agreed to sell to the respondents a quantity of redwood and whitewood staves c.i.f. River Thames of a thickness of half an inch. When they arrived in London the buyers claimed to reject the goods on the ground that they did not correspond with the description in the contracts in that they were more than half an inch in thickness. The matter having been submitted to arbitration, the umpire made an award in the form of a Special Case in which he found that the staves exceeded the specified thickness, but that, when shipped, they were "commercially within and merchantable under the contract specification," and awarded that the buyers were not entitled to reject the goods.

Held: the fact that the goods were merchantable under the contract was no test proper to be applied in determining whether the goods satisfied the contract description; if the article purchased was not in fact the article that had been delivered the buyer was entitled to reject it; in the present case the finding as to measurement showed that the goods were not those contracted to be sold; and, therefore, the buyers were entitled to reject them.

Vigers Bros. v. *Sanderson Bros.* (1), [1901] 1 K.B. 608, distinguished.

Per Lord Atkin: In dealing with commercial contracts the question is not in all cases whether there has been a substantial compliance with the contract. If the written contract specifies conditions of weight, measurement, and the like, those conditions must be complied with. A ton does not mean about a ton, or a yard about a yard. Still less, when you descend to minute measurements does half an inch mean about half an inch. If the seller wants a margin he must stipulate for it. By recognised trade usage particular figures may be given a different meaning, as in a baker's dozen, and there may be microscopic deviations which business men, and, therefore, lawyers, will ignore.

Notes. For the conditions implied on a sale by description, see the Sale of Goods Act, 1893, s. 13. Section 7 of the Arbitration Act, 1889, has been replaced by s. 21 of the Arbitration Act, 1950.

As to sales by description, see 29 Halsbury's Laws (2nd Edn.) 59–62, and for cases see 39 Digest 432–438. For Sale of Goods Act, 1893, see 22 Halsbury's Statutes (2nd Edn.) 985.

Cases referred to:

(1) *Vigers Bros.* v. *Sanderson Bros.*, [1901] 1 K.B. 608; 70 L.J.K.B. 383; 84 L.T. 464; 49 W.R. 411; 17 T.L.R. 316; 45 Sol. Jo. 328; 6 Com. Cas. 99; 39 Digest 466, *919*.

(2) *Green* v. *Arcos, Ltd.* (1931), 39 Ll.L.Rep.; 47 T.L.R. 336, C.A.; Digest Supp.

Appeal from an order of the Court of Appeal (Scrutton, Greer and Slesser, L.JJ.) affirming an order of Wright, J., upon an award in the form of a Special Case under s. 7 of the Arbitration Act, 1889.

The question raised was whether the respondents, the buyers, were entitled to reject wooden staves tendered to them by the appellants, as sellers, under two contracts of sale upon the ground that the goods were not of the contract description. The Court of Appeal held, affirming the decision of WRIGHT, J., and differing from the umpire, that the buyers were entitled to reject. The sellers appealed.

Van den Berg, K.C., and *Gordon Alchin* for the appellants.

C. T. Le Quesne, K.C., and *W. A. Davies*, for the respondents, were not called upon to argue.

The House took time for consideration.

Feb. 2. The following opinions were read.

LORD BUCKMASTER.—The appellants are an English company, and are the instruments of the Russian government for the sale of their goods in this country. By two contracts, dated Nov. 13, 1929, they agreed to sell to the respondents a quantity of redwood and whitewood staves c.i.f. the River Thames. The staves were to be shipped during the summer of 1930 and were to be of the following dimensions: Under one contract as to ninety standards they were to be of ½in. thickness, 28in. in length, and 2in. to 5in. in breadth; and as to ten standards, ½in. thickness, 17in. in length, and 2½in. to 5in. in breadth. Under the other contract 135/180 standards were to be ½in. by 28in. by 2in. to 5in.; fifteen to twenty, ½in. by 17in. by 2½in. to 5in.; twenty-seven, ½in. by 28in. by 2in. to 5in.; three, ½in. by 17in. by 2½in. to 5in. Each contract was in the same terms and provided that any dispute that should arise should be forthwith referred to the decision of a third party to be mutually agreed upon, or, in default, to two arbitrators. The goods were shipped from Archangel on or about Oct. 9, 1930. The buyers rejected the documents when tendered on the ground that the shipment was not a shipment during the summer of 1930 in accordance with the terms of the contracts. This matter was referred to arbitration, and the arbitrator, by his award dated Feb. 18, 1931, awarded that the respondents were not entitled so to reject the goods. Since October, 1930, the goods, which had been landed, have lain exposed to the weather on the open wharf. On April 10, 1931, the respondents demanded a further arbitration with regard to the quality and cutting of the staves. This was referred to two arbitrators, according to the contracts, and they, having failed to agree, on July 3, 1931, appointed Mr. Vigers as umpire, who heard the evidence, inspected the goods, and made his award on Aug. 24, 1931. It is as to the meaning of the award upon the true facts there found that this appeal is concerned.

The real dispute was whether the goods satisfied the description as to measurement contained in the contracts, and upon this the arbitrator found as follows:

> "(ii) The goods tendered by the sellers to the buyers as aforesaid and invoiced as 28in. staves (hereinafter referred to as 'the said 28in. staves') were redwood and whitewood staves bundled and were in length not less than 28in. and not more than 28⅛in. (iii) The said 28in. staves are of the following thicknesses: None are less than ½in. 4.3 per cent. are ½in. 85.3 per cent. are more than ½in. and not more than 9/16ths in. 9.4 per cent. are more than 9/16ths in. and not more than ⅝in. 1 per cent. are more than ⅝in. and not more than ¾in. None are over ¾in. (iv) All the said 28in. staves were 2in. to 5in. in width. (v) The goods tendered by the sellers to the buyers as aforesaid and invoiced as 17in. staves (hereinafter referred to as 'the said 17in. staves') were redwood and whitewood staves bundled and were in length not less than 17in. and not more than 17⅛in. (vi) The said 17in. staves are of the following thicknesses: None are less than ½in. 6.4 per cent. are ½in. 75.3 per cent. are more than ½in. and not more than 9/16ths in. 18.3 per cent. are more than 9/16ths in. and not more than ⅝in. None are over ⅝in. (vii) With the exception of 2.159 standards 2in. in width all the said 17in. staves were 2½in. to 5in. in width. The tender of 2.159 standards of 17in. staves 2in. in width was within the provisions of the contracts referred to in para. 5 (ii) of this award and constituted a good tender. . . . (xii) It was admitted by the buyers that some excess in thickness is permissible, and I find that staves of thickness not exceeding ⅝in.

> are fit for the purpose of making cement barrels, whether as sides or headings. (xiii) The said 17in. and 28in. staves are now swollen and in bad condition by reason of wetting since shipment. I cannot say with accuracy from their present size what was their thickness when shipped, but I find that their thickness was closer to ½in. when shipped than it is now, and I am satisfied that the staves when shipped were commercially within and merchantable under the contract specification."

On these findings he held that the respondents were not entitled to reject the goods. The award was in the form of a Special Case which came before Wright, J., on Dec. 15, 1931, who referred it back to the arbitrator to say what was the evidence upon which he based his statement as to the admission by the buyers that some excess in thickness was permitted. To which the arbitrator replied that that was his clear impression, but that his award was not based on that admission, and that the buyers had in fact received the very goods that the contract had provided for. Wright, J., in his judgment decided in favour of the buyers, upon the ground that the difference in the sizes was not of such a trivial character as would justify its being disregarded by the court, that the finding as to measurement shows that the goods were not those contracted to be sold, and that it was those goods and not their commercial equivalent that the buyers were entitled to demand. The Court of Appeal have confirmed this view.

It is not necessary to examine again the actual difference between the goods shipped and those defined in the specification; nor is it possible to fix the exact extent to which the exposure of the staves, for which the respondents were responsible, has altered their size. For the real question is whether the statement of the arbitrator that the staves, when shipped, were commercially within and merchantable under the contract shows that the arbitrator has found that, according to its proper construction, the contract has been satisfied. The very wording of the phrase leads strongly to the conclusion that it does not bear that interpretation.

The fact that the goods were merchantable under the contract is no test proper to be applied in determining whether the goods satisfied the contract description, and I think the phrase "commercially" itself shows that, while the goods did not in fact answer the description, they could, as a matter of commerce, be so dealt with; but the rights of the buyers under the contract are not so limited. If the article they have purchased is not in fact the article that has been delivered, they are entitled to reject it, even though it is the commercial equivalent of that which they have bought.

But for the decision in *Vigers Bros.* v. *Sanderson Bros.* (1), there could, I think, be little doubt about this matter. The learned judge there held that the buyer was entitled to reject the goods, but he made a statement that the clause entitling the rejection did not operate

> "so as to force the buyer to take the goods which are neither within nor about the specification, nor commercially within its meaning."

That decision must be read in relation to the words of the contract then considered, which provided that the goods were to be "about" the specification stated, and no such word as "about" occurs in the present contract. There is no room in this contract for any elasticity, and I agree with the judgment of Scrutton, L.J., in *Green* v. *Arcos, Ltd.* (2) (39 Ll.L.Rep. at p. 231), that the phrase used by Bigham, J., was only intended to cover cases in which the difference was so small that the law would not regard it.

The only part of this case that, in my opinion, presents any difficulty is the fact that some change of size took place owing to the exposure for which the respondents were responsible, but I agree with the interpretation of the Court of Appeal upon the finding in this respect, namely, that, though the staves were nearer to ½in. when they were delivered, yet they did not then satisfy the specification, except by regarding the matter as one in which the commercial equivalent can be accepted for the actual description. I can find no flaw in the reasoning of WRIGHT, J., and the Court of Appeal, and their unanimous opinion renders further discussion of the matter unnecessary.

LORD WARRINGTON.—The question in this appeal from a unanimous decision of SCRUTTON, GREER and SLESSER, L.JJ., affirming a judgment of WRIGHT, J., in favour of the buyers, is whether on a sale of goods by description the implied condition that the goods shall correspond with the description (Sale of Goods Act, 1893, s. 13) has been performed by the seller so as to disentitle the buyer to reject the goods. The facts and the law applicable have been or are about to be so thoroughly stated and discussed by other noble and learned Lords, whose opinions I have had the advantage of reading, that I propose to state quite shortly my reason for agreeing with their conclusion and that of the four learned judges by whom the case was decided in the courts below.

The contracts (there were two in identical terms) were for the sale by the appellants as sellers to the respondents as buyers of a quantity of Russian redwood and whitewood staves of certain specified dimensions in length, breadth, and thickness. As to length and breadth certain limits of variation were permitted by the contract and are specified in the description, but as to thickness this is to be in every case ½in. without any qualification. The goods were duly shipped and tendered, but they were rejected by the buyers on the only ground material to this appeal, namely, that they, or a large number of them, exceeded the contractual thickness and that the statutory condition was, therefore, not fulfilled. Pursuant to the contracts the matter was referred to a commercial arbitrator, who made his award in the form of a Special Case.

Under the contracts the staves were to be of a definite thickness of ½in., neither more nor less, and with no qualification such as "about," or "substantially," or "commercially," whatever may be the precise meaning of this last word. The sellers, therefore, were bound to tender ½in. staves. The actual results of the inspection of the staves given by the arbitrator disclosed extensive variations in thickness always on the side of excess. The staves had, however, been exposed to weather since landing and were swollen and in bad condition. In these circumstances the arbitrator stated:

> "I cannot say with accuracy from their recent size what was their thickness when shipped, but I find that their thickness was closer to ½in. when shipped than it is now."

That is, in my opinion, a finding that staves now exceeding ½in. were at shipment also in excess of that measure, though not to the same extent. He then adds:

> "I am satisfied that the staves when shipped were commercially within and merchantable under the contract specification,"

and he made an award in favour of the sellers.

In my opinion, by acting as he did, he has added to the description in the contract a qualification to which the contracting parties have not agreed, and which he was not entitled to add, and that the courts below were justified in setting aside his award. It is not suggested that this is a case in which the deviations from the contractual thickness were so slight as to be negligible. In such a case a simple finding that they answered the description would be proper without the addition of such a qualification as above mentioned. I agree that the appeal fails, and should be dismissed, with costs.

LORD ATKIN.—The question between the parties arises on an award stated in the form of a Special Case by an umpire appointed under a submission contained in two contracts for the sale of timber. The contracts were in the White Sea, 1928, c.i.f. form, and were between the appellants, Arcos, Ltd., sellers, and the respondents, E. A. Ronaasen & Son, buyers. It is unnecessary to set them out at length. The substance was that the sellers agreed to sell to the buyers "the wood goods hereinafter specified'' subject to a variation of 20 per cent. in sellers' option on any item, to be shipped from Archangel ''during the summer 1930.'' The first contract specified ''Redwood and whitewood staves bundled

> ''ninety standards ½in. by 28in. by 2in. to 5in.; ten standards ½in. by 17in. by 2½in. to 5in. Messrs. Arcos, Ltd., promise to do their best to induce the shippers not to cut any 2in. in the ½in. by 17in. headings, but should a few 2in. width fall, buyers agree to take same at a reduction in price of 40s. per standard.''

There were further conditions on the back of the contract which it is unnecessary at present to consider. The second contract was in identical terms, save as to quantities of standards, and provided for 135/180 and twenty-seven standards of 28in. length and fifteen to twenty and three standards of 17in. length. The staves were required by the buyers for making cement barrels, and this was made known to the sellers in circumstances that implied a condition that they should be fit for that purpose. The goods in question were shipped under the contracts in October. When the shipping documents were tendered the buyers refused them on the ground that there had not been a summer shipment. There was an arbitration to determine this dispute, and the umpire held that the shipment was a summer shipment. The buyers thereupon examined the goods which had been landed and claimed to reject them on the ground that they were not of contract description. This dispute went to arbitration, and the umpire made his award in the form of a Special Case in which, after stating the facts, he awarded, subject to the opinion of the court, that the buyers were not entitled to reject. On the hearing of the Special Case WRIGHT, J., and on appeal the Court of Appeal, differed from the umpire, and held that the buyers were entitled to reject.

The simple question is whether the goods when shipped complied with the implied condition (Sale of Goods Act, 1893, s. 13) that they should correspond with the description. When the umpire inspected them on July 9, 1931, some nine months after landing and exposure to rain, he found the actual measurements to be as follows: 28in. staves—None less than ½in. 4.3 per cent. were ½in. 85.3 per cent. between ½in. and 9/16ths in. 9.4 per cent between 9/16ths in. and ⅝in. 1 per cent. between ⅝in. and ¾in. None over ¾in. 17in. staves—None less than ½in. 6.4 per cent. were ½in. 75.3 per cent. between ½in. and 9/16ths in. 18.3 per cent. between 9/16ths in. and ⅝in. None over ⅝in. He found that they were all fit for use in the manufacture of cement barrels. He was unable with accuracy to say what was their thickness when shipped, but

> ''their thickness was closer to ½in. than it is now, and I am satisfied that the staves when shipped were commercially within and merchantable under the contract specification.''

The decisions of the learned judge and of the Court of Appeal appear to me to have been unquestionably right. On the facts as stated by the umpire as of the time of inspection only about 5 per cent. of the goods corresponded with the description, and the umpire finds it impossible to say what proportion conformed at the time of shipment. It was contended that in all commercial contracts the question was whether there was a ''substantial'' compliance with the contract; there always must be some margin, and it is for the tribunal of fact to determine whether the margin is exceeded or not. I cannot agree. If the written contract specifies conditions of weight, measurement, and the like, those conditions must be complied with. A ton does not mean about a ton, or a yard about a yard. Still less, when you descend to minute measurements, does ½in. mean about ½in. If the seller wants a margin he must, and in my experience does, stipulate for it. Of course, by recognised trade usage, particular figures may be given a different meaning, as in a baker's dozen, or there may be even incorporated a definite margin more or less, but there is no evidence or finding of such a usage in the present case. No doubt, there may be microscopic deviations which business men, and, therefore, lawyers, will ignore. And in this respect it is necessary to remember that descrip-

A tion and quantity are not necessarily the same, and that the legal rights in respect of them are regulated by different sections of the code, description by s. 13, quantity by s. 30. It will be found that most of the cases that admit any deviation from the contract are cases where there has been an excess or deficiency in quantity which the court has considered negligible.

But, apart from this consideration, the right view is that the conditions of the B contract must be strictly performed. If a condition is not performed, the buyer has a right to reject. I do not myself think that there is any difference between business men and lawyers on this matter. No doubt in business men often find it unnecessary or inexpedient to insist on their strict legal rights. In a normal market, if they get something substantially like the specified goods, they may take them with or without grumbling and claim for an allowance. But in a falling C market I find that buyers are often as eager to insist on their legal rights as courts of law are ready to maintain them. No doubt at all times sellers are prepared to take a liberal view as to the rigidity of their own obligations and possibly buyers who in turn are sellers may also dislike too much precision. But buyers are not, as far as my experience goes, inclined to think that the rights defined in the code are in excess of business needs. It may be desirable to add that the result D in this case is in no way affected by the umpire's finding that the goods were fit for the particular purpose for which they were required. The implied condition under s. 14 (1), unless, of course, the contract provides otherwise, is additional to the condition under s. 13. A man may require goods for a particular purpose and make it known to the seller so as to secure the implied condition of fitness for that purpose, but there is no reason why he should not abandon that purpose if he E pleases and apply the goods to any purpose for which the description makes them suitable. If they do not correspond with the description there seems no business or legal reason why he should not reject them if he finds it convenient so to do. Agreeing, as I do, with the reasoning of the judgments below, I find it unnecessary to say more than that I agree that the appeal should be dismissed, with costs.

F **LORD BUCKMASTER.**—I have been asked to say that **LORD BLANESBURGH** and **LORD MACMILLAN** agree.

Appeal dismissed.

Solicitors: *Wynne-Baxter & Keeble*; *Nisbet, Drew, & Loughborough.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

R. *v.* SUSSEX JUSTICES. Ex parte BUBB

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Charles, JJ.), May 31, 1933]

[Reported [1933] 2 K.B. 707; 102 L.J.K.B. 577; 149 L.T. 537; 97 J.P. 237; 49 T.L.R. 495; 77 Sol. Jo. 503; 31 L.G.R. 307]

Licensing—Permitted hours—"Special occasion"—Period of "summer time"—Premises in "coastal area"—General order—Validity—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *and* 1 *Geo.* 5, *c.* 24), *s.* 57 (1).

By the Licensing Act, 1910, s. 57 (1): "If the holder of a justices' on-licence applies to the local authority for an order (in this Act called a special order of exemption) exempting him from the provisions of this Act relating to general closing hours on any special occasion or occasions, the local authority may, if in their discretion they think fit to do so, grant to the applicant such a special order so exempting him during the hours and on the special occasion or occasions specified in the order." Justices granted to a licence-holder a special order of exemption, authorising the licensed premises to remain open until 10.30 p.m. instead of 10 p.m. for the period of "summer time," and announced that they had decided to grant a similar order to any licence-holder whose premises were situated within the "coastal area" of their division who applied therefor.

Held: (i) "summer time" could not be regarded as a "special occasion" within the above section; and (ii) the order was a general, and not a special order; there had been excess of jurisdiction; and, therefore, certiorari would lie to quash the order.

Notes. Section 57 (1) of the Licensing (Consolidation) Act, 1910, has been replaced by s. 107 of the Licensing Act, 1953, which is in substantially the same terms. The question of "special occasion" has arisen also under the Road Traffic Acts.

Distinguished; *R.* v. *Sussex Justices, Ex parte Bubb* (1934), 50 T.L.R. 410.

As to exemptions from provisions relating to restricted hours, see 19 HALSBURY'S LAWS 110 et seq., and for cases see 30 DIGEST (Repl.) 79 et seq. For Licensing Act, 1953, see 33 HALSBURY'S STATUTES (2nd Edn.) 142.

Case referred to:

(1) *R.* v. *Butt, Ex parte Brooke* (1922), 38 T.L.R. 537; 30 Digest (Repl.) 80, *618.*

Rule Nisi for certiorari.

On April 11, 1933, justices for the petty sessional division of Steyning, Sussex, granted to one Pigott, the licensee of premises known as the Swiss Cottage, Shoreham-by-Sea, a special order of exemption from the provisions of the Licensing Acts, 1910 and 1921, relating to permitted hours of opening, authorising him to keep his licensed premises open between 10 and 10.30 p.m. on April 13, 1933, and during the same hours on every day thereafter, except Good Friday and Sundays, until Oct. 9, 1933, in order that he might be enabled to sell and supply such intoxicating liquors as he was by law licensed to sell and supply on the occasion of the summer holiday season.

A rule nisi for certiorari was obtained at the instance of one Bubb, a superintendent of police for the above division (hereinafter called "the applicant") calling upon the justices to show cause why the above order should not be removed into the High Court to be quashed. The rule was granted on the following grounds: (a) That the justices, in making the order, exceeded their jurisdiction under s. 57 of the Licensing (Consolidation) Act, 1910; (b) that there was no definition of the expression "coastal area," within which, it was said, the justices had announced that they would grant the exemption.

From an affidavit by the applicant, it appeared that on April 11, 1933, a Mr. Gates, a solicitor, on behalf of the Brighton and County Licensed Victuallers' Protection Society and the Shoreham and District Licensed Victuallers' Association, made an application to the justices for a special order of exemption to be granted to all the holders of justices' on-licences within the division who were members of the above society and association; that the application was made on behalf of the several holders of justices' on-licences collectively and not individually; that no particulars, names, or premises were specified, and that in no instance was the case of any one of these licence-holders considered separately by the justices upon its merits; that the chairman announced that the justices had decided to grant a special order of exemption to those licence-holders whose premises were situated in the coastal area of the division, and who might apply to the clerk to the justices therefor, the orders being made out in blank for that purpose; that the term "coastal area" was not defined by the justices, nor was any enumeration made of the licence-holders whose premises came within that area; that the order had been drawn up as a separate order in respect of each of these on-licensed premises in the division, although, in fact, it was a general order to the extent mentioned; and that by reason of the order uniformity in permitted hours in the division had been destroyed.

An affidavit in opposition to the application was made by the clerk to the justices, who denied that Mr. Gates had applied for a special order of exemption to be granted to all the holders of justices' on-licences within the division who were members of the society or association, and said that the application was for a special order of exemption on behalf of a number of licensees. He further said that a list had been sent in advance to the clerk of the justices by the solicitor who made the application; that the list was before the justices, who considered each licence specified; that the justices ordered that a special order of exemption should be granted to each of the licensees specified in the application whose premises were in Shoreham, Lancing, Kingston, and Southwick, which were, in fact, the coastal towns, and that the orders were not made for a "coastal area," but for those of the applicants whose premises lay in these four coastal parishes; that the justices intimated that, if any licensees whose names did not appear in the list wished to apply subsequently for a similar order, it would be granted if properly applied for; that the orders were not made out in blank, but the licensees were informed that they could call for them at the clerk's office, and that orders in respect of all the applications granted were subsequently signed by two of the justices; that no general order was made, but a separate order was made in respect of each licensee; that the justices considered the question (including the alternative suggestion of a shorter period) carefully and came to the conclusion that for the districts mentioned the whole of "summer time" was a "special occasion," and that, therefore, they granted the orders in the exercise of their discretion. An affidavit to the same effect was made by the chairman of the justices.

After the application was granted, the solicitor acting for the police applied to the justices to state a Case and served notice requiring them to do so. No further application with regard to this was made, but the justices were prepared to state a Case if required.

Norman Birkett, K.C., and *Eric Neve* showed cause.
John Flowers, K.C., and *Geoffrey Lawrence* in support of the rule.

LORD HEWART, C.J.—I have no doubt that this rule ought to be made absolute.

Section 57 (1) of the Licensing (Consolidation) Act, 1910, provides:

> "If the holder of a justices' on-licence applies to the local authority for an order (in this Act called a special order of exemption) exempting him from the provisions of this Act relating to general closing hours on any special occasion or occasions, the local authority may, if in their discretion they think fit to do

> so, grant to the applicant such a special order so exempting him during the hours and on the special occasion or occasions specified in the order." A

In order to see what happened here it is not necessary to go further than the affidavit of the clerk to the justices. He describes how an application was made and a contention was put forward that the period known as "summer time" created a special occasion within s. 57 (1), and he goes on to say that after certain exemptions had been granted the justices intimated that, if any licensees whose names did not appear in the list of applicants before them wished to apply subsequently for a similar order, it would be granted, if properly applied for. Again, the same gentleman says: B

> "The justices came to the conclusion that the whole period of summer time from April 13 to Oct. 9, as defined by the Summer Time Act was a special occasion within s. 57 of the Licensing (Consolidation) Act, 1910, and, therefore, granted the orders in the exercise of their discretion." C

It seems to me that that period cannot reasonably be held to be a special occasion within the meaning of this section, and, indeed, it is frankly admitted that, by parity of reasoning, the justices might have extended the time during which licensed houses might be open to the whole period of the licensing year. D More than that, this order bears all the marks of a general order, and just as I think that the occasion could not be special, so also I think that the order which the justices made with reference to what are called coastal parishes, or the coastal area, was general. It seems to me that the case to which our attention has been directed, *Rex* v. *Butt* (1), is directly in point.

It is said that certiorari will not lie because there was no excess of jurisdiction. E In my opinion, there clearly was excess of jurisdiction. It is true that the justices purported to act under s. 57, but they were doing something which s. 57 did not authorise them to do. It is said, further, that under s. 102 of the Act of 1910, their order cannot be questioned by certiorari. I do not think that s. 102 has any bearing upon this matter. Finally, it is tentatively said that the applicants for this rule are out of court because there was a time when they were minded to F raise the whole matter upon a Case Stated. I think, as the cases stand, that that also is immaterial. In my opinion, this is clearly a case where the justices acted in excess of their jurisdiction and the rule ought to be made absolute.

AVORY, J.—I am of the same opinion, upon the short ground that what is here described as "summer time" from April 13 to Oct. 9, is not a special occasion within the meaning of s. 57 of the Licensing Act. G I think that there is force in the argument which has been addressed to us in support of this rule that, if any such order as was made in this case was to have been made at all, the proper procedure would have been under s. 1 of the Licensing Act, 1921, and if any such application had been made under that Act, it appears by the rules that there must have been a public advertisement and the opportunity for any member of the public to come in and oppose. H In the other grounds which my Lord has stated for making the rule absolute, I entirely concur.

CHARLES, J.—I agree.

Rule absolute.

Solicitors: *Godden, Holmes, & Ward*, for *Gates, McCully, & Buckwell*, Brighton; *Walmsley & Stansbury*, for *J. E. Dell & Loader*, Shoreham, Sussex. I

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

MEDLICOTT v. EMERY

[King's Bench Division (Acton and Finlay, JJ.), May 4, 1933]

[Reported 149 L.T. 303; 49 T.L.R. 427; 77 Sol. Jo. 389]

Solicitor—Counsel's fees—Recovery from client—Payment by solicitor after withdrawal of authority by client.

A solicitor who has been instructed by his client to brief counsel is entitled to recover from his client fees paid to counsel, even though the payment is made by the solicitor after the client has stated that he does not propose to pay the fees.

A client instructed his solicitor to brief counsel to conduct an action, and a fee was marked on the brief with the client's knowledge and approval. The action resulted in judgment being given against the client and an order was made directing the client to pay the costs. The solicitor sent to the client a note of counsel's fees, which the client refused to pay, alleging that he was under no legal obligation to pay them. The solicitor himself then paid the fees.

Held: the solicitor could recover from the client the amount so paid to counsel.

Notes. As to recovery of disbursements by a solicitor, see 31 Halsbury's Laws (2nd Edn.) 173, 234; and as to a solicitor's authority in relation to incurring counsel's fees, see ibid., p. 104.

Cases referred to:

(1) *Read* v. *Anderson* (1884), 13 Q.B.D. 779; 53 L.J.Q.B. 532; 51 L.T. 55; 49 J.P. 4; 32 W.R. 950, C.A.; 1 Digest 372, *798*.

(2) *Seymour* v. *Bridge* (1885), 14 Q.B.D. 460; 54 L.J.Q.B. 347; 1 T.L.R. 236; 10 Digest (Repl.) 1146, *7981*.

Appeal by defendant from an order made by Master Ball in an action referred to him under Order XIV, r. 7.

The plaintiff, a solicitor, had been retained by the defendant to act for him in an action in which he instructed the plaintiff to brief a King's Counsel, and a brief was delivered to that counsel marked with a fee of fifty guineas. The counsel appeared in the action, in which judgment was given against the defendant, and an order made that he should pay the costs. After the trial counsel's clerk sent to the plaintiff his list of fees, and the plaintiff applied to the defendant for instructions to pay them, but the defendant refused to pay, saying that counsel were not entitled to sue for their fees, and that he was under no legal liability to pay them. The plaintiff, however, took the view that there was a moral duty to pay, and that it would be injurious to his professional reputation if he failed to do so. He, therefore, paid the fees himself and brought this action to recover the amount of them from the defendant. On the matter coming before the Master he gave judgment for the plaintiff in the following terms:

This is an action brought by a solicitor against his client to recover the sum of £55. The defendant, being concerned in an action pending in the Chancery Division, retained the plaintiff to act for him. When the day of trial drew near it became necessary to employ leading counsel. The defendant chose a certain King's Counsel and went to see him. Counsel's clerk pointed out that it would not be proper for the client to see counsel in the absence of his solicitor, and one of the plaintiff's clerks attended and a consultation was held. On the following day a brief was delivered to counsel, and after some discussion was marked with a fee of fifty guineas, and I find that the defendant never indicated to the plaintiff that he was not to be held responsible to pay this fee. The case proceeded, and the defendant was ordered to pay the costs. On June 22, 1931, the plaintiff sent a note of the counsel's fees to the defendant, who replied that counsel had no legal claim to be paid his fees, and that he (the defendant) was dissatisfied with the conduct of the case, and, therefore, did not propose to pay them. The plaintiff thereupon consulted the Law Society, whose secretary expressed the view that the plaintiff ought to pay counsel, and that the defendant was liable to reimburse the plaintiff. Eventually, on May 27, 1932, the plaintiff paid £55 in satisfaction of counsel's fees and brought the present action to recover that amount. In the course of his evidence, the plaintiff said: "I paid because it is the proper professional practice to pay fees marked on a brief." He was asked: "What are the consequences if you don't?" and replied: "Disciplinary action by the Law Society, and also one's reputation would be damaged with counsel, a thing which would make it difficult to get counsel to act for one, and that would be to the prejudice of one's client."

Two points are taken in the defence. In the first place, it is suggested that the action does not lie because no signed bill was delivered a month before action. I hold that there is nothing in this point. A list of counsel's fees was delivered to the defendant in June, 1931. The term "bill of costs" is not a term of art. The list so delivered—coupled with the signed bill the receipt of which the defendant admitted—constitutes a signed bill; and the fact that the amount sued for in the action is not the actual amount of the bill is immaterial.

The next point taken was this. It was said that the payment made by the plaintiff was purely voluntary; there was no obligation to make it, and it was made contrary to the defendant's express instructions. There is no doubt that a learned counsel cannot in any circumstances sue for his fees. He cannot sue the solicitor and he cannot sue the lay client. No authority need be referred to in support of that proposition. But that does not conclude the matter. One has to apply certain well-recognised principles concerning the relationship of principal and agent to the facts. It appears to me that when a client authorises a solicitor to mark a brief with a certain fee he authorises the solicitor to pay that sum to the member of the Bar who accepts the brief. If the solicitor actually paid that sum to the barrister before the barrister went into court, it is clear to me that he could then sue his client as for money paid to his use. But then suppose that after the brief is delivered and the case is over, and before counsel's fee has been paid, the client revokes his authority, and the solicitor notwithstanding the revocation pays the fee, can he recover it from the client? That is this case. The reason why the client revokes the authority appears to be irrelevant.

The general law on the subject is to be found in *Read* v. *Anderson* (1) from which it appears that there are cases in which, if a principal authorises an agent to incur an obligation which cannot be enforced at law, and the principal withdraws his authority, but the agent, in spite of the withdrawal, still incurs the obligation, he may recover over against the principal. In *Read* v. *Anderson* (1) it was clear that, if the plaintiff had not paid the bet, he would have been warned off the turf. In a later case, *Seymour* v. *Bridge* (2), it was clear that by the custom of the Stock Exchange the plaintiff would have been a defaulter if he had not discharged the contract in respect of which he was seeking indemnity. It is established in the present case that the plaintiff would have been subject to disciplinary action by the Law Society if he had not paid these fees. The question is whether the fact that the plaintiff, if he had failed to pay, would have been subjected to disciplinary action by the Law Society and would generally have been injured in his position as a solicitor is sufficient to bring this case within the principle of *Read* v. *Anderson* (1). In that case, Bowen, L.J., said (51 L.T. at p. 57):

> "There is a contract of employment between the principal and the agent, which expressly or by implication regulates their relations; and if as part of this contract the principal has expressly or impliedly bargained not to revoke the authority and to indemnify the agent for acting in the ordinary course of his trade and business, he cannot be allowed to break his contract."

I am of opinion that the loss and inconvenience which the plaintiff is likely to suffer in the case before me is of a very serious character. It is important to note, too, that in his dissenting judgment Brett, M.R., says this (51 L.T. at p. 56):

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> "But it has been contended that . . . the law puts it into the plaintiff's power to enforce payment by the defendant of the amount of a bet because unless it is paid the plaintiff will suffer a loss in his business; but the plaintiff's business, although it may not be illegal, is directly objected to by the law . . . and the inconvenience and loss which the plaintiff may suffer in his objectionable business form no ground for an action for revoking an authority which the B principal ought not to have given."

I regard this passage as important, because it shows that the court will have regard to the character of the business. Whatever may be said about the business of a turf commission agent, it cannot (to put the matter mildly) be said that there is anything objectionable to the law about the business of a solicitor. It might almost C be said that it was on this ground that BRETT, M.R., differed from the other members of the court.

Read v. *Anderson* (1) was followed a year later in *Seymour* v. *Bridge* (2), wherein there was no suggestion of an objectionable contract. The plaintiffs' brokers bought bank shares for the defendant, and bought them without the distinguishing numbers, so that by virtue of Leeman's Act the contract could not be enforced. D Before settling day, the defendant repudiated the contract, but the plaintiffs nevertheless paid under it, doing so because otherwise they would have been declared defaulters on the Stock Exchange. They were held to be entitled to recover the price of the shares.

In these circumstances I have come to the conclusion that the plaintiff has made out his case and there must be judgment accordingly.

E From this judgment the defendant appealed.

The appellant appeared in person.

Russell Vick for the respondent.

ACTON, J.—This case involves an unfortunate dispute between members of the legal profession to which we all belong. I have given it the most careful and anxious consideration, and in the result I agree with the view of the matter F taken by the Master, both on the law and on the facts, and the appeal must therefore be dismissed.

FINLAY, J.—I agree.

Solicitors: *Medlicott & Co.*

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

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GOODWIN FOSTER BROWN, LTD. *v.* DERBY CORPORATION

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Lawrence, JJ.), October 27, 30, 1933]

[Reported [1934] 2 K.B. 23; 103 L.J.K.B. 603; 151 L.T. 402; 32 L.G.R. 17] B

Compulsory Purchase—Exercise of powers—Date—Service of notice to treat.

The service of a notice to treat may be a step towards the exercise of powers of compulsory purchase, but it is not in itself an exercise of those powers.

A local Act authorised the compulsory acquisition of certain premises by a corporation. The owners of the premises granted a lease of the premises for a C term of years, with an option for an extension, "subject to the termination of such demise by reason of the exercise by the said corporation of such compulsory powers as may hereafter become effective." The corporation served a notice to treat upon the lessors in respect of their reversionary interest in the premises and subsequently a notice to treat upon the lessees, who were claiming compensation. D

Held: neither of the above notices to treat was an effective exercise of the corporation's compulsory powers of acquisition, which would terminate the lease and put an end to the lessees' interest in the premises; and, therefore, the lessees were entitled to compensation in respect of their interest in the premises as at the date when the notice to treat was served upon them.

Held, further: an official arbitrator under the Acquisition of Land (Assess- E ment of Compensation) Act, 1919, had, under s. 6 (1) of the Act, power to state his award in the form of a Special Case raising a question of law as to the title or interest of the claimant in the lands compulsorily acquired.

Notes. Section 6 of the Acquisition of Land (Assessment of Compensation) Act, 1919, was repealed by the Lands Tribunal Act, 1949, which, by s. 1 (3) (a) provided that there should be referred to and determined by the Lands Tribunal F any question which, by any Act (including a local Act), was directed to be determined by an official arbitrator under the Act of 1919. For the power of the Tribunal to state a Case for the opinion of the Court of Appeal, see the Act of 1949, s. 3 (4) (11).

As to notices to treat, see 10 HALSBURY'S LAWS (3rd Edn.) 60 et seq., and for cases see 11 DIGEST (Repl.) 186 et seq. For Lands Tribunal Act, 1949, see 28 G HALSBURY'S STATUTES (2nd Edn.) 317.

Cases referred to:

(1) *Guest* v. *Poole and Bournemouth Rail. Co.* (1870), L.R. 5 C. P. 553; 39 L.J.C.P. 329; 22 L.T. 589; 18 W.R. 838; 11 Digest (Repl.) 183, *501*.

(2) *Re Uxbridge and Rickmansworth Rail. Co.* (1890), 43 Ch.D. 536; 59 L.J.Ch. H 409; 62 L.T. 347; 38 W.R. 644, C.A.; 11 Digest (Repl.) 190, *572*.

Special Case stated by an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919.

The following facts were admitted on the hearing of the arbitration: By an agreement in writing dated June 17, 1929, and expressed in terms substantially similar to those of the lease next hereinafter mentioned, Messrs. Reid and Cooper-Parry, I the freeholders of premises in Full Street, Derby, comprising a warehouse, offices, store rooms, yard, garages, and fixtures, agreed to let the premises to Messrs. Goodwin Foster Brown, Ltd., grocers and provision merchants ("the claimants"), and on the date of that agreement the claimants entered into possession of these premises. The Derby Corporation Act, 1929, which received the Royal Assent on July 29, 1929, authorised the Derby Corporation ("the acquiring authority") to acquire such of the lands as were included within the limits defined by the Act as might be required for purposes therein specified, and incorporated the Lands

Clauses Acts and the Acquisition of Land (Assessment of Compensation) Act, 1919.

By a document purporting to be a lease under seal made on Aug. 19, 1929, Messrs. Reid and Cooper-Parry let to the claimants for five years from June 17, 1929, with an option to extend that term for a further five years, the abovementioned premises at the yearly rent of £750, the document containing the following clause:

> "2. The Derby Corporation having given notice that the premises hereby demised have been scheduled for compulsory acquisition under the provisions of a Bill promoted by them in Parliament which has not yet been passed, this demise and the option hereinafter granted for an extension thereof are made and granted subject to the termination of such demise by reason of the exercise by the said corporation of such compulsory powers as may hereafter become effective."

The document further provided (cl. 3) that the lessees to the intent that the obligation might continue throughout the term covenanted to paint all the internal wood, iron, and other work in and about the premises in the last year of the term; to keep the premises insured during the term; and to yield up the premises at the determination of the tenancy in good and tenantable repair; and (cl. 4) that the lessors covenanted that the lessees paying the rent reserved and observing the covenants on their part should, subject to cl. 2, peaceably hold and enjoy the premises during the term.

The acquiring authority served upon the lessors a notice to treat dated Oct. 12, 1929, in respect of their reversionary interest in the premises. By letter dated Nov. 7, 1929, the acquiring authority served upon the claimants a notice to treat dated Oct. 12, 1929, in respect of their interest (as lessees) in the premises. On Dec. 23, 1929, the claimants delivered to the acquiring authority a formal written claim for compensation in respect of the acquisition of the claimants' interest in the premises, and consequential loss and damage to the claimants. On July 25, 1931, the claimants vacated the premises in consequence of the service of the notice to treat, having up to that date paid the rent reserved. On Sept. 29, 1931, the acquiring authority obtained the freehold reversion of the premises subject to any right or interest of the claimants therein, exclusive of all fixtures.

The claimants and the acquiring authority being unable to come to an agreement in regard thereto, the question as to the amount of the compensation was referred to the official arbitrator. Before the hearing of the arbitration, however, the parties came to an agreement that the compensation should be £3,165 18s. 4d., the payment of that sum being conditional upon the claimants proving their interest in and title to the premises.

It was contended on behalf of the claimants: (i) That, having regard to the fact that the amount of compensation to be paid had been agreed between the acquiring authority and the claimants, leaving outstanding only the question of the claimants' title, the arbitrator had no jurisdiction except to make his award in the agreed terms; (ii) that the claimants would then have to sue on his award, and would thereby be enabled to submit the question of title for decision by the court; (iii) that if the arbitrator made his award in the form of a Special Case, the claimants would be deprived of the right to adduce further evidence to prove their title or interest in the lands and premises; (iv) that s. 6 (1) of the Acquisition of Land (Assessment of Compensation) Act, 1919, did not give an official arbitrator power to state a Special Case or to make his award in the form of a Special Case when the question of law was one of title or interest in the lands and premises, the subject of the arbitration; (v) that questions as to title and interest were not questions of law which could arise in the course of the proceedings of an arbitration under the Act of 1919, as they were not within the jurisdiction of the tribunal assessing the compensation; (vi) that the validity of the title claimed could not be disputed in proceedings taken for the assessment of compensation under the Act of 1919; and (vii) that if it was lawful and proper for the arbitrator to state his award in the form of a Special Case, the claimants had the title to and interest in the lands and premises as alleged in their written claim, and, therefore, that the arbitrator should make his award for the sum agreed. A

It was contended on behalf of the acquiring authority: (i) That the proper course for the arbitrator to follow was to state his award in the form of a Special Case for the opinion of the High Court; (2) that he had power to do so under the Act of 1919; (iii) that the notice to treat served upon the lessors of the premises, and/or B the acquisition by the acquiring authority of the reversionary interest of the lessors in the premises, was an effective exercise by the acquiring authority of their compulsory powers within the meaning of cl. 2 of the lease; (iv) that upon the date of such effective exercise of their compulsory powers the demise to the claimants of the above premises was duly terminated by reason of the terms of cl. 2 of the lease; and (v) that after the date of such effective exercise of compulsory powers C the claimants remained in occupation of the premises as tenants at will of the acquiring authority.

On March 6, 1933, the arbitrator made his award in the form of a Special Case, which stated the above facts, and submitted the following questions for the opinion of the court: 1. Whether it was lawful and proper for the arbitrator to state his award in the form of a Special Case, or whether he must make his award for the D claimants for the amount agreed between the parties. 2. If it was lawful and proper for him to state his award in the form of a Special Case, what was the claimants' title to and interest (if any) in the lands and premises. 3. If the claimants had a lease for five years from June 17, 1929, with an option for renewal for a further five years, then the arbitrator found that the acquiring authority had agreed to pay to the claimants as compensation the sum of £3,165 18s. 4d. 4. If E the claimants had not the title to or interest in the lands and premises as alleged in their claim, then he found that they were not entitled to any sum by way of compensation. The arbitrator also made alternative awards regarding costs.

R. M. Montgomery, K.C., and *A. Capewell* for the claimants.
H. H. Joy, K.C., and *T. N. Winning* for the acquiring authority. F

LORD HEWART, C.J.—This is an award stated in the form of a Special Case by an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919. The Case involves some matters which are, in my view, by no means free from difficulty, but I have come to the conclusion that, on the whole, the contention on behalf of the claimants is correct and should be upheld. G

There was a period during the hearing of the case when it was argued that an arbitrator could not deal with a question of title. Our attention was directed to various authorities upon that point, but none of them went to show that an arbitrator might not state a Special Case upon the question of title, and since s. 6 of the Act of 1919 came into operation, following as it did similar provisions in earlier Acts, it seems to me to be quite clear that the arbitrator has power to state H in the form of a Special Case for the opinion of the High Court any question of law arising in the course of the proceedings, including a question of title, and also power to state his award as to the whole or part in the form of a Special Case for the opinion of this court.

Here the Derby Corporation had been authorised to acquire lands compulsorily, and the official arbitrator was dealing with a difficult question relating to the I interests of the claimants as against the corporation in respect of certain of these lands, of which the claimants were said to be the lessees by virtue of a lease made on Aug. 19, 1929. Clause 2 of that lease provides that the demise is made and granted

> "subject to the termination of such demise by reason of the exercise by the said corporation of such compulsory powers as may hereafter become effective."

A question of difficulty which arises under that clause is, at what date did the exercise by the corporation of those compulsory powers or some of them become effective? There is, indeed, a preliminary question whether this particular clause affects these claimants at all in the present matter. The clause is ambiguous and it may well be that, so far as the claim of these claimants is concerned, the clause is of no force and effect. If it is of force, then it ought to be construed, not against the claimants, but against the corporation. When counsel for the acquiring authority was faced with the difficulty of saying when, if at all, the exercise by the corporation of the compulsory powers under the local Act became effective, he gave or seemed to give two answers. One of these was that the exercise of the powers became effective at the date of the service of the notice to treat upon the claimants, namely, Nov. 7, 1929; and the other was that it became effective at the date of the service of the notice to treat upon the lessors and/or the acquisition by the acquiring authority of the reversionary interest of the lessors in the premises. In my view, that argument places upon a notice to treat an importance which it does not deserve. Counsel for the claimants cited to us a series of cases forming part of a much larger whole, in which it has been considered whether the notice to treat may or may not be the exercise of compulsory powers, and in two of these cases, at any rate (*Guest* v. *Poole and Bournemouth Rail. Co.* (1) and *Re Uxbridge and Rickmansworth Rail. Co.* (2)), it was expressly stated that the service of the notice to treat was not the exercise of compulsory powers. Once that difficulty is got rid of, the position is that the lessees' interest is to be looked at as at the date of the notice to treat served upon them, namely, Nov. 7, 1929. At that date there had been no determination of this lease, and it was quite uncertain when the lease would be determined. Apparently it might run for the full term of five years with a possible extension for a further period of five years. Looking at the claimants' interest in that way, the official arbitrator has said in para. 3 of his award that, if the claimants have a lease for five years from June 17, 1929, with an option for renewal for a further five years, he finds that the acquiring authority have agreed to pay to the claimants as compensation the sum of £3,165 18s. 4d. It seems to me that, on the true construction of the lease, the claimants had that interest, and are entitled to that sum and to the corresponding amount of costs allowed in the concluding part of this Case Stated.

AVORY, J.—As to the first point raised, namely, whether the arbitrator had power to state a Special Case in the form in which he stated it, I have nothing to add to what my Lord has said. It is clear, I think, that he has not purported to take upon himself to determine any question of title or interest, but has reserved that question to this court, it being stated in the Case that before the hearing of the arbitration the parties agreed the compensation at a certain sum, the payment of that sum being conditional upon the claimants proving their interest in and title to the premises.

The substantial question is whether the claimants, upon this statement of facts, do prove their alleged interest in and title to the premises, namely, an interest under a lease thereof for five years with the option of a further five years. I agree with what my Lord has said that, if cl. 2 of the lease of Aug. 19, 1929, is ambiguous in its terms, it must be construed in the sense most favourable to the lessees and most adverse to the lessors and, therefore, for the purpose of this case, as between the acquiring authority and the claimants, in the sense most favourable to the claimants. In my view, however, there is no such ambiguity in the clause as to call that principle into operation. The whole contention on the part of the acquiring authority as to the meaning and effect of that clause is succinctly stated in para. 3 of the points of law submitted by them, namely, that the notice to treat served upon the lessors or the acquisition by the acquiring authority of the reversionary interest of the lessors was an effective exercise by the acquiring authority of their compulsory powers within the meaning of cl. 2 of the lease.

Upon the authority of the cases which have been cited, namely, *Guest* v. *Poole and Bournemouth Rail. Co.* (1) and *Re Uxbridge and Rickmansworth Rail. Co.* (2), I do not think that the notice to treat served upon the lessors was an effective exercise of the compulsory powers. As those cases state, the service of such a notice to treat may be a step towards the exercise of the compulsory powers, but it is not in itself an exercise of these powers. The second ground on which it is said by the acquiring authority that there was an effective exercise of the compulsory powers is the acquisition of the reversionary interest of the lessors. That, in fact, took place on Sept. 29, 1931, and, if it is suggested that the demise was determined at that date, it must be borne in mind that, for the purpose of assessing compensation to the lessee, what has to be considered is the interest which he, the lessee, had in the premises at the date when notice to treat was served upon him, and that notice to treat had been served upon the claimants on Nov. 7, 1929. It seems, therefore, to follow that at that last-mentioned date, which is for the present purpose the date to be considered, the claimants still had the interest created by the lease, and, according to the contention, it had not then been determined because it was not in fact determined until September, 1931. It thus appears to me that on neither of the grounds relied upon by the acquiring authority was there an effective exercise of their compulsory powers within the meaning of cl. 2 of the lease so as to deprive the claimants of their interest in the premises at the material date, which was Nov. 7, 1929.

For these reasons I agree that the award should stand, and that the claimants are, therefore, entitled to be paid as compensation the sum which has been agreed at £3,165 18s. 4d.

LAWRENCE, J.—I am of the same opinion. There are two constructions of cl. 2 of the lease between which to choose. The claimants and the acquiring authority are agreed in suggesting that the purpose of that clause was to protect the lessors against any possible claim by the lessees in case the acquiring authority should exercise their statutory powers; but, whereas the claimants allege that that was the sole object and effect of the clause, the acquiring authority contend that it has the additional effect by reason of the words used of putting an end to the interest of the lessees in the lease altogether. It is clear, I think, that an effective exercise of the compulsory powers would terminate the demise, but, in the absence of cl. 2, it would not put an end to the lessees' interest. The lessees' interest would then have to be valued and paid for. It seems to me that the words of cl. 2 are satisfied by reading them as referring to that inevitable fact and as having been inserted for the protection of the lessors against any assertion by the lessees of a greater interest than they might, in fact, have, and for no other purpose. The words are not, I think, sufficiently clear to indicate an intention to put an end to the lessees' interest and to transfer that interest to the lessors with the result that the lessors would be entitled as at the date of the exercise of the compulsory powers to compensation as a freeholder without any lease existing. I think that the difficulties which have been adverted to by my Lord and my brother AVORY point to this being the true construction, and I am, therefore, of opinion that the claimants are entitled to the sum of £3,165 18s. 4d., which has been agreed upon.

[As the case was not a consultative case, the court did not answer the four questions submitted to it seriatim and specifically, but answered question 1 in the affirmative, and as to question 3 declared that the claimants were entitled to the sum of £3,165 18s. 4d., there mentioned.]

Solicitors: *Timbrell, Deighton & Co.*, for *Weston, Fisher, & Weston*, Kidderminster; *Trevelyan Lee, Town Clerk*, Derby.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

Re MEWBURN'S SETTLEMENT. PERKS *v.* WOOD

[CHANCERY DIVISION (Maugham, J.), May 18, 1933]

[Reported [1934] Ch. 112; 103 L.J.Ch. 37; 150 L.T. 76; 77 Sol. Jo. 467]

Power of Appointment—Settlement executed before 1926—Power of appointment among issue "generally in such manner for the benefit of such issue or some or one of them as" the appointor "shall by will or codicil appoint"—Exercise of power—Validity of power of advancement in appointment.

By a settlement made in 1894 a trust fund, subject to a prior life interest, was directed to be held in trust for the issue of W.M. "in such shares and with such gifts over and generally in such manner for the benefit of such issue or some or one of them as the said W.M. shall by will or codicil appoint." By his will dated Dec. 10, 1902, W.M., in exercise of the said power, appointed the trust fund to his children in equal shares, the shares of daughters being settled on them and their issue. By cl. 9 of the will he provided that the trustees of the settlement might, with the consent of any person having a prior life interest, raise any part or parts not exceeding in the whole one-half of the then expectant or presumptive or vested share of any grandchild or remoter issue of his, and pay or apply the same for the advancement or benefit of such person in such manner as the person or persons exercising the power should think fit.

Held: the power of advancement in the will of W.M. did not go beyond what was authorised by the power in the settlement; it was valid as being a provision for "the benefit" of the issue of W.M. and was not objectionable as an attempt to delegate the power.

Notes. Distinguished: *Re Morris's Settlement Trusts, Adams* v. *Napier*, [1951] 2 All E.R. 528.

As to the exercise of powers, see 25 HALSBURY'S LAWS (2nd Edn.) 525 et seq., and for cases see 37 DIGEST 405 et seq.

Cases referred to:

(1) *Re Greenslade*, [1915] 1 Ch. 155; 84 L.J.Ch. 235; 112 L.T. 337; 59 Sol. Jo. 105; 37 Digest 408, *185*.

(2) *Re Joicey*, [1915] 2 Ch. 115; 84 L.J.Ch. 613; 113 L.T. 437, C.A.; 37 Digest 408, *186*.

(3) *Re May's Settlement*, [1926] Ch. 136; 95 L.J.Ch. 230; 134 L.T. 696; 37 Digest 409, *187*.

Adjourned Summons.

By a settlement made on May 2, 1894, between William Mewburn, the elder, of the one part, and William Mewburn, the younger, and three others, of the other part, certain securities, therein called the "trust fund," were settled upon trust to pay the income thereof to William Mewburn the younger, during his life or until forfeiture as therein provided, and the settlement continued:

> ". . . subject to the trusts and provisions hereinbefore contained the trust fund and the income thereof shall be held in trust for all such one or more exclusively of the other or others of the issue of the said William Mewburn, the younger, whether children or remoter issue at such time and if more than one in such shares and with such gifts over and generally in such manner for the benefit of such issue or some or one of them as the said William Mewburn the younger shall by will or codicil appoint, but so that under any appointment a child shall not take a vested interest unless being a son he attains the age of twenty-one years or being a daughter she attains that age or marries."

In default of appointment there was a gift over to the said children, if more than one, in equal shares.

A William Mewburn the younger died on May 14, 1932, having by his will dated Dec. 10, 1902, after reciting the above-mentioned power of appointment, together with another power not material to be here stated, provided as follows:

> "Clause (1): . . . I hereby appoint that the trustees or trustees for the time being of the said . . . indenture [i.e., the settlement] shall from and after my decease . . . stand possessed of the capital and income of so much of the said . . . trust fund . . . as I have power to appoint in trust for all or any my children or child who being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or marry, and if more than one in equal shares. . . ." B
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> "Clause (2): . . . I further declare and appoint that notwithstanding the appointment hereinbefore made the shares . . . of the . . . said trust fund which are . . . hereinbefore expressed to be appointed to each daughter of mine who shall attain the age of twenty-one years or marry shall not in the case of any of my said daughters now living vest absolutely in such daughter but shall be retained by the trustees or trustee for the time being of the said . . . indenture . . . and held by them or him upon trust during the life of such daughter to pay the income of her . . . share to her for her separate use (without power of anticipation) and after the death of such daughter the trustees or trustee for the time being of the said . . . indenture shall hold such share . . . and the future income thereof upon trust for such person or persons for such purposes and in such manner as such daughter shall whether covert or sole by will or codicil thereto appoint, and in default of and subject to any such appointment as to the capital and income of such share . . . of the said trust [fund] in trust for all such of the children of such daughter of mine as shall be living at my decease and being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or marry under that age and if more than one in equal shares." C D E

By cl. 9 of the will he continued as follows:

> "Provided always and I declare so far as I lawfully can I further appoint that the trustees or trustee for the time being of . . . [the settlement] as to the trust fund hereinbefore appointed . . . may at any time or times but so that in regard to any estate funds or moneys in which any person or persons may have a prior life or other interest, the exercise of this present power be with their his or her consent in writing whilst having such interest whether contingent or not raise any part or parts not exceeding in the whole one-half of the then expectant or presumptive or vested share of any grandchild or remoter issue of mine under the appointments made by . . . this my will and pay or apply the same for the advancement or benefit of such person in such manner as the person or persons exercising this power shall think fit. . . ." F G

The trustees of the settlement took out this summons asking (inter alia) whether, upon the true construction of the settlement and in the events which had happened, the trustees for the time being of the settlement had power to advance any, and, if so, what, part of the share in the trust funds subject to the trusts of the settlement to which the infant defendants to the summons (grandchildren of William Mewburn the younger) were entitled with the consent of the tenant for life of the share, for the benefit of those infant defendants. William Mewburn the younger had six children, all of whom were born prior to the date of the settlement, and were defendants to the summons. H I

J. V. Nesbitt for the plaintiffs, the trustees of the settlement.

R. M. Pattisson for the children and grandchildren of William Mewburn the younger.

MAUGHAM, J.—This summons raises an interesting point on which different minds might come to different conclusions. [His Lordship stated the facts, and continued:] The question which arises is whether, under the power of appointment given to him in the settlement, William Mewburn, the younger, was justified in giving a power of advancement to the trustees of the settlement. The answer to that question depends simply upon the true construction of the power of appointment. It is well settled that, primâ facie, a person with a power of appointment is not entitled to delegate the exercise of the power unless there is something to justify the delegation. The question, therefore, in the present case, is whether the words in the settlement

> ". . . generally in such manner . . . as the said William Mewburn the younger shall by will or codicil appoint . . ."

justify the insertion by William Mewburn the younger, in the words by which he purported to exercise the power, of a common form power of advancement in favour of the objects of the power.

The matter is not free from authority. It is dealt with by a decision of my brother EVE in *Re Greenslade* (1), a decision of the Court of Appeal in *Re Joicey* (2), and a decision of ASTBURY, J., in *Re May's Settlement* (3). In *Re Greenslade* (1) the power was of the barest kind. It was a power to a daughter, given by her father's will, to appoint the property in question in trust for her children or any of their issue. There was in the power no context or language which seemed to authorise anything more than a statement of the way in which the property was to be divided, though the power, no doubt, enabled the donee to declare substituted interests, life interests to her children, and ultimate interests to their children, within the limits of the rule against perpetuities. The testator declared that his trustees might apply the annual income to the benefit of which any infant should be entitled in expectancy under the trusts of his will for or towards that infant's maintenance, education or benefit. The matter was somewhat complicated by the testator's declaring, in a codicil, that that power of maintenance should apply only to income to which the infant was, or if of full age would be, entitled. The daughter appointed the property upon such trusts that the interests of her grandchildren were at the date of the summons merely contingent, and she purported to confer a power of maintenance in their favour on the trustees. The learned judge said:

> ". . . it cannot, I think, be denied that the trustees, acting under that power, could divert income from objects of the power of appointment, who become ultimately entitled in possession under the appointment, to other objects, who, in the event, may never become entitled in possession. . . . It must, therefore, be admitted that the power enables the trustees to modify in some respects the appointment made by the donee, a result which is for practical purposes tantamount to what would have arisen had the appointment of the income accruing prior to the period of distribution been made in express terms to such of the objects as the trustees might select. In other words, I think the power is, in effect, an attempt to delegate to the trustees a personal discretion exercisable by the donee."

The case, of course, was one in which the learned judge was dealing with the particular power of appointment which he had before him, in which there were no words such as were to be found in the power dealt with in *Re Joicey* (2), or such as exist in the case before me.

In *Re Joicey* (2) a testator gave a sum of money to trustees upon trust to pay the income to his daughter for life, and after her decease as to the principal in trust for her issue born in her lifetime "for such interests in such proportions and in such manner in all respects" as she should by deed or will appoint. The daughter by her will appointed the fund among all her children who should survive her and being male attain the age of twenty-one, or being female attain that age or marry, and she declared that during the period of twenty-one years from her death the income of each child's share should be paid to the child, and if the child should die within the period of twenty-one years the child should have a power of appointment by will, and, subject thereto, in the event of the child leaving issue, in trust for the child absolutely; but in the event of the child not leaving issue the share was to go by way of accruer to the other shares. If the child survived the period of twenty-one years it was to take absolutely,

> "provided always that the said trustees [of the testator's will] shall (if and so far as I can authorise the same) have power from time to time or at any time during the said period of twenty-one years in their absolute discretion to transfer and make over the share or shares for the time being of the appointed funds of any son of mine who shall have attained the age of twenty-one years or any part of such share or shares to such son for his own use absolutely."

That is in substance the statement of facts as given in the headnote. The will was of a peculiar character, and the question before the court was not as to the propriety of the daughter's giving powers of management and advancement to the trustees, but was whether the proviso was valid, and it had to be admitted that the delegated power, if exercised, would have the effect of turning the contingent interest of the son in whose favour it was exercised into an absolute interest and destroying the interest to which younger children might in certain events become entitled. The Court of Appeal pointed out that that was beyond an ordinary power of advancement, though it is only fair to say that they intimated that strong arguments might be put forward in favour of an ordinary power.

In *Re May's Settlement* (3), ASTBURY, J., had before him a simpler case than I have before me. It was a case (again I am reading substantially from the headnote) in which a widow with a special power of appointing a settled fund (subject to her own life interest) to her issue "in such manner and form in every respect" as she should by deed or will appoint, irrevocably appointed the fund by deed to her two infant children (naming them) in equal shares as tenants in common, and gave the trustees (of the settlement) an ordinary power of advancement. It was clear that the children took absolute interests and the only question was whether the widow's exercise of the power, in so far as it purported to give to the trustees of the settlement a power of advancement, was valid or not. The learned judge had no difficulty in distinguishing *Re Greenslade* (1) and in holding that in the case before him the appointment was not invalid as being a delegation, but was a perfectly good exercise of the power given.

I have before me in the present case a wide power which refers in particular to an appointment for the benefit of the issue of William Mewburn the younger, or such of them as he should by deed or will appoint. For many years past a parent who desires to appoint for the benefit of his or her own issue or who is dealing with his or her own property, has found it a wise precaution, in many cases, to defer the giving of an absolute interest to children and to provide for powers of management during the attaining of a vested interest and for powers of advancement limited to one-half of the presumptive or expectant share of the object of the power. Such clauses have almost invariably been inserted in properly drawn settlements and wills whereby young children have to be provided for. So common has a power of advancement become that the legislature has thought fit to give trustees a power of advancement at any time. This it has done by s. 32 (1) of the Trustees Act, 1925, which is as follows:

> "Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and such payment or application may be made notwithstanding that the interest of such person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs: Provided that—(a) the money so paid or applied for the advancement

> or benefit of any person shall not exceed altogether in amount one-half of the presumptive or vested share or interest of that person in the trust property; and (b) if that person is or becomes absolutely and indefeasibly entitled to a share in the trust property the money so paid or applied shall be brought into account as part of such share; and (c) no such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied, unless such person is in existence and of full age and consents in writing to such payment or application."

In the present case I have to ask myself whether the power of advancement in cl. 9 of the will of William Mewburn, the younger, goes beyond what is authorised by the power in the settlement. In my view, a power of advancement of the character of the one before me, having regard to the terms of the power of appointment which I have read, and to the circumstance that at the date at which the instrument creating the power was made such a provision was common form, is valid as being a provision

> "for the benefit of such issue or some or one of them as the said William Mewburn the younger shall by will or codicil appoint,"

and is, therefore, not objectionable on the ground that it was an attempt to delegate the power.

I am glad to observe that questions of this sort will not arise in the case of trusts constituted or created after Jan. 1, 1926, it being expressly provided by sub-s. (3) of s. 32, of the Trustee Act, 1925, that that section does not apply to trusts constituted or created before the commencement of the Act. With regard, therefore, to settlements and wills executed after that date, there will be no difficulties of the kind with which I have here had to deal.

Solicitors: *Sole*, *Sawbridge & Co.*, for *Bailey & Cogger*, Tonbridge.

[*Reported by* MISS B. A. BICKNELL, *Barrister-at-Law.*]

HILLER *v.* UNITED DAIRIES (LONDON), LTD.

[COURT OF APPEAL (Lord Hewart, C.J., Lord Wright, and Slesser, L.J.), October 5, 6, 1933]

[Reported [1934] 1 K.B. 57; 103 L.J.K.B. 5; 150 L.T. 74; 50 T.L.R. 20]

Rent Restriction—Persons protected—Company—Protection from eviction—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 5.

A trading company, which is the tenant of premises occupied as a dwelling-house by its servant, is not entitled to the protection from eviction conferred on tenants by the Rent Restriction Acts because it does not, and cannot, occupy the house as its home.

Reidy v. *Walker* (1), [1933] 2 K.B. 266, approved.

Haskins v. *Lewis* (2), [1931] 2 K.B. 1, and *Skinner* v. *Geary* (3), [1931] 2 K.B. 546, applied.

Duke of Richmond v. *Dewar* (4) (1921), 38 T.L.R. 151, overruled.

Notes. Applied: *S. L. Dando, Ltd.* v. *Hitchcock*, [1954] 2 All E.R. 335.

As to the application of the provisions of the Rent Restrictions Acts as to limitation of rent where a limited company is tenant, see *Carter* v. *S. V. Carburettor Co., Ltd.*, [1942] 2 All E.R. 228. For the security of tenure now given in respect of business premises, see the Landlord and Tenant Act, 1954, Part II, 34 Halsbury's Statutes (2nd Edn.) 382. As to the position of a limited company's tenancy under the Rent Restrictions Acts, see 20 Halsbury's Laws (2nd Edn.) 334, para. 401, and for cases on the subject see 31 Digest (Repl.) 660, *7617–7618*. For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5, see 13 Halsbury's Statutes (2nd Edn.) 981.

Cases referred to:

(1) *Reidy* v. *Walker*, [1933] 2 K.B. 266; 102 L.J.K.B. 424; 149 L.T. 238; 49 T.L.R. 386; 77 Sol. Jo. 267, D.C.; 31 Digest (Repl.) 660, *7617*.

(2) *Haskins* v. *Lewis*, [1931] 2 K.B. 1; 100 L.J.K.B. 180; 144 L.T. 378; 95 J.P. 57; 47 T.L.R. 195; 29 L.G.R. 199, C.A.; 31 Digest (Repl.) 650, *7532*.

(3) *Skinner* v. *Geary*, [1931] 2 K.B. 546; 100 L.J.K.B. 718; 145 L.T. 675; 95 J.P. 194; 47 T.L.R. 597; 29 L.G.R. 599, C.A.; 31 Digest (Repl.) 659, *7612*.

(4) *Duke of Richmond* v. *Dewar & Cadogan Hotel Co., Ltd.* (1921), 38 T.L.R. 151, D.C.; 31 Digest (Repl.) 648, *7523*.

(5) *De Beers Consolidated Mines, Ltd.* v. *Howe*, [1906] A.C. 455; 75 L.J.K.B. 858; 95 L.T. 221; 22 T.L.R. 756; 5 Tax Cas. 198; 13 Manson 394.

(6) *Keeves* v. *Dean*, [1924] 1 K.B. 685; 93 L.J.K.B. 203; 130 L.T. 593; 40 T.L.R. 211; 68 Sol. Jo. 321; 22 L.G.R. 127, C.A.; 31 Digest (Repl.) 694, *7865*.

Appeal.

The tenants appealed from the decision of a Divisional Court (Acton and Goddard, JJ.) dismissing their appeal from a judgment in favour of their landlord, the plaintiff, given at Wood Green County Court. The landlord claimed possession of certain premises, No. 113, High Road, Wood Green, which had been demised by a lease made in 1905 by the landlord's predecessor in title to the tenants' predecessors in title for a term of twenty-six years from Dec. 25, 1905. The lease expired on Dec. 25, 1931, prior to which date it had been assigned to the tenants, who were a limited liability company. It contained a covenant that the premises were only to be used for carrying on the business of a dairyman. The premises consisted of a shop on the ground floor, with living accommodation on the upper floors, which were occupied by the manager of the shop, who was the servant of the tenants.

The tenants contended that they were statutory tenants, entitled to retain possession under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The county court judge, following the decisions of the Court of Appeal in *Skinner* v. *Geary* (3) and of the Divisional Court in *Reidy* v. *Walker* (1), held that the Act did not apply to the tenancy of a limited company, and gave judgment for the landlord. The Divisional Court dismissed an appeal from this judgment. The tenants now appealed to the Court of Appeal.

R. C. Vaughan for the tenants.—The decision in *Reidy* v. *Walker* (1) was wrong: that decision was an unwarrantable extension of *Skinner* v. *Geary* (3). The tenants were in actual occupation by their servant. There was nothing in the Act to exclude corporations from its protection, and in some of the earlier cases the courts had held that companies were within the Act. An instance of this was to be found in *Duke of Richmond* v. *Dewar* (4).

Robert Fortune and *Sir Alfred Callaghan* for the landlord.—The Act applied only to the domestic occupation of dwelling-houses, and only to personal occupation by the tenant. Neither of these conditions could exist in the case of a trading company.

LORD HEWART, C.J.—In this appeal we have heard an able and full argument from counsel for the tenants, but it seems to me that their appeal fails, and fails for the reason that, on the materials which are before us, there is no difference in principle between this case and *Haskins* v. *Lewis* (2) and *Skinner* v. *Geary* (3). The learned judge in the county court was of opinion that evidence had been withheld by the tenants, the present appellants, as to the terms on which their manager resided over the shop where the business of dairymen was carried on. This court must take the materials which are before it, and I think that the Divisional Court came to a correct conclusion and was following, and rightly following, the two cases to which I have referred. I think, therefore, that this appeal must be dismissed.

LORD WRIGHT.—I agree. The Divisional Court gave no specific judgment in this case because the parties agreed before the Divisional Court that the matter was not capable of further discussion there, being concluded by the just previous decision of that court in *Reidy* v. *Walker* (1). In that case the Divisional Court held that they were bound by the principles laid down by the Court of Appeal in *Skinner* v. *Geary* (3). I agree with that conclusion. If the matter was not covered, as I think it is, by the authority of that case I should certainly have required an opportunity of considering the point very carefully. There has been considerable difference of opinion in very authoritative quarters on the question here involved, but the decision of the court in *Skinner* v. *Geary* (3) lays down quite clearly the principle for the construction of the Rent Restriction Acts, and lays it down in terms which precisely apply to the present case.

I need not now repeat at length what was said by SCRUTTON, L.J., with whom SLESSER, L.J., agreed, in *Skinner* v. *Geary* (3), but I will just read one short passage from the judgment of the Lord Justice in which he says (145 L.T. at p. 680):

> "In my opinion it has not done so because it [that is the Act] never contemplated the possibility of the tenant living somewhere else. A non-occupying tenant was in my opinion never within the precincts of the Acts, which were dealing only with an occupying tenant who had a right to stay in and not be turned out. This case is to be decided on the principle that the Acts do not apply to a person who is not personally occupying the house, and who has no intention of returning to it. I except, of course, such a case as that to which I have already referred—namely, the temporary absence, the best instance of which is that of a sea captain who may be away for months, but who intends to return, and whose wife and family occupy the house during his absence."

Skinner v. *Geary* (3) really followed the principles which had already been laid down by the Court of Appeal in *Haskins* v. *Lewis* (2), where SCRUTTON, L.J., expressed substantially the same view as to the construction of the Act. ROMER, L.J., put the matter in this way (144 L.T. at p. 382):

> "It has frequently been pointed out in the courts, and it has been pointed out once more by SCRUTTON, L.J., in the judgment that he has just given, that the principal object of the Rent Restriction Acts was to protect a person residing in a dwelling-house from being turned out of his home. Where, therefore, when the contractual tenancy comes to an end, the tenant is not in physical possession of any part of the premises, there is nothing in the Act which enables him to resist the claim of his landlord to possession, whether he has gone out without sub-letting the premises or whether he has sub-let the premises as a whole."

The Lord Justice there takes as the test the question of physical possession.

As I understand the argument very ably put forward by counsel for the tenants in the present case it is this, that as the tenants are a company, and therefore incapable of physical possession, they ought to be placed in a better and different position from the position of one who is an individual and not merely a juristic person. I cannot follow that argument at all. If the rights under the Acts which are given to the statutory tenant are, as this court has held in several cases, purely personal, I do not see how these rights can be vicariously enjoyed or how the principle of dwelling by an agent in the premises can be admitted. I do not wish to discuss the matter at any further length or even to consider whether it is possible now to reconcile the case relied upon by counsel for the tenants, *Duke of Richmond* v. *Dewar* (4), with the principle laid down in the Court of Appeal in the authorities to which I have referred. It is enough to say that I think, as Goddard, J., has very clearly expressed it, that the present case is precisely covered by the principles laid down in this court which are binding on us sitting here to-day. I think, therefore, that the appeal should be dismissed.

SLESSER, L.J.—I am of the same opinion. This appeal is an important one because, before the difficult principles which affect this particular matter were clarified, there were cases where relief has been given to limited companies who have been tenants. I refer in particular to *Duke of Richmond* v. *Dewar* (4); but since the time when that case and other similar cases were decided, various cases have been before this court which have now established principles which make it impossible to say that a company such as this one can any longer be a tenant entitled to the protection of the Rent Acts. The cases which have decided that, as my Lords have said, are *Haskins* v. *Lewis* (2) and *Skinner* v. *Geary* (3). In *Skinner* v. *Geary* (3), Scrutton, L.J., at the end of his judgment made it quite clear that before a tenant could avail himself of the protection of the Act he must show that the house or part of the house is in some sense his home. He uses this language (145 L.T. at p. 683):

> "For the reasons I have given the Act does not, in my opinion, apply to protect a tenant who is not in occupation of a house in the sense that the house is his home and to which, although he may be absent for a time, he intends to return."

And again:

> "A man who does not live in a house and never intends to do so is, if I may use the expression, withdrawing from circulation that house which was intended for occupation by other people."

Goddard, J., in the case of *Reidy* v. *Walker* (1), used very much the same phrase, where he says that the Court of Appeal lays down the proposition that before a person has become a statutory tenant his occupation is of an essential domestic quality (149 L.T. at p. 239). If that be the test here to apply it is to my mind evident that this trading company cannot have that domestic quality, it cannot have a home, and it cannot in that sense reside. As Lord Loreburn, L.C., said in *De Beers Consolidated Mines, Ltd.* v. *Howe* (5) ([1906] A.C. at p. 458), a company cannot eat or sleep.

Counsel for the tenants seeks to avoid the difficulty by pointing to the fact that in this case it is found by the learned county court judge that the manager of the shop has been residing over the shop for about six or eight months. Owing to the wise or unwise decision of the company here to call no evidence we do not know the terms on which that manager resided over the shop. If he is a sub-tenant, of course, that would exclude any possibility of the company seeking the protection of the Act. Even if he was not it is quite impossible in my view for the tenant company to say, as their counsel argues, that they occupy this shop and the residence above it through their manager. The occupation under the Act must be of a personal kind. As Bankes, L.J., said in *Keeves* v. *Dean* (6) ([1924] 1 K.B. at p. 690)

> "His right is a purely personal one, and as such, unless the statute expressly authorises him to pass it on to another person, must cease the moment he parts with the possession or dies."

Here the right, such as it is, is a personal right of tenancy of the company. There is no evidence they have parted with the possession of it, and if they had it would in itself exclude them from any rights here. They cannot by the nature of themselves reside in a domestic sense, they cannot come or go to these particular premises and they are without the Act.

I would only add this. I do not intend to decide, it is not necessary to decide in this case, whether the Act can in all circumstances be said not to apply to a corporation. A corporation may be a corporation aggregate or a corporation sole. There may be cases where corporations, particularly corporations sole, may come within the province of the Act. It is not necessary to decide the point. It is sufficient to say that this trading company cannot come within the Act, and that *Skinner* v. *Geary* (3) and *Haskins* v. *Lewis* (2) exclude it. I agree, therefore, that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *S. L. MacAndrew*; *Payne & Co.*

[*Reported by* V. R. Aronson, Esq., *Barrister-at-Law.*]

Re SUTTON. EVANS *v.* OLIVER.

[Chancery Division (Luxmoore, J.), December 6, 21, 1933]

[Reported [1934] Ch. 209; 103 L.J.Ch. 127; 150 L.T. 453; 50 T.L.R. 189]

Will—Distribution of property according to statutes of distribution—Will coming into operation before 1926—Trusts for persons "who under the statutes for the distribution of the personal estates of intestates would be entitled if I were to die immediately after . . . my wife"—Death of testator in 1923—Death of widow in 1933—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 50 (2).

The testator directed his trustees to pay the income arising from his residuary estate to his wife during her life and subject thereto to hold the same in trust "for such person or persons (with the exception of my nephew J.B. and his issue if any) who at the decease of my said wife shall be of my blood and of kin to me and who under the statutes for the distribution of the personal estates of intestates would be entitled to my personal estate if I were to die immediately after the death of my said wife intestate and domiciled in England, such persons if more than one to take in the portions prescribed by such statutes."

The testator died in 1923. On Jan. 1, 1926, the Administration of Estates Act, 1925, came into operation, which varied the law relating to the distribution of effects of intestates, and further provided, by s. 50 (2), that "trusts declared in a will coming into operation before the commencement of this Act by reference to the statutes of distribution" should, unless the contrary thereby appeared, be construed "as referring to the enactments (other than the Intestates Estates Act, 1890) relating to the distribution of effects of intestates which were in force immediately before the commencement of this Act."

Held: the law applicable to the distribution of the testator's estate was the law governing the distribution of personal property immediately before Jan. 1, 1926, because (i) the will contained sufficient reference to the statutes of distribution to bring s. 50 (2) into operation; (ii) neither the express exclusion of the issue of a nephew nor the words "if I were to die . . . after . . . my wife" showed a contrary intention.

Notes. The provisions of the Administration of Estates Act, 1925, as to distribution on intestacy have been amended by the Intestates' Estates Act, 1952; but s. 50 of the 1925 Act has not been amended.

Referred to: *Re Hooper's Settlement Trusts, Phillips* v. *Lake*, [1943] 1 All E.R. 173.

As to references to the statutes of distribution in settlements made before 1926, see 29 Halsbury's Laws (2nd Edn.) 609, para. 884; and as to such references in a will coming into operation before 1926, see 34 Halsbury's Laws (2nd Edn.) 318, para. 367. For the Administration of Estates Act, 1925, s. 50 (1), (2), see 9 Halsbury's Statutes (2nd Edn.) 757.

Case referred to:

(1) *Re Sutcliffe, Sutcliffe* v. *Robertshaw*, [1929] 1 Ch. 123; 98 L.J.Ch. 33; 140 L.T. 135; 72 Sol. Jo. 384.

Adjourned Summons.

Joseph Edward Sutton, by his will dated March 13, 1923, after appointing executors and trustees and making certain pecuniary and specific bequests, devised his freehold messuage, "The Priory," West Hampstead, to his trustees upon trust to permit his wife, Ellen Sutton, to reside there during her life as therein provided, and after the death of his wife, or her ceasing to reside therein, upon trust for sale, and to stand possessed of the proceeds upon the trusts and subject to the provisions affecting his residuary estate. The testator devised all his real estate and bequeathed all the personal estate of which he should die possessed, and which should not be otherwise disposed of by his will, upon trust to sell (subject to a power to postpone sale) and convert the same and, after payment of his debts, funeral and testamentary expenses, death duties, and legacies thereby bequeathed, to stand possessed of the residue thereof upon trust, after the purchase of certain annuities, to invest the same as therein provided and to pay the income arising therefrom to his wife during her life for her separate use without power of anticipation, and subject thereto, "in trust as to such residue and income for such person or persons (with the exception of my nephew Joseph Browning and his issue if any), who at the decease of my said wife shall be of my blood and of kin to me, and who under the statutes for the distribution of the personal estates of intestates would be entitled to my personal estate if I were to die immediately after the death of my said wife intestate and domiciled in England, such persons if more than one to take in the portions prescribed by such statutes."

The testator by his said will gave directions to his trustees as to advertising in such newspapers of the United Kingdom and of Canada, Australia, New Zealand, and South Africa, and of the United States, as his trustees should select for one clear year, if any difficulty should arise as to ascertaining or tracing the person or persons entitled to a share of his residuary estate under the foregoing bequest thereof. He further provided that, at the end of such year, his trustees might divide his residuary estate among the persons of whom they had knowledge or should have answered such advertisements, and that any unknown or untraced person should be considered to have died in the testator's lifetime and not to be entitled to a share or shares of his residuary estate, and directed that each of his trustees at the completion of the administration of his estate should receive an additional legacy of £300.

The testator died on Oct. 9, 1923, and his will was duly proved on Nov. 5, 1923. The estate was duly administered, the Priory being sold, and the proceeds of sale added to the residuary estate. The testator's widow died on June 6, 1933.

The next-of-kin of the testator under the law in force immediately before the commencement of the Administration of Estates Act, 1925, were not entirely the same persons as those who would be his next-of-kin under the provisions of that Act. Before advertising for next-of-kin, in accordance with the directions contained in the will, the trustees of the will issued this summons to have it determined (inter alia) whether, on the true construction of the said will and in the event which had happened, namely, the death of the testator's widow on June 6, 1933, the persons entitled to the residuary estate of the testator were the persons who were of the testator's blood and of kin to him if the testator had died on June 7, 1933, or

A alternatively on June 6, 1933, have been entitled to his personal estate (a) under the Statute of Distribution, 22 & 23 Car. 2, c. 10; or (b) under the Administration of Estates Act, 1925, and in the several shares and proportions to which such persons would be entitled under such statutes respectively.

The Administration of Estates Act, 1925, s. 50 (2), provides that

> B "Trusts declared in an instrument inter vivos made, or in a will coming into operation, before the commencement of this Act by reference to the Statutes of Distribution, shall, unless the contrary thereby appears, be construed as referring to the enactments (other than the Intestates' Estates Act, 1890) relating to the distribution of effects of intestates which were in force immediately before the commencement of this Act."

C The arguments appear sufficiently from the judgment.

Meyrick Beebee for the plaintiffs, the trustees of the will.

Wilfrid Hunt for the first defendant, one of the persons who would be entitled under the new law.

Roxburgh, K.C., and *C. A. J. Bonner* for the persons claiming as next-of-kin under the old law.

D *Cur. adv. vult.*

Dec. 21, 1933. **LUXMOORE, J.**, read the following judgment.—The testator by his will dated March 13, 1923, devised all his real estate and bequeathed all his personal estate on trust for sale, and, after providing for the payment of his debts, funeral and testamentary expenses, and legacies and the duty thereon, directed his E trustees to purchase certain annuities, and to invest the residue of his estate, and to stand possessed of the investments on trust to pay out of the income the expenses of the management of his estate, and to pay the residue of such income to his wife during her life. The will continued in these terms:

> "Subject thereto in trust as to such residue and income for such person or persons (with the exception of my nephew Joseph Browning and his issue if F any) who at the decease of my said wife shall be of my blood and of kin to me and who under the statutes for the distribution of the personal estates of intestates would be entitled to my personal estate if I were to die immediately after the death of my said wife intestate and domiciled in England, such persons if more than one to take in portions prescribed by the same statutes."

The will contained a declaration that:

> G "In case any part of my estate shall at the time of my death consist of freehold property the same shall as from the date of my death be deemed to be and shall pass as personal property."

The testator died on Oct. 9, 1923, and his widow died on June 6, 1933.

The question that arises for decision is, whether the persons to take under the H residuary gift in favour of

> "such person or persons (with the exception of my nephew Joseph Browning and his issue, if any) who at the decease of my said wife shall be of my blood and of kin to me"

are to be ascertained in accordance with the law as it stood before the Adminis- I tration of Estates Act, 1925, came into operation, or in accordance with the law laid down by that Act.

By s. 50 (1) of the Administration of Estates Act, 1925, it is provided that:

> "References to any statutes of distribution in an instrument inter vivos made or in a will coming into operation after the commencement of this Act, shall be construed as references to this Part of this Act; and reference in such an instrument or will to statutory next-of-kin shall be construed, unless the context otherwise requires, as referring to the persons who would take beneficially on an intestacy under the foregoing provisions of this Part of this Act."

Subsection (2) provides:

> "Trusts declared in an instrument inter vivos made, or in a will coming into operation, before the commencement of this Act by reference to the Statutes of Distribution, shall, unless the contrary thereby appears, be construed as referring to the enactments (other than the Intestates' Estates Act, 1890) relating to the distribution of effects of intestates which were in force immediately before the commencement of this Act."

It is therefore necessary in the case of a will coming into operation before the commencement of the Act, if the mode of distribution laid down by the Administration of Estates Act, 1925, is to apply, that there should be found in that will an expression of intention to that effect. The testator died before Jan. 1, 1926, the date fixed for the coming into operation of the Administration of Estates Act, 1925. His wife died after that date.

Counsel for the persons who are entitled if the distribution is to be governed by the Administration of Estates Act, 1925, argued that that Act applies because there is no reference in the will to the Statutes of Distribution within the meaning of s. 50 of that Act, and that there is therefore no need to consider whether there is any contrary intention expressed in the will. He argued that the phrase "statutes for the distribution of the estates of intestates" on its true construction is a reference, not to particular statutes in force at the date of the testator's death, but to the general statute law which may happen to be in force at the date of distribution. In support of his argument he pointed out that in the phrase used by the testator the word "distribution" is written with a small "d," and that the words "for the distribution of the personal estates of intestates" are descriptive of the objects of the statutes, and are more apt to describe the general law than to describe particular statutes or a particular statute which are or may be referred to as the "statutes of distribution." He placed reliance on the fact that in the Short Titles Act, 1896, the Act 22 & 23 Car. 2, c. 10, which regulated the distribution of personal estate on an intestacy, had given to it the short title of "The Statute of Distribution." There is no other Act which has a similar short title given to it by statute, nor are the words "statutes of distribution" constituted a short title by the Short Titles Act, 1896, or by any other Act. It is to be observed that s. 50 of the Administration of Estates Act, 1925, refers not to the Statute of Distribution but to the Statutes of Distribution. As I have pointed out, this is not a statutory short title, although it is a well recognised phrase in common use at the date of the testator's will, and at the passing of the Administration of Estates Act, 1925, for compendious reference to a number of statutes regulating the devolution and distribution of property upon an intestacy. The only difference between the words of the Act and the will is that the word "distribution" appears in the Act with a capital letter, while in the will it is written without a capital. The words in s. 50 (2): "The enactments . . . relating to the distribution of effects of intestates" are, in their ordinary meaning, difficult to distinguish from the words in the will: "Statutes for the distribution of the personal estates of intestates." If you compare the wording of sub-s. (1) of s. 50 with that of sub-s. (2) of the same section it seems to me to be clear that "statutes of distribution" throughout the section are not used in any restricted sense, but with reference to all statutes regulating distribution on an intestacy.

It follows, in my opinion, that there is in this will sufficient reference to the statutes of distribution to bring into operation the provisions of s. 50 (2), and, this being so, the testator's will must be construed with reference to the law in force before Jan. 1, 1926, unless there is to be found in the will a sufficient contrary intention; for the subsection requires that, if the new law is to apply, you must find that contrary intention expressed.

Counsel argued that a contrary intention is to be found in this will, because the testator excludes from participation in the distribution not only his nephew Joseph Browning, but also the issue of that nephew, and he points out that under the old law there is no provision for the representation of a deceased nephew or niece by his or her surviving issue. I am unable to accept this contention for what must be considered is possibility and not probability. Under the old law the issue of a nephew or niece would take if no nephew or niece of the testator survived the period of ascertainment. For the old rule with regard to personalty was that if there were no children or remoter issue, no father or mother, or brothers or sisters, nephews or nieces, the intestate's property was divisible among such persons as were in the nearest degree of kindred.

Counsel also relied on the circumstance that at the date of the will, namely, March 15, 1923, the Law of Property Act, 1922, had been passed, and was to come into force according to its provisions on Jan. 1, 1925. I do not think that much weight can be attached to this argument, for the will refers to the statutes for the distribution of personal estates. The Act of 1922 applied not only to personalty but also to realty, and the testator was possessed of property in each case. Moreover, it would be difficult to accept the view that the testator deliberately intended that the choice of the law to govern the distribution of his residue should depend on the chance whether his widow should die before or after Jan. 1, 1925. There is no doubt that the testator wanted his property to go after his wife's death to a class of persons to be ascertained at that date, and to give effect to this desire words of futurity were necessary. In using as he did words of futurity it is, of course, possible that such words are wide enough to put into the future the ascertainment of the law applicable as well as the ascertainment of the class to take, but in the present case it is at least impossible to say that the use of words of futurity must of necessity cover the ascertainment of the law as well as the ascertainment of the class, and, if the argument cannot be put higher than this, there must always be ambiguity as to the intention. If there is ambiguity it is impossible to find a positive contrary intention in the will. Further, the presence in the will of the reference to "personal estates" suggests that the testator had in mind the old law, for both the Acts of 1922 and 1925 abolished the distinction between realty and personalty so far as devolution and distribution are concerned.

It follows from what I have said that, in my judgment, the law applicable to the distribution of the testator's estate is the law applicable to the distribution of personal property in force immediately before Jan. 1, 1926. This view is in accordance with the decision of Eve, J., in *Re Sutcliffe* (1), but I have expressed my opinion apart from that decision because the able argument addressed to me by Mr. Hunt raised points which were not brought to the notice of the court in that case.

Solicitors: *Pearce & Sons*; *Burton, Yeates, & Hart.*

[*Reported by* Miss B. A. Bicknell, *Barrister-at-Law.*]

BUCKLAND *v.* REGEM

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), February 10, 13, 1933]

[Reported [1933] 1 K.B. 767; 102 L.J.K.B. 404; 148 L.T. 557;
49 T.L.R. 244]

Customs—"Baggage of passengers"—Cinematograph films intended for commercial exhibition—Customs Consolidation Act, 1876 (39 *&* 40 *Vict.*, *c.* 36), *s.* 66.

Cinematograph films **held** not to be "passengers' baggage" within the proviso to s. 66 of the Customs Consolidation Act, 1876, and so, on their importation into this country, the importer must deliver to the proper officer of Customs an entry in the form prescribed by the Commissioners of Custom.

Decisions in railway cases on the meaning of ordinary, passenger's, or personal luggage examined by **McCardie, J.**

Notes. The effect of s. 64 and the proviso to s. 66 of the Customs Consolidation Act, 1876, has been reproduced in s. 28 (1) of the Customs and Excise Act, 1952, by s. 320 of and Sched 12 to which Act ss. 64 and 66 of the Act of 1876 were repealed. Petitions of right were abolished by the Crown Proceedings Act, 1947, s. 1.

Referred to: *Piddington* v. *Co-operative Insurance Society, Ltd.*, [1934] All E.R. Rep. 773.

As to collection of customs duties, see 28 HALSBURY'S LAWS (2nd Edn.) 322 et seq., and for cases see 39 DIGEST 227–231. For Customs and Excise Act, 1952, see 32 HALSBURY'S STATUTES (2nd Edn.) 672.

Cases referred to:

(1) *Phelps* v. *London and North Western Rail. Co.* (1865), 19 C.B.N.S. 321; 6 New Rep. 206; 34 L.J.P.C. 259; 12 L.T. 496; 11 Jur.N.S. 652; 13 W.R. 782; 144 E.R. 811; 8 Digest (Repl.) 130, *829*.

(2) *Hudston* v. *Midland Rail. Co.* (1869), L.R. 4 Q.B. 366; 10 B. & S. 504; 38 L.J.Q.B. 213; 20 L.T. 526; 33 J.P. 453; 17 W.R. 705; 8 Digest (Repl.) 129, *823*.

(3) *Macrow* v *Great Western Rail. Co.* (1871), L.R. 6 Q.B. 612; 40 L.J.Q.B. 300; 24 L.T. 618; 35 J.P. 678; 19 W.R. 873; 8 Digest (Repl.) 129, *824*.

(4) *Great Northern Rail. Co.* v. *Shepherd* (1852), 8 Exch. 30; 7 Ry. & Can. Cas. 310; 21 L.J.Ex. 286; 155 E.R. 1246; 19 L.T.O.S. 324; 8 Digest (Repl.) 128, *821*.

(5) *Great Western Rail. Co.* v. *Evans* (1921), 38 T.L.R. 166, D.C.; 8 Digest (Repl.) 130, *837*.

(6) *Mytton* v. *Midland Rail. Co.* (1859), 4 H. & N. 615; 28 L.J.Ex. 385; 33 L.T.O.S. 287; 24 J.P. 42; 7 W.R. 737; 157 E.R. 982; 8 Digest (Repl.) 132, *854*.

(7) *Gilbey* v. *Great Northern Rail. Co., Ltd.* (1920), 36 T.L.R. 562; 8 Digest (Repl.) 130, *836*.

(8) *Bruty* v. *Grand Trunk Rail Co.* (1871), 32 U.C.R. 66; 8 Digest (Repl.) 130, **573*.

(9) *Cusack* v. *London and North Western Rail. Co.* (1891), 7 T.L.R. 452, D.C.; 8 Digest (Repl.) 130, *832*.

(10) *Britten* v. *Great Northern Rail. Co.*, [1899] 1 Q.B. 243; 68 L.J.Q.B. 75; 79 L.T. 640; 15 T.L.R. 71; 8 Digest (Repl.) 130, *833*.

(11) *Jenkyns* v. *Southampton, etc., Steam Packet Co.*, [1919] 2 K.B. 135; 88 L.J.K.B. 965; 121 L.T. 186; 35 T.L.R. 435; 63 Sol. Jo. 477; 24 Com. Cas. 208, C.A.; 8 Digest (Repl.) 135, *868*.

(12) *Shannon* v. *Midland Great Western Rail. Co.* (1898), 33 I.L.T. 32; 8 Digest (Repl.) 130, **574*.

Petition of Right by which the suppliant sought the return of certain cinematograph films which had been detained by the Commissioners of Customs, and damages for their detention.

In 1925 the suppliant had caused to be produced in Berlin films of a number of well-known operas. In June of that year, having heard that a Customs duty on films was likely to be imposed, he and his wife went to Berlin with the intention of bringing the films into this country before the duty became effective. On June 30, 1925, the Finance Act, 1925, was enacted and provided (by s. 3) that as and from July 1, 1925, duties should be levied on imported cinematograph films. On June 29 the suppliant and his wife left Berlin with the films, which were packed in six parcels registered to Victoria Station, London. At Folkestone Customs officials came on the ship at 6 p.m. on June 30, and the suppliant told them that he had the six registered parcels of films. The suppliant's wife travelled to London in the same train as the films, and arrived there at 9.30 p.m. She there had an interview with a Customs officer, who told her that the films were not baggage of passengers, but were merchandise, and would be detained until the amount of duty could be ascertained, and he detained the parcels on the ground that an entry in accordance with the Customs Consolidation Act, 1876, s. 64, was required. On July 1, 1925, the suppliant interviewed the Customs officials, who contended that the films were liable to forfeiture on the ground that they had not been duly entered, and also that they were liable to duty under s. 3 of the Finance Act, 1925, which had become effective at midnight of June 30–July 1. A long correspondence ensued, the effect of which was that the suppliant maintained that the parcels of films were "baggage of passengers" within s. 66 of the Customs Consolidation Act, 1876, and, therefore, not subject to a Customs entry, while the Customs officials contended that they were merchandise which required entry, and, further, that, as they had not been entered before July 1, 1925, they were dutiable goods under the Finance Act, 1925. Ultimately, as the Customs officials refused to deliver the parcels, the suppliant instituted these proceedings.

By the Customs Consolidation Act, 1876, s. 66:

> ". . . no entry shall be required in respect of the baggage of passengers, which may be examined, landed and delivered under such regulations as the Commissioners of Customs may direct, but if any prohibited or uncustomed goods shall be found concealed therein, either before or after landing, the same shall be forfeited, together with everything packed therewith."

It was contended on behalf of the Crown that the parcels of films were not baggage of passengers; that, therefore, they required entry; and that, as no entry had been made before July 1, 1925, they must be treated as having been imported into this country after that date and so liable to duty, and also to forfeiture for failure to comply with s. 66. The suppliant's case was that the parcels were "baggage of passengers" which should have been delivered to him at Victoria on June 30, 1925, before the duty became effective, and that they had since that date been wrongfully detained from him.

Claude Grundy for the suppliant.

The Solicitor-General (*Sir Boyd Merriman, K.C.*) and *Bowstead* for the Crown.

Nov. 8. **McCARDIE, J.,** read a judgment in which he stated the facts and continued: How do the decisions stand on the meaning of the words "ordinary luggage," "passenger's luggage" and "personal luggage" under the English railways Acts and regulations? The phrase "ordinary luggage" was dealt with in *Phelps* v. *London and North Western Rail. Co.* (1). There it was held that title deeds which a solicitor was carrying with him in the interests and for the purposes of his client were not "ordinary luggage" within the meaning of the Act. In that case Erle, C.J., said:

> "It is agreed on all hands that it is impossible to draw any well-defined line as to what is and what is not necessary or ordinary luggage for a traveller: that

> which one traveller would consider indispensable would be deemed superfluous and unnecessary by another. But the general habits and wants of mankind must be taken to be in the mind of the carrier when he receives a passenger for conveyance."

In *Hudston* v. *Midland Rail. Co.* (2), Lush, J., as he was in those days, defined "ordinary luggage" as describing "a class of articles which are ordinarily or usually carried by travellers as their luggage," but extending to "something more than that which he requires for his own personal use and convenience." In that case a child's spring horse, weighing seventy-eight pounds and measuring forty-four inches in length, was excluded, because of its unusual size and shape; apparently it would seem from that decision that a smaller toy might well have been included in the phrase "ordinary luggage." It was stated in *Hudston's Case* (2) by the court that certainly the words "ordinary luggage" did not extend to articles of merchandise. In *Macrow* v. *Great Western Rail. Co.* (3) the words at issue were "ordinary luggage." Cockburn, C.J., there made some observations which were so often referred to in these cases. He said:

> "We hold the true rule to be that whatever the passenger takes with him for his personal use and convenience according to the habits and wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage. This would include not only all articles of apparel, whether for use or ornament . . . but also the gun case and fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveller and the taking of which has arisen from the fact of his journeying."

In the same judgment the rule of exclusion is stated to be as follows:

> "What is carried for the purposes of business, such as merchandise or the like, or for larger or ulterior purposes, such as articles of furniture or household goods, would not come within the description of ordinary luggage unless accepted as such by the carrier."

So, in that case a trunk containing six pairs of sheets, six pairs of blankets and six quilts was held to be outside the range of ordinary luggage, though a pair of sheets or the like, for the passenger's own use on a journey, might have been included.

Applying that principle, because there seems to be a principle asserted in that case, it would seem clearly to exclude the films here in question. Let me pause for one moment to say this. I do not think there can be any question of estoppel here at all. The Great State Railway in Berlin can accept what it pleases as registered luggage and put it into the registered luggage van, but nothing that could be done by a State railway or a private railway in this great German area could to my mind possibly affect in any way the rights or the duties of the Customs official acting under the authority of His Majesty and applying the provisions of the Customs Act, 1876. I cannot see any ground for estoppel at all in the present case. Therefore, the dividing line seems to be between articles of personal and immediate use and articles of merchandise or of ulterior use. Here the films cannot be said to be in any way of personal use and convenience to the plaintiff. He has got them with him either for the purpose of immediate sale or for subsequent disposal. They were in fact articles of high value according to him carried by him for the purpose of dealing with them commercially. Proceeding for a moment, I may say that the observations of Cockburn, C.J., in *Macrow's Case* (3) as to the exclusion of merchandise were followed and adopted by Park, B., in *Great Northern Railway Co.* v. *Shepherd* (4) (8 Ex. at p. 39). The difficulties under these Railway Acts certainly are not likely to be overlooked, because it is undoubtedly difficult to draw a distinction between the permissible and the unpermissible, because while, according to *Macrow's Case* (3), the artist's easel is to be admitted as "personal luggage," yet it has been held that a violoncello carried for professional purposes is not to be admitted, in *Great Western Rail. Co.* v. *Evans* (5).

I do not propose to criticise these decisions in detail. They offer so many points of criticism. I confess at once I cannot reconcile the two sets of observations by the court. Apparently, the decision in the violoncello case would qualify *Macrow's Case* (3), and would seem to draw a distinction between the artist who only amuses himself and the artist who hopes to sell his work. In fact, the pencil sketches of an artist have been held not to be passengers' luggage: see *Mytton* v. *Midland Rail. Co.* (6). "Personal luggage," it has been held, as I pointed out, does not include documents which a solicitor is taking with him to court for use in connection with the litigation of his client: see *Phelps' Case* (1). It has been held that "personal luggage" does not include a hamper, the greater part of the contents of which are the professional costumes and property of a comedian: see *Gilbey* v. *Great Northern Rail. Co., Ltd.* (7). Again, I point out the difficulty of reconciling a decision such as that with some of the observations of Cockburn, C.J., in *Macrow's Case* (3). It has been held in Canada that a sewing machine is not passengers' luggage: see *Bruty* v. *Grand Trunk Rail. Co.* (8). It has even been held in Great Britain that an invalid chair is excluded: see *Cusack* v. *London and North Western Rail. Co.* (9). It has also been held that a bicycle is not luggage; why, one cannot see, but so it has been held, and in the case where the matter was referred to, *Britten* v. *Great Northern Rail. Co.* (10), a somewhat full definition was suggested by Channell, J. I need not read the words he there delivered. I will only say if one reads his observations one finds several inconsistencies between what he said and what was said by Cockburn, C.J., in *Macrow's Case* (3). For example, he seemed to think that a gun, apart from its case, might be carried as ordinary luggage, but that a gun with its case would not be personal luggage.

I can only say I abstain from criticism upon the various observations referred to in these different decisions. Still stranger to my thinking—I say it with all respect —is the decision in *Jenkyns* v. *Southampton, etc., Steam Packet Co.* (11), where it has been held that an officer's revolver and binoculars are his luggage. So be it. How they can be his luggage and how the professional costumes of a comedian cannot be luggage is a matter which I do not propose to deal with now. I have cited one or two cases that were not mentioned to me by counsel in their learned arguments, and I should like to add that there has been much debate in several cases as to whether a typewriter carried by a passenger is luggage, whether ordinary or personal. In Ireland the question whether a sewing machine is personal luggage has been held to depend on whether it is carried by a lady for personal use or by a professional seamstress: see *Shannon* v. *Midland Great Western Rail. Co.* (12). There is much confusion in the English case law, and I can only add that I hope the day is approaching when the confusion will be recognised and a clearer formulation will take place, and when chaos in many parts of the great area of English case law will be replaced by correct and well-ordered formulation.

Viewing those decisions as a whole, and bearing in mind the facts and circumstances of the present case, I must hold that the six parcels of films were not "baggage of passengers" within the fair meaning of s. 66 of the Customs Consolidation Act. It therefore follows that the Crown are right in their contentions; that the Commissioners of Custom were entitled to detain the parcels until the suppliant had duly entered them and had paid the appropriate duty upon them; and that the petition of right fails.

The suppliant appealed.

Claude Grundy and *G. V. Cameron* for the suppliant.

The Solicitor-General (*Sir Boyd Merriman, K.C.*) and *Bowstead* for the Crown.

SCRUTTON, L.J.—Some ten years ago the suppliant, Mr. Martin Buckland, conceived the idea that he might do very well for himself and for the public by representing operas with the assistance of a cinematograph in a way which I am afraid I have not quite clearly grasped. As I gather, part of the opera, minor parts of singers, the stage setting, and, I suppose, the action of the crowd, were to be represented on a cinematograph film, but the principal parts were to be represented by people who would sing, I suppose, with an orchestra. Taking the first act of "Lohengrin," when Lohengrin arrives drawn by the swan in the middle of a crowd of excited people, and there is the bewildered progress of the swan down the river, I have some difficulty in making out, although it is not necessary for the purpose of deciding this case, how much of the representation of that scene was to be photographed and how much was to be sung, in order to make it effective. However, Mr. Buckland conceived the idea that that would be a great success, and he made the cinematograph parts in six operas, "The Merry Wives of Windsor," "Martha," "Lohengrin," "Cavalleria Rusticana," "Der Freischütz," and "Waffenschmied," and he says that he paid £5,000 in respect of each of these productions, with the result that the value to him was £35,000. Only once did a performance take place, and that was in Scotland, but from that time until the time of the incidents in this case apparently no other production had been made anywhere. In 1925, these films being in Germany, Mr. Buckland heard that there was a likelihood, almost a certainty in fact, of a duty being imposed on films imported into England, and he decided almost at the last minute of the last day to bring these films over before the duty came into force. That he was entitled to do. However, in order to do it successfully, he had to bring them through the Customs, and I do not suppose he knew very much either about the Customs regulations or the Customs Act.

The duty in question was imposed by the Act of 1925, and it was imposed on and after July 1 "on any of the following articles imported into Great Britain," including cinematograph films. So that the time when the duty became payable was the date of importation, and by s. 7 (2) of the Finance Act, 1901, as regards the first payment for any dutiable goods, the time at which the importation of any goods shall be deemed to have had effect shall be the time at which the entry of the goods under the Customs Act is delivered. So, the time when the entry should have been delivered in the present case in order to avoid the duty was midnight on June 30. What happened was this. Mr. Buckland and his wife, who were in Berlin, proceeded by train to England; they took these films, which weighed a couple of hundredweight, to the station at Berlin, and there registered them to Victoria, paying the charges which would be payable for registration by passenger train and steamer to Victoria. As I follow, a receipt being given to the person who paid for the transit of the films, they would then go through to Victoria with or without the passenger, and at Victoria they would be met by the Customs. When the Customs officer came on the steamer and called out aloud, "Anything to declare," the films were somewhere on the steamer, and Mr. Buckland seems to have mentioned it to the Customs officer, who, of course, had no authority to deal with the matter there and then. The films did not go to the Customs platform with Mr. Buckland, but went on with the train; they were registered to Victoria, and it was there that they were dealt with. Mr. Buckland himself did not go on, but Mrs. Buckland went on. When the films and the passenger got to Victoria the films were, as usual, put on the Customs platform, and the Customs officer who deals with passengers' baggage formed the view that they were not passengers' baggage, but were merchandise. In doing that he was acting upon directions of the Commissioners of Custom, with which we have been provided, and the report that he made that day to the King's Warehouse, to which theoretically he sent the films, was: "I have this day detained six packages registered from Berlin Nos. 162 and 163 said to contain films being merchandise imported by Mrs. Buckland for the Grand Opera Photo-Play Co., of 6A, George Street, Edinburgh." It was quite obvious that the Grand Opera Photo-Play Co. was not the passenger; the films were imported for that company, according to Mrs. Buckland.

According to the Customs directions—I am using the word "directions" instead of "regulations," although I think it is the same thing—if merchandise came with a passenger it would not be dealt with by the ordinary Customs officer as passenger's baggage, but it would be dealt with by another higher officer, who would be dealing with any question of merchandise said or said not to be included in passengers' baggage. The Customs hours terminate at 6 o'clock, and merchandise could not be put through after 5 o'clock. The result of the official's view, as expressed in that temporary report, was that those films had to wait until the next morning when, in the ordinary course of business, and in the ordinary Customs hours, the superior officer who dealt with this question of merchandise coming with the passenger would be dealt with, and the consequence was that the films did not go through the Customs until the duty had become payable. I do not state in detail what happened afterwards, but Mr. Buckland took rather an obstinate line, in the sense that he was offered that the films might go back to Germany without paying any duty, but he stood on what he thought were his rights; he was offered that the fine which was payable under the regulations should be remitted, and he still stood on his rights; he demanded that those films should come in free, as they would have done if they were ordinary passenger's baggage not subject to duty and had come over to Victoria on the night of June 30.

Those being the facts, I would say two things. First of all, there is not the slightest ground for saying that this is any dodge or pretence on the part of the Customs for the purpose of making a thing liable to duty that is not; the Customs officials were carrying out the ordinary regulations of the Customs, made without any reference to this particular case. Secondly, although Mr. Buckland was claiming originally in his petition of right £35,000 damages, if he had acted reasonably he could have avoided the damage that has accrued by the films standing in the warehouse, and any of the large loss that he alleges has fallen upon him is because of the detention of these films for four or five years.

The position of the statutes is this. Primâ facie they deal with all goods. Some goods are liable to duty, some goods are not liable to duty, but whether they are liable to duty or not, they must all be entered and go through the Customs, with an exception. Section 64 deals with the entry of goods free of duty:

> "The importer of any goods not subject to duties of Customs, or his agent, shall deliver to the collector or other proper officer an entry of such goods in the Form No. 5 in Sched. B to this Act, and containing the several particulars indicated in or required thereby, or in such other form and manner as the Commissioners of Customs may direct."

One would rather expect to find in that section a provision making an exception, but one does not. One passes on to s. 66, which is in my view one of the oddest bits of drafting I have ever seen. It deals with two matters; it deals with goods being concealed, and it deals with them in the first sentence up to the semi-colon:

> "If any goods or other things shall be found concealed in any way or packed in any package or parcel to deceive the officers, such package or parcel, and all the contents thereof, shall be forfeited";

and then going on to the end of the paragraph, again in the middle of a sentence, beginning with a comma, it says,

> "but if any prohibited or uncustomed goods shall be found concealed therein, either before or after landing, the same shall be forfeited, together with everything packed therewith."

That is one subject-matter, the question of concealing goods so that they may escape paying duty. Those two matters might very well have been put together; the only thing that seems to be added is "together with everything packed therewith" in the second part of the sentence. In the middle of the section there is something quite different, which might have appeared very well in s. 64. The words are,

> "and if any goods be taken or delivered out of any ship or out of any warehouse, not having been duly entered, the same shall be forfeited."

Then there is a proviso to the section: "Provided always that no entry shall be required in respect of the baggage of passengers." It is clear that if these six films are the baggage of passengers they need not be entered; on the other hand, if they are not the baggage of passengers, then they have not been duly entered, and the procedure contained in the regulations was properly followed.

So, we get to this position at the end of a day and a half: Were these six films the baggage of passengers? There was a gentleman who was asked to define an elephant; he said he could not define an elephant, but that he knew one when he saw it. I am very much in the same position as that gentleman. I should find it very difficult to define exactly the baggage of passengers, but I know what is not the baggage of passengers when I see it, and I am quite clear that these six films were not the baggage of passengers. One gets some light on the matter from the descriptions and definitions which are contained in the regulations. I agree with counsel for the suppliant when he says that these are not statutory regulations; at the same time I think that they are very good sense, and they help me in seeing what is and what is not baggage of passengers. When there is in the baggage something which is liable to duty these regulations and definitions provide how you are to deal with that matter, and the commissioners say, in instructing their officers how to deal with the matter, that a concession may be given.

> "The term 'private effects,' generally speaking, means used articles imported by the owner on his person or in his luggage or with his household belongings, which are intended for his own private use or enjoyment,"

and there is a similar definition of "household effects."

> "The term 'personal effects' means any used portable articles imported in baggage, or on the person of a passenger or seaman, which he might reasonably be expected to carry with him for his own regular and private use. The term 'household effects' means any used furniture and any articles of ordinary and domestic use (including the personal effects of individual members of the household) removed collectively on a transfer of residence to this country."

In my view, those definitions give a very good idea of what is properly baggage of passengers. On the other hand, supposing the articles which are said to be baggage of passengers are obviously merchandise not being brought in for the personal use of the passenger or his family or for private use in his house, but are brought in for commercial purposes, as, for instance, if you import a thousand sheets, nobody would say that a thousand sheets were the baggage of a passenger. I hope Mr. Buckland will not be hurt when he hears what I am going to say, but really to say that these films are the baggage of a passenger would be the same as if a person were to say, if he imported a dozen barrel organs, that they were the baggage of a passenger. The dozen barrel organs would obviously be imported for sale or for letting out on hire or for the purpose of other people, not the passenger, going about the country and playing them. These films are a device for representing operas, not for the private amusement or pleasure of Mr. Buckland, but for commercial purposes; they are used in various theatres throughout the country for commercial remuneration, and again I cannot say more as to my meaning than that I am quite clear these films are not within the term "baggage of passengers."

I rather agree with counsel for the suppliant that I do not think the numerous cases which appear in the learned judge's judgment, all of which I think owe their presence there to the industry of counsel, have anything to do with the matter. The transit of goods by railway is quite a different thing from the importing of goods into England through the Customs, and I have not, myself, got any assistance from the numerous cases which are referred to in the judgment, nor from the one or two cases which have been cited to us by counsel. In my view, once you get

A to the position that this is merchandise and not baggage of passengers, the proper course here was pursued. Merchandise cannot come in at any hour of the day or night; it must come in during the Customs hours, and if it is brought in at the last minute before the material time, and not in Customs hours, it must wait till the Customs hours begin again, and then the proper formalities must be gone through under s. 64 and the second sentence of s. 66.

B For these reasons I have come to the conclusion that Mr. Buckland's goods were not properly through the Customs until July 1, and that they then, under the sections to which I have referred, became liable to duty. Mr. Buckland was offered several opportunities of getting his goods away without payment of the full duty or without payment of the fine, but he did not choose to take them; he stood on his rights, as he thought they were, but in my view he had not the rights under C the Customs Act that he thought he had. For these reasons, in my opinion, the learned judge's judgment is correct, and the appeal must be dismissed with costs.

GREER, L.J.—I have come to the same conclusion, but not without having encountered very considerable difficulties on the way of arriving at it.

The question for our determination may be simply stated, and it is this. Were D the six boxes of films which arrived on June 30, 1925, liable to duty under the Act which imposed duties with regard to goods that were entered after the expiration of June 30, 1925? That depends on whether these articles were goods within the meaning of s. 65, or whether they were baggage of passengers within the meaning of the proviso to s. 66 of the Customs Laws (Consolidation) Act, 1876. At first sight, on reading s. 65, the words seemed to me not very appropriate to describe E any kind of small parcel of goods that comes with a passenger who purports to bring it as part of his luggage. The section is in these words:

> "Upon the entry of any goods, the importer, his agent, or the consignee of the ship, as the case may be, shall deliver two or more duplicates of the entry thereof, as the case may require, in which duplicates all sums and numbers may be expressed in figures; and the number of duplicates shall be such as the F collector or other proper officer may require; and the importer or his agent shall produce to such officer, if required by him, the invoice, bills of lading, and other documents relating to the goods."

At first sight those words do not seem to me to be words appropriate to describe goods which accompany the passenger as part of his luggage; they seem to me to be rather directed to the kind of goods which are set out on a ship's manifest, and G in respect of which there is an obligation not merely on the importer, but also on the ship, to take the necessary measures required by that section to enable the goods to be properly imported. Section 66, however, says this:

> "If any goods or other things shall be found concealed in any way, or packed in any package or parcel to deceive the officers, such package or parcel, and H all the contents thereof, shall be forfeited; and if any goods be taken or delivered out of any ship or out of any warehouse, not having been duly entered, the same shall be forfeited. Provided always that no entry shall be required in respect of the baggage of passengers, which may be examined, landed, and delivered under such regulations as the Commissioners of Customs may direct, but if any prohibited or uncustomed goods shall be found concealed therein, I either before or after landing, the same shall be forfeited, together with everything packed therewith."

At first sight that seemed to me to be a provision which was intended to be applicable to cases in which a passenger might bring goods which are brought in the ordinary way under a bill of lading—a shipment to a consignee, or landed goods by the ship's agent to the consignee of the ship; and the appropriate way of dealing with them is given by that section by treating them as part of the passenger's luggage; but on consideration I have come to the conclusion that that is not really the meaning of the two sections, but that the proviso which refers to the baggage of passengers is a proviso which relates only to that which can be appropriately called part of the baggage of passengers, and does not apply to things which accompany the passenger and are, in fact, goods imported, not as part of the passenger's baggage, but for purposes other than the purposes of personal use by the passenger.

For these reasons, although I think the petitioner here has been a little unfortunate, I think he was too late in getting his goods into this country to escape the duty which is put upon them by the Act which came into force on July 1, 1925, I agree that the appeal should be dismissed.

SLESSER, L.J.—I have come to the same conclusion with some difficulty, caused principally by the language of ss. 65 and 66. I have been impressed with the consideration that, in so far as a failure to enter goods under s. 66 may lead to forfeiture, and at the same time it is provided that in respect of the baggage of passengers there is no obligation so to enter them, it does put upon the person importing goods into this country a very considerable burden, to decide whether the particular goods must or must not be entered, which must depend upon whether those goods are or are not the baggage of passengers. Nevertheless, the legislature appears so to have enacted. But I have come to the conclusion that the goods which we have here to consider cannot properly be called baggage of passengers. I notice that in the proviso to s. 66, the one which establishes the liberty of the passenger bearing baggage, it says: "Provided always, that no entry shall be required in respect of the baggage of passengers," and then these words follow,

> "but if any prohibited or uncustomed goods shall be found concealed therein, either before or after landing, the same shall be forfeited, together with everything packed therewith."

I read that to produce the result that the obligation in the earlier part of the section that goods, generally speaking, must be the subject of entry would apply in the case where the baggage of passengers had merchandise within it. I cannot think that the obligation of entry can be avoided by concealing the goods within the baggage of passengers and not at the same time impose upon the person so concealing them an obligation to enter them. If that be so, then the conclusion, I think, follows that "baggage of passengers" must be read in the narrow sense of meaning baggage accessory to the needs of passengers, reasonably required by passengers in their transit, and does not include, for example, merchandise within that baggage. In the present case there is no question of merchandise being concealed within the baggage. Firstly, there was no concealment, secondly, the whole parcel, whatever it was, was of one kind of merchandise; it was all films; it was not a case of goods being placed within the ordinary baggage of passengers; it was a separate and independent parcel. I think that separate and independent parcel would have had to be entered for the reasons I have given if it was contained in a portmanteau of a passenger with his baggage, and I think therefore a fortiori it ought to be entered when it appears by itself unsurrounded and unconcealed in passengers' baggage.

Therefore, I come to the conclusion that an obligation of entry was imposed by s. 65 upon these goods, and for failure of entry the consequences which have been complained of have necessarily followed, and that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Gordon Gardiner, Carpenter & Co.*; *Solicitor of Customs and Excise.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

MOUNT ROYAL ASSURANCE CO. AND OTHERS *v.* CAMERON LUMBER CO., LTD.

[Privy Council (Lord Blanesburgh, Lord Merrivale, Lord Thankerton, Lord Russell and Sir Lancelot Sanderson), July 10, 11, 13, 14, November 30, 1933]

[Reported [1934] A.C. 313; 103 L.J.P.C. 34; 151 L.T. 23]

Insurance—Fire insurance—Consequential loss—Standing charges—Covered to extent that "would have been earned had no fire occurred"—Estimate of probable earnings—Adoption of arbitrary method of valuation of stock common in industry.

By policies of insurance against fire the appellants, as insurers, agreed that, in the event of destruction or damage by fire during the term of the policy necessitating a total or partial suspension of the respondents' business as timber merchants, the appellants would be liable to the respondents, the assured under the policies, for the actual loss sustained, consisting of such fixed charges and expenses as must necessarily continue during the suspension "to the extent only that such fixed charges and expenses would have been earned had no fire occurred." The jury, in valuing the plaintiffs' stock-in-trade at the beginning and at the end of the period of suspension, adopted an arbitrary figure of $15 per thousand feet of timber, which was very widely used as a method of valuation in the presentation of the accounts of such a business as that in which the respondents were engaged.

Held: in estimating the probable earnings of the respondents for the present purpose, a method of valuation so widely recognised in the industry and adopted by the assured in their business might find its justification in the absence of evidence that its application in the particular case would be either unjust or unreasonable, and here there was a complete absence of any such evidence.

Notes. As to consequential loss fire insurance, see 22 Halsbury's Laws (3rd Edn.) 402–404, and for cases on the amount recoverable on a fire policy, see 29 Digest 336 et seq.

Appeal from an order of the Court of Appeal of British Columbia (Martin, Galliher and McPhillips, JJ.A., Macdonald, C.J.B.C., and Macdonald, J.A., dissenting), affirming an order of the Supreme Court of the same province.

The action in which judgments had been pronounced was consolidated out of seven actions which had been brought by the present respondents against the appellants upon seven identical policies of insurance against fire which were described as use and occupation policies. The claim put forward by the respondents was that, in the event of the destruction of or damage to their premises by fire during the term of the policy "so as to necessitate a total or partial suspension of business," the insurers were to be liable to them in respect of such fixed charges and expenses to the extent to which they would have been earned had no fire occurred. At the trial in the Supreme Court before D. A. McDonald, J., and a jury, a verdict was returned in favour of the plaintiffs (the respondents) for $24,679.07, and judgment was entered accordingly. That judgment having been affirmed by the Court of Appeal by a majority the defendants appealed.

Alfred Bull, *K.C.*, and *R. Symes* for the appellants (the insurers).

E. C. Mayers, *K.C.*, and *A. R. McLeod* for the respondents (the assured).

Nov. 30. **LORD BLANESBURGH.**—This is an appeal by the defendants from a judgment of the Court of Appeal of British Columbia affirming, by a majority, a judgment of the Supreme Court of the same province whereby, following the verdict of a special jury, the sum of $24,679.07 was adjudged to the plaintiffs. The action in which these judgments were pronounced was one resulting from the consolidation into one action against seven defendant insurance companies of seven suits which had been brought by the plaintiffs against each defendant company separately. In that consolidated action the plaintiffs sought to recover from the defendants, the present appellants, the aggregate amount alleged to be due under seven policies of use and occupation insurance, each policy, except as to the sum assured, being in terms identical with the others and one policy having been issued to the plaintiffs by each appellant company.

On Feb. 25, 1931, the saw mill, lathe mill, wharf and other buildings of the plaintiffs, who are a company carrying on the business of lumber manufacture in the city of Victoria, British Columbia, were destroyed by fire. The properties so destroyed were insured under ordinary fire policies, and as to these no questions arise or have ever arisen. Liability under them has been duly acknowledged and discharged. The plaintiffs were, however, further insured by the policies of use and occupation insurance already referred to, and in the consolidated action aforesaid their claim under these was to recover the loss which they asserted they had sustained in respect of their fixed charges and expenses during the period of total suspension of business resulting from the fire. The maximum liability of the seven insurance companies collectively under the policies in question amounted to $120 for each day of suspension. As, however, the fixed charges and expenses of the respondents amounted to $124.62 a day, the plaintiffs were in fact uninsured in respect of these to the extent of $4.62 a day. The defendants' maximum liability in respect of each day of suspension was, therefore, $115.56 per day only. It has, however, been their contention before the Board that no liability whatever under the policies has been established against them or exists, and they claim that the above verdict and judgment in the plaintiffs' favour should be set aside and that in lieu thereof judgment should be entered for them, or, at least, that a new trial of the consolidated action should be directed.

As the case on both sides is based upon the terms of the policies themselves, it will not be inconvenient to refer at once to their relevant provisions. They are all, as has been said, in the same form, and each provides that in the event of the destruction of or damage to the respondents' premises by fire during the term of the policy "so as to necessitate a total or partial suspension of business," the insuring company is to be liable "for the actual loss sustained consisting of:

> "Such fixed charges and expenses as must necessarily continue during a total or partial suspension of business *to the extent only that such fixed charges and expenses would have been earned had no fire occurred.*"

The liability during the time of total suspension of business is

> "to be limited to the 'actual loss sustained,' not exceeding 1/300th of the amount of the policy for each business day of such suspension . . . *due consideration . . . being given to the experience of the business before the fire and the probable experience thereafter.*"

In the course of the proceedings there has been much discussion on both sides as to the true result of this last italicised passage. Less attention has been directed to the first. To both their Lordships will return later.

There are matters affecting the quantum of loss alleged to have been insured against which were either never in dispute or which are now accepted by both parties. It has, for instance, been agreed throughout that the respondents' annual fixed charges and expenses amounted to $31,157.05, or $124.62 a day. Again, while it was originally claimed by the respondents that the time required for the re-building of their mill was 250 days, the jury, in answer to a specific question, limited the period of total suspension of business to 221 days, and that figure is now accepted by both sides. The jury, again, placing upon the policies the construction to which reference will later be made, found in answer to a further question that the respondents during the period of suspension would have earned only a portion of their fixed charges and expenses, namely, $111.67 per day, so that their verdict for $24,679.07 represented $111.67 a day for 221 days. And this figure of $111.67 was reached by them after charging a sum at the rate of $13,120

A per annum for depreciation of plant and machinery. This question of depreciation has been strongly contested. Before the board, however, allowance of depreciation at the rate fixed by the jury has been accepted by both sides. Their Lordships, accordingly, need not themselves deal with this question. It is no longer a subject of debate.

The burden of establishing liability under the policies resting upon the respon-
B dents as plaintiffs, they, at the trial, put forward in evidence facts and figures which, in their submission, established the claim they made in the action. The defendants, the present appellants, not content with destructive criticism of the plaintiffs' case, put forward and sought to support in evidence alternative facts and figures. These in their final form were embodied in an exhibit numbered 25 and showed affirmatively, as the defendants contended, that, there being placed upon
C the policies the construction already alluded to, the respondents would not during the period of suspension have earned, had there been no fire, their fixed charges and expenses or any part of them. These rival views of the parties had little in common, but there was one essential difference between them, the proper adjustment of which has become the main, if not the only, existing issue on this appeal. On the question of the proper value to be placed upon the plaintiffs' stock-in-trade
D —upon their so-called valuations—at the beginning and at the end of the period of suspension, the plaintiffs adopted at both ends an arbitrary figure of $15 per thousand feet, while the defendants placed at each end a differing figure representing, as they contended, the cost of production of the inventory in each case. And to a question left to them by the judge, the jury replied that, in arriving at the figure of $111.67 already mentioned, they had adopted at each end the plaintiffs'
E figure of $15 per thousand feet, rejecting the figures of the defendants in that instance. It will thus be seen that the jury's verdict is based for its principal factor on their finding that the respondents would have earned during the period of suspension only $111.67 per day of their fixed charges. That figure, however, represents no exact translation into money of the whole case made by either side, and in view of the course of the trial as above described it might have been, to say
F the least, difficult to ascertain from the jury's answers alone the exact extent to which the divergent views presented by one side or the other in evidence had been accepted by them, or the extent to which these had been rejected. More than one explanation of the figure of $111.67 was possible, and had the jury been content to leave their answers without any explanation, the result might well have been that every court subsequently invited to review their verdict would have been compelled
G to guess from alternative conjectural sets of figures put forward by one side or the other what was its real basis, a process from which there might have been no definite outcome possible.

The jury, however, foreseeing, it may be, this difficulty, met it in advance by appending to their specific answers an explanatory memorandum, which in the light of the evidence led clearly shows the actual facts which they took into their
H consideration and accepted. The memorandum was, in fact, the exhibit 25 put in by the appellants as above stated, amended only in the two respects to which attention has already been called: the plaintiffs' figure of $15 per thousand feet being now taken to represent the value of each inventory: the figure at the rate of $13,120 per annum for depreciation being now inserted in place of the higher figure appearing in the exhibit. In every other particular the jury accepted the appel-
I lants' figures. It becomes clear, too, from a consideration of the memorandum that in reaching their conclusion the jury, except with reference to the question of inventory valuation, in no way pronounced upon the alternative figures put forward and relied upon by the plaintiffs. The plaintiffs accordingly cannot uphold the verdict on the ground that their case as a whole, supported as it was by evidence, was the case accepted by the jury. It was by the appellants' memorandum and the appellants' evidence with reference thereto that, with their two amendments only, the jury reached the conclusion embodied in their formal verdict. The regularity of their procedure in this regard was never seriously questioned. In their Lordships'

A view, the memorandum has been a valuable aid to each tribunal which has been called upon to consider and adjudicate upon the competence of the jury's verdict. And with reference to the detailed figures, disclosing the reasoning on which the verdict is rested, the result has been that a basis of computation well open to question by the respondents has not been canvassed by them, so that in what might have become a litigation of almost infinite complexity there remains only one B question in effective issue between the parties, namely, the question on which, as above stated, the jury accepted the evidence and contentions of the respondents in preference to those of the appellants. The only real question which remains for determination is whether the jury were entitled so to do.

Before entering upon its consideration their Lordships desire to refer to a construction, already mentioned, which the jury were invited to place upon the C policies, and which has so far, without objection from any quarter, been taken to be correct. It has been assumed that the limitation of the insurer's liability in respect of fixed charges and expenses "to the extent only that such fixed charges and expenses would have been earned had no fire occurred," prevents any liability from attaching under the policy until it has been shown by the assured not only that some part of these charges and expenses would have been earned had there D been no fire, but also that all other revenue charges for the proper conduct of the business would have been earned as well. That may be the true effect of the words used, but the question has not been argued, and in view of its possible importance in future cases arising under such policies, their Lordships, while in this case accepting the assumption on which all parties have so far proceeded, desire to intimate that upon its correctness or otherwise they express no opinion E of their own. It may in some future case have to be considered whether the words used fairly import a condition which is not in terms expressed, whether they require an assured to apply all moneys earned in discharge, in the first instance, of revenue liabilities other than fixed charges and expenses, and whether within the meaning of the policies, liability on the insurer does not attach without more so soon as it is shown that moneys would have been earned available to meet his fixed F charges and expenses had the assured thought fit so to apply them. It is fixed charges and expenses that must have been earned, not profits. The importance of this point is obvious. If in the present case this alternative construction of the policy had been put forward and upheld, the respondents would, on the appellants' own exhibit 25, unamended, have been entitled to judgment at the full insured rate of $115.56 a day and the question of difficulty contested on this appeal would G not have arisen.

Their Lordships now come to the consideration of that question, the one remaining issue between the parties. They may phrase it as follows. Was there evidence fit for the consideration of the jury which entitled them, if they thought fit, to place upon the inventories the values put forward by the plaintiffs and to reject those put forward by the defendants? Ought they to have been directed, as a H matter of law, that the principle of the defendants' valuations was correct, and that their only duty was to determine whether in the figures put forward by them it had been correctly applied? In answering these questions it is convenient to ascertain the reason for the adoption by the respondents of the arbitrary figure of $15 per thousand feet. This very clearly appears in the evidence. It is admitted that the valuation of lumber inventories for accounting purposes involves a difficult I problem, and for many years in concert with practically every other lumber company in British Columbia, and with the approval of the income tax authorities, the plaintiffs have adopted an arbitrary figure for valuation, so adjusted, however, as not to exceed what may be taken to be the market value of the inventory at the time. It was admitted by the appellants' principal witness that in the presentation of a lumber company's accounts over a period of years this method might be fairly adopted.

There was, however, evidence fit for the consideration of the jury—although on this point there was undoubted conflict—that even over a short period the method

A was not open to objection. And it was not contested that an actual valuation of the inventory piece by piece or even the ascertainment of its cost of production piece by piece was impracticable and was never in practice attempted. The question, it must be remembered, is not whether their Lordships on this point would adopt the view of the jury if the decision rested with them. The question is whether there was evidence before the jury upon which, not improperly, they could B reach the conclusion at which they arrived. It was contended before the board that the words of the policy requiring due regard to be had to the experience of the business before the fire justified the jury in accepting as permissible the respondents' long-continued practice in this matter. Their Lordships, however, are unable to place upon these words a construction wide enough to justify that contention. All that can, perhaps, be said in this connection is that a method of C valuation so widely recognised in the industry and adopted by the assured in their business may find its justification in the absence of evidence that its application in the particular case would be either unjust or unreasonable. And here there was a complete absence of any such evidence. On the contrary, there was evidence that the method of valuation put forward by the appellants, when properly examined, was in its essence at least as arbitrary as the figure of the respondents. D Moreover, their method really treated the business assumed to have been carried on during the period of suspension as one which began and ended with that period instead of being a business in unbroken succession to the respondents' business and one to be continued after the period of suspension had come to an end. It is not necessary for their Lordships to go into further detail in this matter. They are quite satisfied that there was ample evidence before the jury to justify them in E preferring the respondents' figures of valuation to those of the appellants; there was evidence on which they might conclude that the appellants' method furnished no picture of the true position and, while being no less arbitrary than the respondents', was, in its result, unjust to them.

In these circumstances the view of the jury in this matter must be accepted. That they should have been directed, as matter of law, to give effect to the appel- F lants' principles of valuation is, in the view their Lordships take of the matter, hardly susceptible of argument. The whole question was one for the jury, and there is no legitimate ground shown for any interference with their conclusion.

Their Lordships accordingly will humbly advise His Majesty that this appeal be dismissed, and with costs.

Appeal dismissed.

G Solicitors: *Blake & Redden*; *White & Leonard*.

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

JAY'S, LTD. *v.* JACOBI AND ANOTHER

[CHANCERY DIVISION (Eve, J.), February 6, 1933]

[Reported [1933] Ch. 411; 102 L.J.Ch. 130; 149 L.T. 90; 49 T.L.R. 239; 77 Sol. Jo. 176; 50 R.P.C. 132]

Passing Off—Name of defendants' firm similar to that of plaintiffs—Name acquired by first defendant by reputation—No evidence of deception.

The plaintiffs, ladies' costumiers carrying on business in London, sought an injunction to restrain the defendants from carrying on business in Brighton under the name of "Jays" or any other name calculated to represent that their goods were those of the plaintiffs or their business a branch of the plaintiffs' business. The first defendant had been in the employ of a company at Brighton in business as ladies' outfitters, and throughout a period of fifteen years she was known there as "Miss Jay." On the liquidation of the company she started business in partnership with the second defendant as ladies' costumiers. It was agreed that throughout the defendants had acted innocently.

Held: the first defendant had acquired by reputation the name of "Jay" and so had the right to trade under that name, and, therefore, in the absence of evidence that she or the second defendant had done something calculated to produce the belief in the mind of a reasonable person that their business was that of, or was connected with that of, the plaintiffs, they could not be restrained from so trading even though the similarity of the name of their firm to that of the plaintiffs might occasionally lead to confusion or to the goods of the one being mistaken for those of the other.

Notes. Referred to: *Wright, Layman and Vinney, Ltd.* v. *Wright* (1948), 65 R.P.C. 185.

As to passing off, see 32 HALSBURY'S LAWS (2nd Edn.) 614 et seq., and for cases see 43 DIGEST 264 et seq.

Cases referred to:

(1) *Massam* v. *Thorley's Cattle Food Co.* (1880), 14 Ch.D. 748; 42 L.T. 851; 28 W.R. 966, C.A.; 43 Digest 266, *1034*.

(2) *Aktiengesellschaft Hommel Hæmatogen* v. *Hommel* (1912), 29 R.P.C. 378; 56 Sol. Jo. 399; 43 Digest 265, *1026*.

(3) *John Brinsmead & Sons, Ltd.* v. *Brinsmead* (1913), 29 T.L.R. 706; 57 Sol. Jo. 716; 30 R.P.C. 493, C.A.; 43 Digest 265, *1031*.

Action for an injunction.

The following statement of the facts is taken from the judgment:

The plaintiffs, Jay's, Ltd., claim an injunction to restrain the defendants, Mrs. Fay Jacobi and Miss Elsie Helena Limburg, and each of them, from carrying on business under the name or style of "Jays" or under any other name or style calculated in any way to represent that the defendants' goods are the goods of the plaintiffs or that the business carried on by the defendants is a branch of or connected with the business carried on by the plaintiffs. The claim is an unequivocal challenge of the defendants' right to use the name "Jays."

The plaintiffs carry on in Regent Street, London, a large and high-class business as costumiers, dressmakers, and furriers, and have done so for many years. They use the best of materials and have a very high reputation all over the kingdom, and a "Jay's costume," or "a costume made by Jay's," means, in circles where such matters are discussed, a costume made by the plaintiffs. They have never had any branch establishment either in or out of London, and they do not deal in cheap or inferior goods. For fifteen years prior to the beginning of the year 1931 the first-named defendant, Mrs. Fay Jacobi, was in the employ of a company known as "Lafayettes (Brighton), Ltd." and carrying on business as ladies' outfitters at

A three shops in Brighton. During that time she rose from the position of an assistant in one of the shops to that of manageress of all three shops. From her first engagement, and throughout the whole fifteen years, she was known to the staff, the customers, and all with whom she was brought into contact as an assistant, saleswoman, buyer and manageress, as "Miss Jay." After her engagement had been terminated early in 1931 by the liquidation of Lafayettes she decided to start B in business on her own account, and in February notified this intention by circulating among those with whom she had been associated during her service with Lafayettes and others a communication which reads as follows:

> "Miss Jay, late of Lafayettes, wishes to announce the opening of her new salon at 6, Church Road, Hove, where she cordially invites you to inspect C without any necessity to purchase her range of exclusive yet inexpensive day and evening gowns, knitwear, coats, furs and chic millinery."

She also advertised for a partner, arranged for such reconstruction of premises at No. 6, Church Road, Hove, as was necessary to adapt them for her business, including the provision of a suitable shop front, and on March 5 she and her co-defendant started to carry on business as costumiers and ladies' dressmakers and D hatters in partnership under the name of "Jays."

In the statement of claim the plaintiffs allege that the carrying on of the business by the defendants under the name or style of "Jays" is intended to lead members of the public to believe that the defendants' goods are the goods of the plaintiffs and that such business is a branch of or connected with the plaintiffs' business; but this allegation was not persisted in after Mr. John Haslett, a director of the plaintiff E company since 1896, admitted in the box that he did not suggest that the name had been adopted for the purpose of filching the plaintiffs' goodwill, and agreed that the case should be dealt with on the footing that the defendants had throughout acted innocently.

Vaisey, K.C., and *J. V. Nesbitt* for the plaintiffs.

Moritz, K.C., and *Shelley* for the defendants.

F

Cur. adv. vult.

Feb. 6. **EVE, J.**, read a judgment in which he stated the facts and continued: Now that the facts have been ascertained, and the suggestion of fraud withdrawn, it is quite clear that the plaintiffs are not entitled to an injunction in the terms G asked for. Whether they are entitled to any relief at all depends upon the answer to the question whether the defendants have done anything calculated to produce the belief in the mind of a reasonable person that their business is the business of, or connected with that of, the plaintiffs.

Let me deal first with Mrs. Jacobi. In my opinion she has acquired the surname of "Jay" by reputation, and is entitled to carry on business under that name if H she thinks fit. Authority for this is to be found in a passage in the judgment of BRAMWELL, L.J., in *Massam* v. *Thorley's Cattle Food Co.* (1), where he is dealing with the argument advanced by the defendants that so long as the food was made and sold by a man named Thorley he could sell it in his own name as Thorley's Food, without qualification, notwithstanding that a preceding Thorley had carried on the business of making cattle food in such a way that by the name Thorley's I Cattle Food the manufacture of that man was understood. The lord justice says (14 Ch.D. at p. 760):

> "I wish to make one observation about the use of the name 'Thorley's Food for Cattle.' It has been said that the defendants have a right to say they make 'Thorley's Food for Cattle' if they do not deceive. I agree that if they could use that expression without the risk of deceiving, I should think they ought to have a right to do so, but it seems to me almost impossible that they can. It is urged that it is hard upon them to forbid them using it for that every Thorley has a right to make food, and, therefore, to sell it in his

> own name, and consequently, I suppose, call it Thorley's Food. But not only has every Thorley a right to do that, but every John Doe has a right to do that because he may give himself the name of Thorley and carry on business under that name if he thinks fit." A

Now this is the point:

> "A surname is not a man's legal property or conferred upon him by law in any particular way; it is gained by reputation, and if he choose to adopt the name of Thorley, and other people call him by that name, he is Thorley to all intents and purposes, although his name was originally John Doe." B

So here this lady is quite entitled to acquire and has acquired by reputation the name of "Jay." Therefore, as the owner by reputation of the surname "Jay," she C has the right to trade under that name, and so long as she acts honestly she cannot be restrained from so doing even though the similarity of such name to that of the plaintiffs may occasionally lead to confusion or to the goods of the one being mistaken for those of the other: see *Aktiengesellschaft Hommel Hæmatogen* v. *Hommel* (2); *John Brinsmead & Sons, Ltd.* v. *Brinsmead* (3) (30 R.P.C.).

What the plaintiffs are insisting upon is that the defendants cannot trade in the D name they have adopted without creating confusion and misapprehension, and their pleading and the evidence they have produced is directed to establish that contention; but these drawbacks in a case where no dishonesty is established and a fortiori in one where, admittedly, there is none, cannot prevail to restrain a defendant from carrying on his business in a name which he is entitled to use, so long as he does not use it in such a way as to represent that his goods are E the goods of the plaintiff or that his business is connected with that of the plaintiff. There is not a line of evidence to suggest that the defendants have done either of these things. Apart from the use of the name—which differs from the plaintiffs' name in the important respects I have already alluded to—the absence of the apostrophe before the final letter and of the word "Limited," no complaint is made of the get-up of the shop front or of the manner in which the goods are displayed F and offered for sale; the script of the name as used upon the shop fascia and on all the defendants' stationery is of quite a different nature from that used by the plaintiffs. The first and last letters in the defendants' name "J" and "S" are much larger than the two middle letters "A" and "Y." In the plaintiffs' name block letters of the same size are used for the word "Jay's," and the word "Limited" is represented by the abbreviation "Ltd." in much smaller letters. G The defendants have in all respects complied with the provisions of the Registration of Business Names Act, 1916, and in the stationery, invoices, and other documents on which their names as proprietors are required to be disclosed, they have disclosed them under the shortened letters "AY" in the middle of the name "Jays." I thought at one time that the plaintiffs might raise objection to the "S" which has been added to the name "Jay." Miss Jay explained that this addition was made H because there were two partners interested in the business in equal shares, and they thought the plural more appropriate to these circumstances. But no point was made on this letter in the plaintiffs' evidence, and Mr. Haslett said they raised no objection to the name if spelt Jayes, and, indeed, this was the alteration generally adopted by persons when the plaintiffs complained of their using "Jays." Phonetically there is no difference between Jays and Jayes. I

In my opinion, the plaintiffs have wholly failed to prove any conduct on the part of the defendants calculated to lead to the belief that their business is in some way connected with the plaintiff company, or that the goods they are making and selling are the goods of the plaintiffs. Even if confusion should arise from the use of the name under which the defendants are trading—which I am very much inclined to doubt—it is not due to any misconduct on the part of the defendants, and in the absence of such misconduct the plaintiffs are not entitled to any relief. I doubt whether there is even a risk of any confusion. The two businesses cater for entirely distinct classes of customers. As one of the trade witnesses said: "The two businesses are two different lines entirely. Jay's of Regent Street is a better end of goods; Jays of Hove is a cheaper end." But this is not all. Although this matter has been under the plaintiffs' notice for just on a couple of years, no one has been found to come forward at this trial and prove any instance of confusion, misapprehension, or mistake. In so saying, I am not unmindful of the young lady, who, ten days or a fortnight ago, from a bus passing along Church Road, caught a glimpse of the defendants' shop, which suggested to her that it might be Jay's of Regent Street. The action is dismissed with costs.

Solicitors: *Lindus & Hortin*; *C. Butcher & Simon Burns.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

Re BENI-FELKAI MINING CO., LTD.

[CHANCERY DIVISION (Maugham, J.), December 6, 1933]

[Reported [1934] Ch. 406; 103 L.J.Ch. 187; 150 L.T. 370; 78 Sol. Jo. 29; 18 Tax Cas. 632; [1934] B. & C.R. 14]

Company—Winding-up—"Expenses incurred in winding-up"—Income tax incurred by liquidator in carrying on business of company after liquidation—Discretion of court to direct priority in payment of expenses out of assets—Provision for liquidator's remuneration—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 171—*Companies (Winding-up) Rules*, 1909, *r.* 187.

Income tax under Sched. D of the Income Tax Acts incurred by a liquidator in carrying on the business of a company after the date of the liquidation **held** to be an "expense incurred in the winding-up" within s. 171 of the Companies (Consolidation) Act, 1908 (now s. 267 of the Companies Act, 1948), which empowered the court in a winding-up, "in the event of the assets being insufficient to satisfy the liabilities, [to] make an order as to the payment out of the assets of the costs, charges and expenses incurred in the winding-up in such order of priority as the court thinks just."

Per **Maugham, J.**: The term "expenses incurred in the winding-up" is not one of art, and I see no reason why it should not include any expenses which the liquidator might be compelled to pay in respect of his acts in the course of a proper liquidation of the company's assets. Primâ facie and in a normal case, my opinion is that the whole of the expenses of the winding-up ought to be paid before the remuneration of the liquidator [e.g., expenses connected with the employment of agents, gas and electric light, and rent]. There may, however, be cases in which the court, under the power which it has under [s. 267 of the Act of 1948], will provide for the liquidator's remuneration to the extent to which such remuneration ought to be given for services which he has rendered by way of salvage in a case where the realisation of property has been long delayed or has become impossible. Nor do I think the court ought to be unwilling to declare that the liquidator is entitled to retain the remuneration which he has paid himself out of the assets of the company at a time when he had no reason to suppose that there would be an insufficient amount available for the payment of the costs, charges and expenses incurred in the winding-up. A debenture-holders' receiver appointed by the court is, as an officer of the court, in a different position from that of a liquidator in a winding-up.

Semble: Income tax incurred in the circumstances mentioned is not "actual expenses incurred in realising or getting in the assets" within r. 187 (1) of the Company (Winding-up) Rules, 1909 (now Company (Winding-up) Rules, 1949, r. 195 (1)), and **quære** whether it is within the words "liquidator's necessary disbursements." A

Notes. Sections 193 and 196 of the Companies (Consolidation) Act, 1908, have been replaced by ss. 307 and 309 of the Companies Act, 1948, respectively. B

Referred to: *Wilson Box (Foreign Rights), Ltd.* v. *Brice*, [1936] 2 All E.R. 452.

As to payment of costs, charges and expenses in a winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 672 et seq., and for cases see 10 DIGEST (Repl.) 1061–1063. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452; and for Company (Winding-up) Rules, 1949 (S.I. 1949, No. 330), r. 195 (1), see 4 HALSBURY'S STATUTORY INSTRUMENTS. C

Cases referred to:

(1) *Re International Marine Hydropathic Co.* (1884), 28 Ch.D. 470; 33 W.R. 587, C.A.; 10 Digest (Repl.) 1024, *7056.*

(2) *Re National Arms and Ammunition Co.* (1885), 28 Ch.D. 474; 54 L.J.Ch. 673; 33 W.R. 585; 1 T.L.R. 240; 49 J.P.Jo. 90; 52 L.T. 237, C.A.; 10 Digest (Repl.) 1125, *7836.* D

Summons in a winding-up.

The Beni-Felkai Mining Co., Ltd., was incorporated in 1907 with a capital of £120,000, divided into preference and ordinary shares. The company was formed to own and work mines and railways and other transport facilities in Algeria under a concession from the French government. The difficulties arising in 1925 from fluctuations in French currency made it necessary in the interests of the shareholders to transfer the business to two French companies, one a mining company to acquire and work the mining concessions, and the other, a transport company, to acquire the railway transport and shipping concession and the assets of that part of the business. There were excepted from the proposal as to transfer to the two French companies cash and other assets including stocks of iron and copper ore, which, it was thought, would be sufficient to pay the preference share capital in full. The ordinary shareholders were to be remunerated out of the proceeds of the two transfers. A scheme was put forward to carry out this arrangement, and it was approved by the court on Dec. 15, 1925. On the following Dec. 30, the company went into voluntary winding-up, and the respondent, who had been manager of the company, was appointed liquidator at £1,000 a year. At that time nobody thought the company was insolvent. The two French companies were incorporated, and they entered into agreements with the company for the adoption of the scheme, and the government was asked to permit a transfer of the concessions to the two companies respectively. In the meantime the liquidator paid to the preference shareholders 5s. in the pound by three different payments, the last of which was made on July 2, 1926. The liquidator proceeded to realise the stocks of ore, and while he was carrying on the business of the company a profit was earned. The Crown claimed income tax under Sched. D of the Income Tax Act, 1918, in respect of these profits for the year 1926–27, £58 12s.; for the year 1929–30, £20; for the year 1930–31, £487 16s., the dates of assessment being March 25, 1930, Oct. 8, 1929, and Oct. 14, 1930, respectively. E F G H

The general strike in Great Britain in 1926 made it practically impossible to carry the original scheme of arrangement into effect owing to the serious fall in the value of the stocks of ore, the advance of freights, and the increase in costs on certain contracts. The French companies were allowed to go into the concessions and to work the mines and railways and other transport facilities of the company in Algeria as agents of the liquidator. Owing to these difficulties it was not possible to realise the concessions and the assets in Algeria. The two French companies went into liquidation and the French liquidator took possession of the assets in Algeria which, if realised, would have been available for the payment of the I

A income tax claims. Before the notification of the assessment to the sum of £487 16s., the liquidator had closed the mine, paid off the workmen, and retained only the bare minimum staff to maintain and protect the property and to realise such assets as remained.

After the date of the assessments to income tax the liquidator received substantial sums on account of ore which he had sold, but no such further sums B remained to be received. The realisation of the stocks of ore produced an aggregate sum of £170,239, and the disbursements of the liquidator, including a certain sum paid for income tax in the earlier years, his own remuneration at the rate of £1,000 a year payable monthly, a number of sums for travelling expenses, a number of salaries and other expenses in respect of work in Algeria, amounted in all to £171,125, so that there was a deficit of about £800 represented by an overdraft C at the bank.

By this summons the Attorney-General asked that the liquidator might be ordered out of the moneys in his hands, which he claimed to retain by way of remuneration for his services as liquidator, to refund to the company the amount of the three sums payable for income tax and of any other claims against the company that might be payable pari passu therewith, and that out of the moneys so refunded, D the sums payable for income tax might be paid to the Commissioners of Inland Revenue.

By the Companies (Consolidation) Act, 1908, in regard to compulsory winding-up by the court:

> Section 171: "The court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the E costs, charges and expenses incurred in the winding-up in such order of priority as the court thinks just."

By the Companies (Consolidation) Act, 1908, in regard to voluntary winding-up:

> Section 193: "(1) Where a company is being wound-up voluntarily the liquidator or any contributory or creditor may apply to the court to determine F any question arising in the winding-up, or to exercise, as respects the enforcing of calls, or any other matter, all or any of the powers which the court might exercise if the company were being wound-up by the court. (2) The court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as the court thinks fit, or may make such G other order on the application as the court thinks just."

> Section 196: "All costs, charges and expenses properly incurred in the voluntary winding-up of a company, including the remuneration of the liquidator, shall be payable out of the assets of the company in priority to all other claims."

By the Company (Winding-up) Rules, 1909:

> H Rule 187: "(1) The assets of a company in a winding-up by the court, remaining after the payment of the fees and actual expenses incurred in realising or getting in the assets, shall, subject to any order of the court . . . be liable to the following payments, which shall be made in the following order of priority, namely: First, the taxed costs of the petition, including the taxed costs of any person appearing on the petition whose costs are allowed I by the court. Next, the remuneration of the special manager (if any). Next, the costs and expenses of any person who makes or concurs in making, the company's statement of affairs. Next, the taxed charges of any shorthand writer appointed to make an examination. . . . Next, the liquidator's necessary disbursements, other than actual expenses of realisation heretofore provided for. Next, the costs of any person properly employed by the liquidator. Next, the remuneration of the liquidator. Next, the actual out-of-pocket expenses necessarily incurred by the Committee of Inspection, subject to the approval of the Board of Trade."

A

J. H. Stamp for the Crown.
H. F. F. Greenland for the liquidator.

MAUGHAM, J.—This is a case of considerable difficulty, but I have formed an opinion and I consider it better to state it at once in case the parties think fit to take the matter to another court.

B

The summons is taken out by His Majesty's Attorney-General, who claims that the Crown is a creditor in respect of income tax under Sched. D. The respondent is a person who has been the liquidator of the company since it went into liquidation on Dec. 30, 1925, for the purpose of reconstruction. The claim of the Crown is to be a creditor in respect of three sums of £58 12s., tax for the year 1926–27, £20, tax for the year 1929–30, and £487 16s., tax for the year 1930–31, the dates of assessment being March 25, 1930, Oct. 8, 1929, and Oct. 14, 1930. The peculiarity of the case is that these claims for income tax are in respect of profits earned by the company since liquidation while it has been in the hands or under the control of the liquidator. The debts are therefore not provable debts. The Crown claims that the liquidator should be ordered to pay these sums out of moneys in his hands. It so happens that there are no sums at present in hand, but, on the contrary, the sum of £800 is overdrawn at the bank. Technically, however, the liquidator may have sums in hand as he has retained remuneration at the rate of £1,000 per annum, in addition to considerable sums for travelling expenses. Counsel for the Crown suggested that those sums should be struck out of his account and that he should be ordered out of the resulting balance to pay the three sums I have mentioned, but it is admitted that the balance, if any, which may result from an adjustment of accounts with regard to the liquidator's remuneration and travelling expenses, may be liable to a claim by the National Provincial Bank, Ltd., and this may have to be the subject of further consideration.

C

D

E

There are some points of construction which fall to be decided before the court can adjudicate on this matter. Here it is necessary to consider certain sections of the Companies (Consolidation) Act, 1908, the relevant Act at the date of the liquidation of the company, and any relevant rules in the Companies (Winding-up) Rules, 1909. The first section to be considered is s. 171 of the Act of 1908, which is the section relating to compulsory winding-up by the court. That section says:

F

> "The court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges, and expenses incurred in the winding-up in such order of priority as the court thinks just."

G

Then in the group of sections relating to voluntary winding-up, ss. 182 to 198, there is to be found s. 196, which says:

> "All costs, charges, and expenses properly incurred in the voluntary winding-up of a company, including the remuneration of the liquidator, shall be payable out of the assets of the company in priority to all other claims."

H

The power of the court under s. 171, expressed to be given in the cases of compulsory winding-up, is a power exercisable in voluntary winding-up under s. 193 of the Act of 1908. If we turn to the rules of 1909, r. 187 makes some express provisions with regard to the costs payable out of the assets, including the remuneration of the liquidator. [His Lordship read the rule and continued:] That rule, of course, does not apply in the present case, which, as I have said, is a case of voluntary liquidation. It may, however, be useful by way of analogy as showing what the framers of the rules considered to be the fair way of dealing with the case where the assets available were not sufficient to pay the whole of those various costs and expenses in full and to leave anything over for the creditors of the company in the ordinary way. Accordingly, as the rule is not strictly applicable and is not binding on me, I am at liberty to disregard it if I think it just, and in any case the rule is expressed to be subject to any order of the court, but I think I ought to express the opinion which I have formed that income tax incurred under

I

Sched. D by a liquidator in carrying on the business of a company after the date of liquidation is not strictly within the words, "fees and actual expenses incurred in realising or getting in the assets." It would be going too far, I think, to hold that the rule gives income tax priority over the taxed costs of the petition, and a number of other costs which are intended to come early in the scale of priorities. I am more doubtful whether an income tax liability so incurred may not be within the words, "the liquidator's necessary disbursements." That, however, is a matter on which I think I had better not express a final opinion at the present time. As I have said, this rule is not of much use to me in the present case.

I turn back to s. 171, and, reading that, in connection with this case, with s. 196 of the Act of 1908, for the purpose of seeing whether the claim to tax such as I have described is one of the expenses of the liquidator, there are two things, I think, to be borne in mind. The first is that income tax under Sched. D is a necessary consequence of the acts performed by the liquidator in the course of the liquidation for the purpose of realising, as it was his duty to do, the assets of the company. In a proper case a business has to be carried on with a view to realisation. If it is carried on, as it sometimes is, at a profit, the liability to pay income tax in the case of an English company which is domiciled here is necessarily incurred. The second is that income tax is a Crown debt; that has been established for, I suppose, over fifty years. It is a tax which under s. 169 of the Income Tax Act, 1918,

> "may be sued for and recovered, with full costs of suit, from the person charged therewith in the High Court as a debt due to the Crown, or by any other means whereby any debt of record or otherwise due to the Crown can, or may at any time, be sued for and recovered, as well as by the summary means specially provided by this Act for levying the tax,"

and the summary means are distraint and commitment to prison. I think it is true in the case of a liquidator that he is not personally liable to discharge out of his own moneys income tax incurred in the way I have mentioned. Those remedies are not available, but there remains the fact that the tax is one payable as a Crown debt which may be sued for and recovered in the High Court as a debt due to the Crown. I have a difficulty in seeing how a liquidator who, in the course of his liquidation, carries on the business of the company at a profit, the consequence being the assessment of the company to income tax, can avoid the conclusion that this is one of the expenses of the winding-up. It is curious that in the authorities, to which I have been referred, the phrase does not seem to have been used by the court.

In my opinion, rates and taxes—and for this purpose I can group them together, although there is for some purposes a plain distinction between them—falling due subsequently to the winding-up are part of the expenses of the winding-up. I have referred to *Re International Marine Hydropathic Co.* (1) and *Re National Arms and Ammunition Co.* (2), and other cases. As far as I can see, the court, although it has held that in a proper case sums of the same nature as the sums which I am considering—for example, rents falling due in respect of property held by the liquidator after the commencement of the winding-up—have got to be paid in full, has not thought fit to describe the sums in question as part of the expenses of the liquidation. On the other hand, in textbooks I think such a phrase will be found. I find such a phrase, for instance, in PALMER'S COMPANY PRECEDENTS (13th Edn., p. 466), and it is to be found in other editions, and I think in other textbooks the same phrase will be found. I do not see any particular reason for limiting the meaning of the phrase "expenses of the liquidation" or "expenses incurred in the winding-up." The term is not one of art, and I see no reason why it should not include any expenses which the liquidator might be compelled to pay in respect of his acts in the course of a proper liquidation of the company's assets. In my opinion, then, the sums in question are sums which can be properly treated as, and which are in substance, expenses in the liquidation. I should add that a debenture-holders' receiver, in a case where the receiver has been appointed by the court, is in a different position. Such a receiver is the officer of the court, and I can see no reason for coming to the conclusion that the liquidator in a voluntary winding-up, whose remuneration has been fixed by shareholders who may have no interest in the ultimate assets, is in the same position as an officer of the court. The latter has had his remuneration provided for in front, as far as possible, of every other payment to be made out of the assets of which the court has assumed control. That that is not the position even of a liquidator in a compulsory winding-up appears from the rule which I have already read.

In my opinion, then, it is open to me, in the exercise of a just discretion, the assets being insufficient to satisfy the liabilities, to make an order as to the payment out of the remaining assets, if any, of the costs, charges, and expenses, including the remuneration of the liquidator, in such order of priority as the court may think just. Here comes in what I venture to think is the most difficult part of my task, because the facts are very exceptional, and certainly they give rise to considerations which do not exist in the ordinary sort of liquidation with which we are most of us usually concerned.

In substance the question which I have got to determine seems to me to be whether the liquidator is entitled to retain remuneration at the rate of £1,000 a year, fixed by the shareholders of the company which was deemed to be completely solvent, without any provision being made for the payment of debts which I hold to be part of the expenses of the winding-up. The bankers are not here, but I assume that, if they were here, it would be contended that the overdraft due to them as the result of the liquidator's trading is also an expense of the winding-up. Primâ facie and in a normal case, my opinion is that the whole of the expenses of the winding-up ought to be paid before the remuneration of the liquidator. It seems to me, in the normal case, that expenses which he has incurred, whether by the employment of agents or in respect of, we will say, gas and electric light or, I would add, for rents or any other of the numerous expenses which he may incur in the winding-up of a company, are things for which he is bound to provide out of the assets of the company as far as he is enabled to recover them. If his position is that, having provided for them, there will be no remuneration left for him, he is entitled to say: "I cannot go on unless the creditors or shareholders or others will put up a fund for my benefit." He is the person who can see what the position is. The people to whom he incurs a liability for expenses have not got the materials which he has for ascertaining the true position. Further, in my opinion, there is in this respect in the expenses of the liquidation no difference between the income tax payable by reason of the acts of the liquidator and his good fortune in making a profit in the course of realising the company's business. There may, however, be cases in which the court, under the power which I hold the court has under the old s. 171 in the Act of 1908, will provide for the liquidator's remuneration to the extent to which such remuneration ought to be given for services which he has rendered by way of salvage in a case where the realisation of property has been long delayed or has become impossible. Nor do I think the court ought to be unwilling to declare that the liquidator is entitled to retain the remuneration which he has paid himself out of the assets of the company at a time when he had no reason to suppose that there would be an insufficient amount available for the payment of the costs, charges and expenses incurred in the winding-up. In my opinion, it is impossible on the materials before me to fix exactly the date as from which the remuneration of the liquidator ought to be inquired into, but I think I am justified on the whole, in making an order that the liquidator's remuneration received by him or paid to himself prior to Dec. 8, 1930, that being the date of the assessment of the sum of £487, shall not be disturbed. I propose to direct an inquiry as to what remuneration is proper to be allowed to the liquidator for the period subsequent to that date in respect of services rendered, which may fairly be regarded as necessary for the preservation of the property belonging to the company, and what sum ought to be allowed for travelling expenses, and there will be liberty to apply. It will be apparent from what I have said that if that results in some sum being obtained, it may have to be shared with the bank.

Solicitors: *Solicitor of Inland Revenue*; *Rowney & Co.*

[*Reported by* MISS B. A. BICKNELL, *Barrister-at-Law.*]

JENKINS *v.* DEANE AND OTHERS

[KING'S BENCH DIVISION (Goddard, J.), December 14, 1933]

[Reported 103 L.J.K.B. 250; 150 L.T. 314; 78 Sol. Jo. 13]

Insurance—Motor insurance—Third-party risks—Assured a partnership—Change in constitution of partnership—No avoidance of policy—Exceptions from liability—Limitation on weight of load of insured vehicle—Use in unsafe condition, or with trailer—Vehicle towing another vehicle—Accident through defective tow chain.

By a policy of insurance in respect of a motor lorry a partnership firm was insured against third-party risks. The proposal was signed by the partners as individuals and not in the name of the firm. During the currency of the policy, the constitution of the insured firm was changed by the admission of a new partner.

Held: bearing in mind that a contract of insurance was essentially a personal contract, where partnership property was insured and lost it would be a good defence for the insurers if a claim were made to prove that a new partner had been admitted to the partnership without their knowledge or consent, but an insurance against third-party risks was an insurance against a liability in tort and the principles applicable to an insurance on property did not necessarily apply; the question was whether the insurers' risk had been enlarged or altered; that was not so in the present case; and, therefore, the policy was not avoided by the change in the constitution of the partnership.

The policy provided that the liability of the insurers should be conditional on the lorry not being used to carry a load in excess of two-and-a-half tons, or in an unsafe condition, or with a trailer. An accident owing to a defect in the tow chain and involving liability to third parties occurred while the lorry was towing another lorry, the combined weight of the two vehicles exceeding two-and-a-half tons.

Held: (i) in towing the lorry the insured vehicle was not carrying a load; (ii) the tow chain was not part of the insured lorry which, therefore, was not being used in an unsafe condition; and (iii) the towed lorry was not a trailer within the meaning of the policy; and, consequently, the insurers were liable on the policy.

Notes. With regard to the remarks of **Goddard, J.**, concerning the repudiation of a policy by insurers because of some condition in the policy which exempted them from liability, see now the Road Traffic Act, 1934, s. 10 et seq. The decisions on the three points taken by the defendants in the present case are, however, retained in this report as they may be of importance in cases not dealing with third-party insurance.

As to motor vehicle insurance, see 18 HALSBURY'S LAWS (2nd Edn.) 556 et seq., and as to change of insurable interest, see ibid. 494, and for cases see 29 DIGEST 408 and Supps. For Road Traffic Act, 1934, see 24 HALSBURY'S STATUTES (2nd Edn.) 709.

Cases referred to: A
(1) *Germania Fire Insurance Co.* v. *Home Insurance Co.* (1844), 144 N.Y. 195.
(2) *Cabell* v. *Vaughan* (1669), 1 Wms. Saund. 288; 2 Keb. 525; 1 Vent. 34; 85 E.R. 386; sub nom. *Chappel* v. *Vaughan*, 1 Sid. 420; 12 Digest (Repl.) 39, *158*.
(3) *Royal Exchange Assurance* v. *Hope*, [1928] Ch. 179; 97 L.J.Ch. 153; 138
L.T. 466; 44 T.L.R. 160; 72 Sol. Jo. 68, C.A.; Digest Supp. B
(4) *Doe D. Pitt* v. *Shewin* (1811), 3 Camp. 134, N.P.; 31 Digest (Repl.) 400, *5296*.
(5) *Acey* v. *Fernie* (1840), 7 M. & W. 151; 10 L.J.Ex. 9; 151 E.R. 717; 29 Digest 55, *175*.
(6) *Simpson* v. *Accidental Death Insurance Co.* (1857), 2 C.B.N.S. 257; 26
L.J.P.C. 289; 30 L.T.O.S. 31; 3 Jur.N.S. 1079; 5 W.R. 307; 140 E.R. 413; C
29 Digest 395, *3145*.

Action against underwriters of a policy of insurance against third-party risks.

On Nov. 3, 1932, the plaintiff's husband was killed in a street accident through
the negligent driving of a lorry belonging to a firm of Wighton and Jordan. On
Feb. 3, 1933, she obtained judgment for £2,600 and costs against that firm in an
action under Lord Campbell's Act tried by SWIFT, J. Wighton and Jordan had D
insured against third-party risks with the defendant underwriters, and after the
plaintiff had obtained judgment, namely, on June 29, 1933, she took an assignment
of the policy from Wighton, the sole remaining partner in the firm. The policy
had been issued on March 9, 1932, and was originally for three months' cover
against third-party risks only. It lapsed on June 9, 1932, and was revived on
July 6. In September a further premium for full risks was accepted, and on E
Sept. 9, 1932, a policy was issued granting full cover.

The defendants contended that the constitution of the firm of Wighton and
Jordan had changed during the currency of the policy, one Tottle having become
a partner in April, 1932, without the knowledge or consent of the underwriters,
and they submitted that this had the effect of avoiding the policy. In answer, the
plaintiff said that the risk insured against was a liability for tort, no right to con- F
tribution arose among joint tortfeasors, and, therefore, the insurers' risk was not
increased by the taking in of a new partner.

At the time of the accident the insured lorry was towing another lorry. The
policy provided that the lorry was not to carry a load in excess of 2¼ tons, and
the defendants said that the combined weight of load of the two vehicles exceeded
that weight, and, therefore, the policy was avoided. G

The policy further provided that the lorry should not be used when in an unsafe condition. At the time of the accident the second vehicle was being towed by a defective chain, which became entangled in the wheels of the insured lorry and caused it to become out of control. The defendants contended that the damage was caused by an insured vehicle being used when in an unsafe condition.

The policy further provided that the risk was excluded if the lorry was used with H
a trailer. The defendants contended that the towing of another lorry amounted
to use with a trailer within the meaning of this clause.

C. L. Henderson for the plaintiff.

Monckton, K.C., and *Vos* for the defendants.

Cur. adv. vult. I

Dec. 14. **GODDARD, J.**, read the following judgment.—When the Road Traffic Act, 1930, obliged the owners of motor vehicles under severe penalties to insure against third-party risks, the public, no doubt, thought that anyone who was unfortunate enough to be injured by the negligence of a driver would at least have the satisfaction of recovering compensation, although the owner of the vehicle was himself impecunious. But as the Act has left approved insurers free to make any bargain that they choose with their assured, except on a minor point dealt with by s. 38 of the Act, it may well happen that after the accident the injured party finds that the insurers can repudiate liability, either because of some misstatement or breach of warranty on the part of the insured or because of some condition in the policy which exempts them. For instance, in the policy under consideration in the present case there is a condition, which I am told is commonly inserted in the case of commercial vehicles, providing that the underwriters shall not be liable for injury, loss, or damage through the driving of any insured vehicles in an unsafe condition either before or after an accident. So if a lorry goes out one day with defective brakes, and in consequence runs into another car and kills or injures the occupants, the fact that the owner, who may be quite impecunious, has been obliged to insure affords but cold comfort to the injured, who will find that they can get nothing from the insurers; or when injured for life by a speed maniac on a motor-cycle the plaintiff may find that the defendant is a young man with a small weekly wage, who has, when effecting his insurance, misstated the number of previous accidents in which he has been involved, thus enabling the insurers to repudiate the policy.

No doubt in the majority—indeed, in the great majority—of cases, the validity of the policy is not disputed, but I have ventured to call attention to this matter because there has been a disturbing number of cases in this list recently in which I have been told on the summons for directions that the insurers are disputing liability, and consequently the plaintiffs, if successful in their claim, may find that the only chance of getting any fruits of their judgment will be by embarking on further litigation, perhaps protracted, and certainly expensive, against the insurers. This state of things constitutes a serious inroad on the value of compulsory insurance as a protection to the public.

The present case is a good instance of that to which I have referred. The plaintiff is a widow of a dairyman; she has four children, and all except one were dependent on their father. He was run over and killed by a lorry owned by a small firm of haulage contractors called Wighton and Jordan, the partners in which have either disappeared or are practically insolvent. On obtaining a judgment from Swift, J., for £2,600 and costs, she finds that her only hope is to take an assignment from the last surviving partner in that firm of his claim under the policy, and to embark on an action in which are raised difficult and doubtful points, both under the policy and as to the general law of insurance; a bleak prospect for a woman in her position, though, to do the present defendants justice, I was told that in any event they mean to make some ex gratia payment to her.

The facts that I have to consider arise partly out of the accident itself and partly out of the circumstances attending the particular insurance. It was agreed that as to the former I should accept the findings of Swift, J., and might refer to the evidence in that case without further proof. It seems that on the day of the accident a Ford lorry was towing a Manchester lorry which had broken down between Birmingham and London. Both lorries were owned by the firm of Wighton and Jordan. The towing chain used was defective and broke, causing the Manchester lorry to get out of control, so that it ran over and killed the plaintiff's husband. The learned judge found that both drivers were negligent, and the firm also, in supplying as part of their plant a defective tow chain. It should be stated that the driver of the second lorry was one Jordan, and it is in dispute in this action whether he was at that time still a member or only an employee of the firm.

The date of the accident was Aug. 23, 1932, and the judgment was given on Feb. 8 of this year. On June 29, 1933, the only partner left in the firm—Albert Edward Wighton—assigned all the rights of the firm in the policy effected by him on the Ford lorry to the plaintiff. The present action was begun on July 14 against the defendant underwriters, and the original defence only raised questions relating to the construction of the policy, but at a late stage of the action, on Nov. 24, the defence was amended by alleging that the partnership existing at the time of the insurance between Wighton and Jordan had been dissolved, and that other partners had been taken in without the knowledge of the underwriters, and the contention was that the policy had been avoided. No particulars as to the changes in the partnership were given, and I was told on the summons for leave to amend that the defendants said they could not give any, but it is evident that they had, if not actual knowledge, at least the means of knowledge as to one of the alleged changes, from a very early date in the history of the case; and though only a fortnight had elapsed between the amendment and the trial, they seemed at the hearing to have surprisingly good information if details had only come to them since the amendment.

The history of the policy begins with a proposal form dated March 9, 1932. The name of the proposer is given as "Wighton and Jordan," and those persons signed it as individuals, and not with a firm's signature. The policy, which incorporated the proposal, was not in fact subscribed till Sept. 9. The original proposal was for three months only—from March 9 to June 9—and only against third-party risks. My attention was not called to the dates and endorsements at the trial, but before giving judgment I asked counsel to attend again before me to deal with the question of when, if at all, the policy was extended or revived. I was then supplied with documents which show that on June 28, 1934, the brokers wrote to the underwriters applying for a further nine months' extension. On July 6 they wrote again, asking for nine months' certificate and for an extension slip to be sent by return of post, and from the endorsement on the policy it appears that the endorsement was passed at the signing bureau on July 6. Then I was given the extension slip, dated July 7, extending the policy to March 9, 1932, and a fresh certificate dating back to June 9. From these documents the only inference I can draw is that the insurance in fact lapsed on June 9 and was revived on July 6 or 7, it matters not which. Then in September a premium for full risk was accepted, and the policy was granted giving full cover, and signed on Sept. 9.

The evidence with regard to the alleged changes in the partnership is very unsatisfactory. Counsel for the defendant agreed that the onus in this matter lay on the defendant, but in accordance with an undertaking given at an interlocutory application, counsel for the plaintiff called Mr. Wighton. As, however, the defendants had given no particulars, I can well understand that the plaintiff's advisers were in some difficulty as to the points to which they should direct attention. There had been since the accident a fire at the firm's office and garage, and Mr. Wighton said, and he was not challenged on the matter, that all documents relating to the original and subsequent partnership were burnt. From his evidence it appears that a man named Tottle was taken into partnership about April, 1932. He seems to have provided enough capital to buy a third lorry; he was said to have driven it to Scotland and stayed there a long time. After his return he left the firm, asking Wighton and Jordan to find someone to buy the lorry, and had not been seen by them since. I suspect that he found that he had put his money into a losing concern and determined to cut his loss. At any rate, I am not prepared to hold that he was a partner beyond the end of May.

The position with regard to Jordan's retirement and the entry of a man named McFarlane was still more unsatisfactory and has caused me some trouble. Mr. Wighton's evidence was that McFarlane came to the firm, on a month's trial as he called it, in August. He paid in £175 out of a total that he was to find of £225 on Aug. 8, but did not become a partner till Sept. 12, and he paid the balance of his capital about that date. The form of registration under the Business Names Act, signed by McFarlane and Wighton, was produced which gives that date, Sept. 12, as that of the commencement of the business. Then Wighton was shown a letter dated Aug. 25, two days after the accident, sent by the firm to the defendants, the printed heading of which shows McFarlane as a partner with him. Wighton still adhered to his story that McFarlane did not in fact become a partner till September, but said that he intended to become one, and that he (McFarlane) got new letter-paper printed with that in view. I carefully observed Mr. Wighton, and while I think he was not very reliable on dates, I am quite satisfied that he was trying to tell the truth, and, indeed, I do not know that he had anything to

A gain by doing otherwise, for the case was presented throughout as one in which nothing could be got out of him, and the defendants did not suggest the contrary. But there was produced a letter from McFarlane to the defendants dated Oct. 26, 1932. This gave an address, and showed that the defendants had been in communication with him, and knew where he was to be found, and also that he had been, at any rate recently, a partner in the firm. The letter of Aug. 25 shows B that an earlier letter had been written by the firm to the defendants. That letter was not produced. Had it, or had it not, got McFarlane's name on it as a partner? The defendants have not told me, nor, indeed, given any evidence at all. They were in communication with McFarlane in October, 1932. They do not call him, nor explain why they do not, nor do they set up a case based on change of partnership till a fortnight before the trial. So far as the documents are con- C cerned, there is the letter of Aug. 25 with McFarlane's name printed on it, while there is the registration form signed by him giving the date of the commencement of the partnership as Sept. 12. Why, on this evidence, should I hold that McFarlane was a partner on Aug. 23? The defendants had some opportunity, at any rate, of finding out the true facts from McFarlane, and yet they give no evidence on the matter beyond the documents to which I have referred. It would, D I think, be quite wrong, on this evidence, to find that the defendants have proved that he was a partner at the date of the accident.

So far as the retirement of Jordan is concerned the matter stands thus. His name does not appear on the letter of Aug. 25 as a partner. On Aug. 24 a claim form was sent in, I am told, in McFarlane's handwriting. In it it is stated that Jordan was the driver, and in answer to the questions: "Was the driver in your E employ?" and "How long employed?" the statement is: "Yes; three years." If the first is true, the second certainly is not. Wighton swears that Jordan was still a partner; that he had arranged that McFarlane, if satisfied after his month's trial, should buy his share; that, in fact, he disappeared the day after the inquest, being afraid, as I gathered, of prosecution, and so far as he knows and believes, Jordan is now out of the country. Here again, though for reasons which I give hereafter, F I do not think the point is of much importance; I cannot find that the defendants have proved that Jordan had ceased to be a partner on Aug. 23. I think it is quite probable that in stating that the driver was in the firm's employment no more was meant than that he was not a stranger or an acquaintance who was driving—(I see the question immediately underneath)—and three years was much nearer the time that Jordan had been a partner than that for which he could have been an employee G if he had ceased to be a partner.

I find, therefore, that Tottle was a partner from some time in April to the end of May; that Jordan was a partner on Aug. 23, and that McFarlane was not. I ought, perhaps, to mention that Wighton alone entered an appearance on behalf of the defendants in the original action.

I will first deal with the points raised on the construction of the policy. They H are four in number, three being taken in the original defence, and the fourth by a very late amendment, though the facts relating to it were all along known to the defendants.

First, it is said that by condition 2 (f) the defendants are relieved if the loss is caused while the vehicle is carrying a load in excess of that for which it was constructed, namely, 2½ tons. It is said that as the Ford was towing the other lorry I the weight of that lorry and its load is to be added to the load of the Ford. I do not so read that clause. It has not, in my opinion, anything to do with towing, but merely with the weight superimposed on the vehicle itself. Giving the ordinary meaning to the words, I am unable to see how it can be said that in giving a tow a vehicle or a vessel is conveying a load. The words do not appear to me appropriate. Nor does the reason for the insertion of the condition apply to a tow. Weight that can be carried has no relation to weight that can be drawn. No one, I suppose, could carry a garden roller, but most people can draw one.

Secondly, by the late amendment to which I have referred, the defendants rely on condition 3 (d) and say that the towed lorry constituted a trailer. The first thing that occurs to one is that, had the defendants meant to prohibit towing, it would have been easy to say so, especially when everyone knows that lorries are often used to tow a broken-down car or to pull one out of a ditch. Thus, the preceding exemption deals with the case of a person who is being conveyed in or towed by the insured vehicle, clearly showing that it is contemplated that the vehicle may give a tow, and incidentally I think showing a clear distinction between conveyance and towage, which fortifies my opinion on cl. 2 (f). I think the trailer referred to in the clause is a truck or wagon, commonly referred to as a trailer, used for increasing the space available for the conveyance of goods, and that the term cannot be fairly applied to a temporarily broken-down motor vehicle which is taken in tow. This point was an obvious afterthought, in which, in my judgment, there is no substance.

Thirdly, reliance is placed on cl. 11, to which I referred in the early part of this judgment. It is said that because the tow chain was defective, and because it got round the wheels or steering gear of the towed lorry, causing it to get out of control, the damage was caused by an insured vehicle being in an unsafe condition. Now the words "any insured vehicle" obviously mean "any vehicle insured under this policy": (see the preceding words of the clause). There is no suggestion that the Ford lorry was in an unsafe condition, and the tow chain was no part of the vehicle. If a tug takes a vessel in tow and the towline was defective and broke, would anyone say that this proved that the tug was unsafe? I think not.

[His Lordship dealt with a point which does not call for report and continued:] I now pass to the other point of the case, which was the chief subject of argument at the trial. I pause here to say that this part of my judgment would not have been as full and as lengthy as it is had I, before I had written it, known the facts about the renewal or the revival of the insurance. At the time when this part of my judgment was prepared I did not know of those facts, and so I have dealt with the matter rather fully. It is said that because Mr. Tottle became a partner in April without the knowledge or consent of the defendants the policy was thereby ended, and the same argument was applied to McFarlane, whom I have found not to have been a partner at the critical times, but, of course, a higher court may take a different view of the facts relating to him.

It is curious that there is no authority in English law dealing with the effect on a policy of the assured taking in a fresh partner without the knowledge or consent of the insurers, even one to whom no objection in fact could be taken, but I have been referred to *Germania Fire Insurance Co.* v. *Home Insurance Co.* (1), and to passages in RICHARDS ON INSURANCE, at p. 386, that being a standard American textbook on insurance law. Bearing in mind that a contract of insurance is essentially a personal contract, where property is insured and lost it would, in my judgment, be a good defence for the insurers to prove that a new partner had been admitted without their consent. The assured cannot be changed by assignment, but only by novation. In the present case, however, there was only one insurance, namely, against third-party risks, until September, when full cover was given. This is, of course, an insurance against a liability in tort. In deciding whether the addition of a member to an assured firm avoids this insurance, as distinct from insurances against damage to or loss of the vehicle itself, it seems to me that the fundamental question is whether the insurers' risk in this respect has been enlarged or altered.

Now, a liability in tort is a several liability, and whether one or more joint tortfeasors are sued no right to contribution arises between them. The injured person can, at his or her option, sue all or some or one only of the members of a firm for a tort, though the rule is otherwise in contract. A plea in abatement was inadmissible in an action for tort unless the action arose substantially ex contractu. If it did, then, though the plaintiff framed his action in tort, he was liable to be met by a plea in abatement if he omitted a defendant, or to a non-suit if he joined too many. The law on the subject will be found discussed in the notes to *Cabell* v. *Vaughan* (2). If more than one is sued, execution may be levied on the property of the firm, but equally it may be levied against the goods of one partner only. If, therefore, a policy insures A. and B. against third-party claims in respect of the negligent driving of a car that they own jointly, it insures each severally against the whole claim, because either A. or B. may be called upon alone to pay. How then is the insurers' risk enlarged or altered if C. be taken into partnership? If C. alone is called upon to pay he can get nothing from the insurers, for he was never insured. But if A. or B. or both be called upon to pay, I do not see on what principle the insurers should not indemnify him or either of them against the claim. I do not think that the principles applicable to an insurance on property must necessarily apply to an insurance against liability for tort. It was suggested that the new partner might be a careless driver, with convictions against him, but there is no warranty in this policy that the vehicle should be driven only by the owners. They can employ what drivers they like, and there is no agreement to employ careful drivers, or only those with clean licences. So, here again the risk is not increased by reason of the fact that the new owner may also drive.

In my judgment, therefore, the fact that a new partner is admitted to a firm without obtaining the consent of the insurers does not relieve the latter from indemnifying those who were partners at the time when the policy was effected from a liability to a third-party claim, provided always that the partner claiming indemnity retains, as he ordinarily would, his undivided interest in the insured vehicle. Tottle was certainly not a partner either at the time of the original proposal or when the insurance was revived in July. For that matter, I do not find that he was a partner in June. Now, if what happens is merely an extension of the currency of the policy while it is still in existence, no new contract is made, there is only a variation of the original contract: see *Royal Exchange Assurance* v. *Hope* (3). But, in the present case, the insurance had lapsed entirely. It seems to me well established by authority that the revival of a lapsed policy is an entirely new contract: see *Doe D. Pitt* v. *Shewin* (4); *Acey* v. *Fernie* (5); *Simpson and others* v. *Accidental Death Insurance Co.* (6). In fact, the same two persons were insured in July as in March. The presence of Tottle as a partner in April and May would only affect the new insurance if the assured were bound to disclose that they had taken in a partner for a couple of months or so previously. No evidence was given, nor was it argued that on a proposal for insurance the proposer was bound to disclose that he had formerly had a partner or partners, and I certainly should not be prepared to hold that as a matter of law without evidence. I may add that if I had held that Jordan had ceased to be a partner before the accident, it would, in my opinion, have made no difference whatever to the insurers' liability. It seems to me that there can be no warrant for saying that a firm must get the consent of insurers before a partner retires or forfeit its insurance.

It was argued that an underwriter might look with suspicion on A. and only insure him because he was a partner with B., whom he trusted. The answer to that argument, which I confess seems to me a far-fetched argument, is, in my opinion, that if he insures A. and B. he must be assumed to trust them both. Again, there is no authority on the point, and I can find no opinion of leading English text-writers upon it, though the view that I have expressed above is, I find, taken in RICHARDS ON INSURANCE, s. 246, where the learned author is considering the effect of an alienation clause. The effect of what I have said above disposes also, I think, of the point taken against the validity of the assignment. Wighton is now the sole partner, and he alone is sued. If I am right in holding that he claims indemnity in respect of his several liability for this accident, it follows that he can assign his right of action against the defendants. It was suggested that he alone could not assign; that (as I understood the argument) there would be some outstanding interest in Jordan. This cannot be so, as if the defendants pay to the extent of their liability either Wighton or his assign, everything is satisfied. The plaintiff will have no further claim on Jordan or anyone else, and there is nothing further that the defendants can be called upon to pay. The plaintiff will have judgment with costs.

Solicitors: *Ernest W. Long & Co.*, for *Thornley & Boutwood*, Leighton Buzzard; *William Charles Crocker.*

[*Reported by* V. R. Aronson, Esq., *Barrister-at-Law.*]

HOOD *v.* SMITH

[King's Bench Division (Lord Hewart, C.J., Avory and Branson, JJ.), December 20, 1933]

[Reported 150 L.T. 477; 98 J.P. 73; 32 L.G.R. 30; 30 Cox, C.C. 82]

Criminal Law—Larceny—Postal packet—"In course of transmission by post"—Test letter not bearing local postmark posted in a letter box by postal official—Collection and retention overnight by another postal official—Letter placed next morning among letters to be delivered by defendant—Contents stolen by defendant—Post Office Act, 1908 (8 *Edw.* 7, *c.* 48), *s.* 89, *s.* 90.

The defendant was charged before a court of summary jurisdiction with stealing a postal packet in course of transmission by post. A test letter containing stamps and notes, and bearing a Saffron Walden postmark, was placed by an official of the Post Office in a post office letter box at Edgware, but there was no evidence that the letter ever had gone to Saffron Walden. Another official of the Post Office specially collected the letter on the same day, kept it in his possession overnight, and on the following morning placed it with letters to be delivered by the defendant. The letter was not proper to the defendant's delivery, and should have been thrown out by him as a mis-sort. The defendant, as he subsequently admitted, stole the stamps and notes from the letter and burned the cover and letter. The justices held that the letter was not in the ordinary course of transmission by post and dismissed the information.

Held: the letter never ceased to be a postal packet in course of transmission by post from the time when it was put in the post office down to the time when it was stolen by the defendant; and (per Avory, J.), if there were any room for doubt on that point, it became in the course of transmission by post when delivered to the defendant on the morning following the posting, because by s. 90 (b) of the Post Office Act, 1908, such delivery was deemed to be delivery to a post office. The case must be remitted to the justices with a direction to find the offence charged proved.

Notes. Sections 89 and 90 of the Post Office Act, 1908, have been replaced by s. 87 (1) and (2) of the Post Office Act, 1953, which are in almost identical terms.

As to larceny from the Post Office, see 10 Halsbury's Laws (3rd Edn.) 782, 783, and for cases see 37 Digest 374 et seq.

Case Stated by Middlesex justices.

At a court of summary jurisdiction sitting at Hendon a charge was preferred by Alfred William Hood (hereinafter called "the appellant") under s. 55 of the Post

A Office Act, 1908, against James Ernest Smith (hereinafter called "the respondent") for that he on May 26, 1933, at Edgware, then being an officer of the Post Office, did feloniously steal a postal packet in course of transmission by post. The respondent elected to be dealt with summarily and pleaded Not Guilty.

The following facts were proved on the hearing of the information: (a) Mr. Wright, a clerk in the secretary's office of the General Post Office, made up a test B letter which contained two £1 Bank of England notes, two 10s. Bank of England notes, four 1½d. stamps, and a communication. It was addressed to Mrs. Mead, 23, Hale Lane, Edgware, and bore three halfpenny stamps and the Saffron Walden postmark. He placed it in a post office letter box at Holmstall Avenue, Edgware, on May 25, 1933, at 6 p.m. There was no evidence that the letter ever had gone to Saffron Walden. (b) Mr. Gray, acting head postman at Edgware, went to this C letter box and specially collected the letter at about 6 p.m. the same day. He kept it in his possession overnight. (c) The letter was not collected or sorted in the ordinary way. (d) The letter was not at any time stamped at Edgware Post Office. (e) The letter was placed by Mr. Gray with letters to be delivered by the respondent, but was not proper to his delivery and should have been thrown out as a mis-sort. (f) At 9.30 a.m. on May 26 the respondent was interrogated by Mr. D Wright in the presence of a detective sergeant. He was found to be in possession of the stamps and notes contained in the letter, and admitted having taken them from the letter and having burned the cover and letter. (g) When charged by the police with larceny under s. 55 of the Post Office Act, 1908, and cautioned, the respondent made no reply.

The justices came to the conclusion that the letter was not in the ordinary course E of transmission by post, and dismissed the information. The informant appealed, by Case Stated, to the Divisional Court. The question upon which the opinion of the court was desired was whether upon the above statement of facts the justices came to a correct determination and decision in point of law.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *H. St. John Hutchinson* F for the appellant.

F. J. Powell for the respondent.

The Post Office Act, 1908, provides:

> "Section 89: The expression 'postal packet' means a letter, postcard, reply postcard, newspaper, book packet, pattern or sample packet, or parcel, and G every packet or article transmissible by post. . . .
>
> "Section 90: For the purposes of this Act—(a) A postal packet shall be deemed to be in course of transmission by post from the time of its being delivered to a post office to the time of its being delivered to the person to whom it is addressed; and (b) the delivery of a postal packet of any description to a letter carrier or other person authorised to receive postal packets of that H description for the post shall be delivery to a post office."

LORD HEWART, C.J.—It is quite clear when one looks at ss. 89 and 90 of the Post Office Act, 1908, that this letter never ceased to be (i) a postal packet and (ii) in the course of transmission by post, and I think that there was no evidence on which the justices could find to the contrary. I think, therefore, that this I appeal ought to be allowed and the case sent back to the justices with the direction that the offence charged was proved.

AVORY, J.—I am of the same opinion. If there were any room for doubt about the letter being in the course of transmission by post, in my opinion s. 90 (b) of the Post Office Act, 1908, establishes that when the letter was delivered to the respondent on the morning of May 26, 1933, it was then in the course of transmission by post, because such delivery was by the terms of that subsection deemed to be delivery to a post office.

BRANSON, J.—I agree. I think that the letter in question never ceased to be a postal packet in course of transmission by post from the time when it was put into the post office down to the time when it was stolen by the respondent.

Appeal allowed.

Solicitors: *Solicitor to the Post Office*; *E. F. Iwi*, for *Vyvyan, Wells, & Son*, Edgware.

[*Reported by* T. R. Fitzwalter Butler, Esq., *Barrister-at-Law.*]

SCHALIT *v.* NADLER, LTD.

[King's Bench Division (Acton and Goddard, JJ.), March 21, 1933]

[Reported [1933] 2 K.B. 79; 102 L.J.K.B. 334; 149 L.T. 191; 49 T.L.R. 375]

Distress—For rent—Right of cestui que trust to distrain—Trustee landlord of demised premises—Failure of tenant to pay rent—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 141 (2).

By the Law of Property Act, 1925, s. 141 (2), any rent reserved by a lease may be "recovered, received, enforced, and taken advantage of, by the person . . . entitled . . . to the income . . . of the land leased." The lessor of premises was a trustee, and on the rent falling into arrear the cestui que trust issued a distress warrant.

Held: on the true construction of the subsection, it enabled a person who was entitled to the rent to the exclusion of all others to recover it although, but for the subsection, he would not have been able to sue in his own name, but would have been obliged to use the name of the person in whom the legal estate was vested; the right of a cestui que trust whose trustee had demised property subject to the trust was not to the rent, but to an account from the trustee of the profits received from the demise; and, therefore, the cestui que trust in the present case was not entitled to distrain and the distress was illegal.

Notes. As to persons who may distrain, see 12 Halsbury's Laws (3rd Edn.) 94 et seq., and for cases see 18 Digest 275 et seq. For Law of Property Act, 1925, see 20 Halsbury's Statutes (2nd Edn.) 427.

Cases referred to:

(1) *Turner* v. *Walsh*, [1909] 2 K.B. 484; 78 L.J.K.B. 753; 100 L.T. 382; 25 T.L.R. 605, C.A.; 35 Digest 341, *836*.

(2) *Allen* v. *I.R. Comrs.*, [1914] 1 K.B. 327; affirmed, [1914] 2 K.B. 327; 83 L.J.K.B. 649; 110 L.T. 446; 58 Sol. Jo. 318, C.A.; 39 Digest 225, *59*.

Appeal by defendants from Westminster County Court.

One Joseph Nadler was a director of and the only shareholder in the defendant company, which desired to become tenants of premises in Shaftesbury Avenue, London. The landlords were unwilling to accept a limited company as tenants, and the lease was, therefore, granted to Mr. Nadler, who executed a deed of trust declaring that he held the premises as a trustee for the company. Subsequently Nadler granted an underlease of part of the premises to the plaintiff. The plaintiff fell into arrear with his rent, and a warrant of distress was issued on behalf of the defendant company, in which it was stated that the rent was due to the defendant company. The plaintiff brought this action claiming damages for wrongful distress. He contended that the defendant company were not his landlords, and, therefore, not entitled to distrain. The defendant company relied on the Law of Property Act, 1925, s. 141 (2), which provides:

> "Any [rent reserved by a lease] covenant or provision shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased."

The county court judge held that the distress was wrongful and awarded to the plaintiff £35 damages. The defendant company appealed.

Vaisey, K.C., and *De Ferrars* for the company.
Swords, K.C., and *Bensley Wells* for the plaintiff.

GODDARD, J., read the following judgment of the court. This is an appeal from a judgment of His Honour the late Judge Turner, whereby he gave judgment for the plaintiff in an action for wrongful distress, assessing the damages at £35. The ground upon which it is alleged and held that the distress was wrongful was that it had been authorised only by the defendant company, who were not the landlords; but the defendants contended, and contend on this appeal, that the defendant company was, by virtue of s. 141 (2) of the Law of Property Act, 1925, a person entitled to recover, receive, or enforce the rent of the premises in question, and that, consequently, the distress was valid. That subsection, which re-enacts s. 10 of the Conveyancing Act, 1881, is as follows:

> "Any such rent [that is, rent reserved by a lease], covenant or provision shall be capable of being recovered, received, enforced, and taken advantage of, by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased."

[His Lordship stated the facts and continued:] It was contended that the defendant company as cestui que trust of the lessor was a person entitled to distrain, and the only question on the appeal is whether this contention is sound.

Counsel for the company contended that Joseph Nadler was a bare trustee for the company, and that, consequently, the latter were entitled to the income arising from the property, and, no doubt, it is true that the company were beneficially interested in the proceeds of the under-letting, but if his argument means that the trustee has no interest at all in the underlease other than a bare legal estate the court cannot agree with the contention. The trustee was personally liable to the superior landlords for the rent and the due performance of the covenants; and he was entitled to reimburse himself out of the rent collected from the sub-tenant for the rent or any other outgoings that he, as trustee for the company, had to pay. It was the net proceeds he was to hold in trust. If the case, therefore, merely depended on whether Joseph Nadler, the lessor of the plaintiff, was a bare trustee for the defendant company with no interest in the underlease, we have no hesitation in deciding that he was not.

But we do not think that this appeal ought to be decided on this narrow ground, as counsel for the plaintiff has contended that in no circumstances does the section entitle a cestui que trust to recover or enforce the rent, and it seems to us that the argument of counsel for the company does involve the contention that, when a lease is granted by a trustee, the cestui que trust can always intervene and demand, sue, or distrain for the rent reserved. It is admitted that the trustee is a person who can sue or distrain for the rent, and his right to do so arises because he and he alone is the lessor. The plaintiff contends that the section is not to be construed as meaning that when there is a lessor entitled to the rent as between himself and the lessee, some other person can also, or, alternatively, be entitled thereto. If it were so, the result would be that at least two persons would have a concurrent or at least an alternative right to the rent; each would apparently be entitled to demand it. And though it is conceded that, if payment were made to one, it would be a defence to a demand by the other, it appears to follow that if the tenant delayed payment, being in doubt whom to pay, he might find that two distresses were put in or two writs were issued against him simultaneously.

In our judgment, the section cannot be so construed. We think it means that

a person who is entitled to the rent to the exclusion of all others can recover it, A
although, but for the subsection, he would not have been able to sue in his own name, but would have been obliged to use the name of the person in whom the legal estate was vested. It is a subsection dealing only with procedure. Counsel for the company relies on *Turner* v. *Walsh* (1) as an authority to support his contention. That was a case of a mortgagor in possession who has always been held in equity to be entitled to receive and recover the rent of the mortgaged property B
until the mortgagee enters into possession. But that case does not decide that, if the mortgagee does enter into possession, the rent can be demanded or recovered either by him or the mortgagor. On the contrary, it seems to us that it decides that it is the mortgagor in possession and he alone who is entitled to the rent until the mortgagee enters, and that the section enables him as the owner in equity to sue in his own name, while at common law he would have been obliged to use the C
name of the mortgagee. It is no authority for saying that both mortgagor and mortgagee are entitled to sue for or otherwise enforce the rent.

But there is another, and as it seems to us, fundamental objection to the appellant's case. The right of the cestui que trust, whose trustee has demised property subject to the trust, is not to the rent, but to an account from the trustee of the profits received from the demise. If authority be needed for that proposition it is D
to be found in the judgment of Scrutton, J., in *Allen* v. *I.R. Comrs.* (2). The cestui que trust has no right to demand that the actual banknotes received by the trustee shall be handed over to him or that a cheque for rent drawn to the trustee should be endorsed over; what he can require is that the trustee shall account to him, after taking credit for any outgoings or other payments properly chargeable, for the profits received from the trust property. E

Counsel has called our attention to passages in the latest editions of Foa's Landlord and Tenant and Wolstenholme and Cherry's Law of Property Acts, in which the learned authors of those standard textbooks express the opinion that rent can be recovered by beneficial owners, and each cites in support the case of *Turner* v. *Walsh* (1), to which we have already referred. For the reasons given above we do not think the case in question supports the proposition that a cestui F
que trust can sue or distrain. Were it so, the position of a tenant whose lessor was in fact, though unknown to him, a trustee, might, indeed, be unenviable. Having been accustomed, perhaps for years, to pay his rent to the person appearing in his lease as lessor, he might be faced with a demand without previous notice from someone of whom he had never heard, with the prospect that, before he had had time to interplead, a distress might be levied at the instance of both the cestui G
que trust and the trustee, and, apparently, neither would be wrongful. Against the opinion of the eminent text-writers quoted above is the fact that, though the provisions of this section, either as s. 10 of the Conveyancing Act, 1881, or as s. 141 (2) of the Law of Property Act, 1925, has been in force for over forty years, not only is there no reported case in which the cestui que trust has ever been held entitled to sue or distrain for the rent, but neither counsel, whose experience in H
these matters is very wide, has been able to tell us of any case within their knowledge where such a claim has ever been made.

It was suggested to us that the damages were in any case excessive because, as the plaintiff was in arrear with his rent, in the particular circumstances of this case he could have suffered no more than nominal damages. While we do not understand why the learned county court judge awarded this sum to a plaintiff I
who apparently has no merits whatever, this matter is not open to the appellant on his notice of appeal, and we therefore say nothing more about it. The appeal is dismissed, with costs.

Solicitors: *J. Nadler*; *Lucien Fior*.

[*Reported by* V. R. Aronson, Esq., *Barrister-at-Law.*]

RUBY STEAMSHIP CORPORATION, LTD. *v.* COMMERCIAL UNION ASSURANCE CO.

[COURT OF APPEAL (Scrutton, Greer and Romer, L.JJ.), July 21, 1933]

[Reported 150 L.T. 30; 39 Com. Cas. 48; 18 Asp.M.L.C. 445]

Insurance—Marine insurance—Cancellation of policy—Need of consent of assured—Non-payment of premiums—Foreign brokers—Application of foreign law—Estoppel—Policies substituted for earlier policies believed to be cancelled—Benefit taken by assured under later policies—No right to claim under earlier policies.

By English law, where an underwriter acknowledges in a policy of marine insurance that the assured has paid the premium, even though the acknowledgment is contrary to the fact, the policy cannot, without the authority of the assured, be cancelled by the insurance broker on the ground that he has not received the premiums from the assured.

An agent's authority as between himself and his principal is governed by the law with reference to which the agency is constituted, which is in general the law of the country where the relation of principal and agent is created.

A Canadian assured instructed in the United States American insurance brokers to effect an insurance in England, which they did through an English broker. The assured failed to pay premiums which became due and the American brokers purported to cancel the policies without the consent of the assured. In an action by the assured on the policies it was proved that in the case of an American assured on a policy underwritten by an American underwriter through an American broker the underwriter looked for the payment of the premiums direct to the assured, and so, in the event of non-payment, could forthwith cancel the policy.

Held: the contract between the assured and the American brokers was concluded in New York, and, therefore, American law applied and the policies were effectively cancelled in the absence of consent by the assured.

Per Curiam: Where policies are underwritten by underwriters in substitution for earlier policies which the underwriters believe to have been validly cancelled an election by the assured to claim, followed by his taking benefits under one set of policies, prevents his making any claim under the other.

Notes. As to authority of broker to cancel policy, see 22 HALSBURY'S LAWS (3rd Edn.) 50; as to the law governing contracts, see 7 HALSBURY'S LAWS (3rd Edn.) 72 et seq.; as to estoppel by conduct, see ibid., vol. 15, 235 et seq. For cases see 29 DIGEST 81; 11 DIGEST (Repl.) 436, 437; 21 DIGEST 328 et seq.

Cases referred to:

(1) *Xenos* v. *Wickham* (1866), L.R. 2 H.L. 296; 36 L.J.C.P. 313; 16 L.T. 800; 16 W.R. 38; 2 Mar.L.C. 537; 17 Digest (Repl.) 216, *153*.

(2) *Maspons* v. *Mildred* (1882), 9 Q.B.D. 530; 51 L.J.Q.B. 604; 47 L.T. 318; 30 W.R. 862, C.A.; affirmed, 8 App. Cas. 874; 11 Digest (Repl.) 439, *819*.

(3) *Irving* v. *Richardson* (1831), 2 B. & Ad. 193; 1 Mood. & R. 153; 9 L.J.O.S.K.B. 225; 109 E.R. 1115; 29 Digest 111, *661*.

(4) *Watson* v. *Swann* (1862), 11 C.B.N.S. 756; 31 L.J.C.P. 210; 142 E.R. 993; 29 Digest 89, *476*.

(5) *Boston Fruit Co.* v. *British and Foreign Marine Insurance Co.*, [1906] A.C. 336; 75 L.J.K.B. 537; 94 L.T. 806; 54 W.R. 557; 22 T.L.R. 571; 10 Asp.M.L.C. 260; 11 Com. Cas. 196; 29 Digest 90, *478*.

Appeal from an order of ROCHE, J.

The plaintiffs—a Nova Scotian shipping company—claimed payment under certain policies of marine insurance taken out with the defendants, English underwriters, in May and September, 1919, on the steamship *Hurona*. These policies

Messrs. Johnson and Higgins, the plaintiffs' insurance brokers, a New York firm, A had, in November, 1919, purported to cancel with the assent of the defendant underwriters, on the ground of the failure by the plaintiffs to pay the premiums due under the policies. In November, 1919, Messrs. Johnson and Higgins had taken out fresh policies on the steamship *Hurona* before the total loss of that vessel on Nov. 26, 1919, and payment having been made under the November policies, the plaintiffs shared in the distribution of the proceeds. The defendants pleaded B (a) that the May and September policies were cancelled by the cancellation of Messrs. Johnson and Higgins; (b) that the plaintiffs had authorised the cancellation; and (c) that, on the assumption that the plaintiffs had not authorised the cancellation of the policies, by sharing in the distribution under the November policies they had ratified the cancellation of the May and September policies, and were now estopped from denying the validity of the cancellation. ROCHE, J., C agreed with all these contentions and gave judgment for the defendants. The facts are very fully set out in the judgment of SCRUTTON, L.J.

The plaintiffs appealed.

Chappell, K.C., and *Cyril Miller* for the appellants.

Porter, K.C., and *David Davies* for the respondents. D

Cur. adv. vult.

July 21. **SCRUTTON, L.J.**, read the following judgment.—This is an appeal from a judgment of ROCHE, J., in favour of the defendants. The action is brought by the Ruby Steamship Corporation, Ltd., a Nova Scotian company, hereinafter called "Ruby," against the Commercial Union Assurance Co., whom I call the English underwriters. It is brought to recover under policies called the "May" E and "September" policies a total loss on the steamer *Hurona*, which occurred on Nov. 26, 1919, and it is a test case for claims against a number of English underwriters. The main defence is that Ruby cannot recover against the underwriters, as the May and September policies were cancelled by Johnson and Higgins, the American brokers concerned in effecting the policies, for non-payment of premiums by Ruby, and that the cancellation was either with the express consent and F authority of Ruby, or within the authority given to Johnson and Higgins by the law of New York State, in which they were employed. There are other points—whether Ruby was a party for whose benefit the policies were effected; and whether Ruby had so taken benefit under "November policies," said to be substituted for the "May" and "September" policies, that Ruby could not now claim under the latter policies. G

The case to some extent turns on a conflict of evidence, and is made more difficult to decide because the writ was not issued till November, 1925, just before the Statute of Limitations was about to take effect, and the case did not come on for trial till the end of 1932, thirteen years after the material incidents occurred. Meanwhile, at least three proceedings connected with the case, with numerous appeals, had taken place in the United States. It is not surprising that the H witnesses were very uncertain and sometimes extremely inaccurate in their recollection, and some of the material documents were not forthcoming.

In 1919 an English company, the Cairn Line, were ready to sell a steamer of theirs, built in 1892, and, therefore, twenty-seven years old. The shipping boom after the war, which ultimately resulted in heavy losses to misguided speculators and to a crop of "scuttling" cases in attempts to retrieve such losses (an incident I which is fortunately absent in this case), led people to be ready to give the ridiculous price of some £150,000 for a twenty-seven years old ship. We do not know the price which the Cairn Line got for their old friend, but we do know that in April, 1919, part of that price, $377,500, was still unpaid and secured by a first mortgage on the ship. We do not know with any certainty who was the original purchaser, as a firm named Williams Steamship Co., had a number of subordinate single-ship companies hoping to buy, and had not decided which should be the ultimate fortunate purchaser of the *Hurona*. Apparently, about April 20, 1919, the *Hurona* was registered as a British ship in the name of Barnett, a vice-president of the Williams company, and the Williams company could control its future destiny. About April 22, 1919, Williams & Co. instructed Johnson and Higgins, well-known American brokers, to procure English and American underwriting, and, a rate of £10 per cent. on hull being agreed, underwriting a slip started on April 30, and a large amount was written in England, the defendants being the leading underwriter, by May 2. At this time Ruby had no interest in the vessel.

It is necessary here to state the difference between English and American underwriting. In England by long practice the underwriter acknowledges in the policy, often contrary to the facts, that the assured has paid him the premium, and cannot thereafter claim for it on the assured. But by ancient fiction the underwriter is supposed to have lent the premium received to the broker, and can therefore re-claim it from the broker as money lent. If the premium is for a year's insurance, it is frequently by agreement payable by the broker in quarterly instalments. It naturally follows by English law that, the assured being supposed to have paid the premium, his contract with the underwriter cannot be cancelled by the broker without the authority of the assured, on the ground that he has not received the premium from the assured. It was so decided by the House of Lords in *Xenos* v. *Wickham* (1).

In the United States the position is different. In the case of an American assured on a policy underwritten by an American underwriter, through an American broker, there is no contractual liability of the broker to the underwriter for premium; the latter looks to the assured. The broker has no further duties after he has effected the policy. He cannot, therefore, cancel the policy, on the ground that the assured has not paid the underwriter the premium; that is no concern of the broker's. But a different position arises when an American assured instructs in the United States an American broker to effect an insurance in England. The American broker must do this through an English broker, who presents the slip to the English underwriter. As the English broker is liable to the underwriter for the premium, and cannot sue the assured, he naturally looks to the American broker for the premium, who must look in turn to the assured. If the assured, in the case of a premium payable by instalments, does not pay the early instalments, the American broker, of course, desires to relieve himself of liability for the later instalments, and, if the underwriter will consent, to cancel the policy without the assured's consent and so free himself from further liability for premiums.

The employment of the American broker is in the United States to do an act there which will result in the underwriting of a policy in England. The questions then arise: (i) What law is applicable to the employment as between broker and employer? (ii) When the relevant law is ascertained, what are its provisions as to the power of the broker, with the consent of the underwriter, to cancel the policy without the consent of the assured and so escape further liability from premiums?

As to the relevant law, I follow and agree with the dictum of Lindley, L.J., delivering the judgment of the Court of Appeal in *Maspons* v. *Mildred* (2) (9 Q.B.D. at p. 539), that in considering the nature and extent of the authority given by a Spanish principal to a Spanish agent in Spain (Cuba) the Spanish law is to be taken into account. This principle was stated by Professor Dicey in his second edition of the Conflict of Laws—I am reading from s. 179 in the fifth edition, it is under another rule in the second edition—

> "The agent's authority as between himself and his principal is governed by the law with reference to which the agency is constituted, which is in general the law of the country where the relation of principal and agent is created,"

and this rule has been continued unchanged by later editors. To find the authority as between Johnson and Higgins, brokers, and their principals, Williams & Co. and/or Ruby, I, therefore, look to the law of the State of New York, where the employment took place.

It is first necessary to state the facts. Between April 22 and April 30 instructions were being given to Johnson and Higgins in New York by the then owners of the *Hurona* to effect insurance in England on hull to the extent of £47,422 and on disbursements and expected earnings to the extent of £28,866. It is not clear exactly who gave these instructions, probably some representative of Williams & Co., who at that time were managing the vessel under the authority of Barnett, the registered owner, and apparently on behalf of a Nova Scotian company, the Convoy Steamship Co., who were expected to be owners. Ruby had at this time no interest in the *Hurona*, and on May 2 the interested parties were Cairn Line, mortgagees, and/or Williams & Co., as may appear, bill for premiums to Williams & Co. On May 5 Ruby became interested under an agreement of that date. They were to buy from Barnett, registered owner, for a purchase price of $781,550, payable as to $25,000 by a deposit of $25,000, the source of which is not certain, and as to $225,000 out of the freights of the first voyage then about to commence, secured by a promise to pay of Richards & Co., who were to manage the vessel until the last instalment but one had been paid. The second instalment was for $273,750, payable with interest on Aug. 23, 1919, and the last instalment for $257,000, with interest payable on Oct. 23, 1919. Each of these instalments was to satisfy half of the sum due on mortgage to the Cairn Line, and the balance to go to defray the purchase price to Barnett. For the last two instalments, $530,000 in all, the vendor had a second mortgage. The last two instalments were secured by notes from Ruby, split up to cover respectively the Cairn Line instalment, the vendor's instalment, and interest. The agreement then contained cl. 8 which was as follows:

> "The purchaser agrees that the vendor shall keep the vessel insured for the benefit of the Cairn Line of Steamships, Ltd., the vendor and the purchaser, as their interests may appear, for a period of one year and until the full purchase price is paid, by full marine insurance and protection and indemnity insurance, and, if required by Cairn Line of Steamships, Ltd., war risk insurance, loss, if any, payable to the Cairn Line of Steamships, Ltd., or the vendor, as their interest may appear, and the purchaser shall pay all premiums thereon, and if such premiums are not so paid, the amount thereof shall also be secured by the second mortgage above referred to."

It will be seen that the vendor was to keep the vessel insured for the benefit of the Cairn Line, the vendor and the purchaser, as their interest may appear, by "full marine insurance," but that the loss, if any, was payable to the Cairn Line or the vendor as their interest may appear, and the purchaser was to pay all premiums thereon. On May 14 Johnson and Higgins report to Williams & Co. that on their instructions the amount insured has been increased by some £6,100, this addition with loss payable to Williams & Co., and that the total amount insured is $530,000. This, it will be noted, is the amount of the last two instalments of price for which the vendor had a second mortgage. The earlier amount was payable, as to the English policies on hull and disbursements, to the Cairn Line, as to the American policies to Barnett and/or Williams & Co. The policies so far are spoken of as "the May policies."

Ruby got some information as to this, and not unnaturally thought their interests were not fully covered. Ruby, therefore, took out, through another broker, p.p.i. policies. Johnson and Higgins pointed out to them that they ran the risk of invalidating the May policies by this assurance, and Ruby thereupon transformed this insurance into an additional insurance through Johnson and Higgins, known as "the September policy." According to Becker's evidence, the September policies were only placed by Johnson and Higgins after an arrangement with Berry that Johnson and Higgins might cancel the policies, if premiums were not paid on the due date.

The position as to premiums was then as follows. On the May policies: Johnson and Higgins were liable to pay to Willis and Faber some $9,000 quarterly on

May 12, Aug. 12, Nov. 12, 1919, and Feb. 12, 1920. On the September policy: Johnson and Higgins were liable to pay to Willis and Faber on a broken period from Sept. 10 to Nov. 12, 1919, $2,686, and two instalments of $3,959 on Nov. 12, 1919, and Feb. 12, 1920. The premiums on the May policies were due on orders placed by Williams & Co., and Ruby had agreed with Williams & Co. to pay them. The premiums on the September policy were due on orders placed by Ruby. In fact, on the May policies the April premiums were not paid to Johnson and Higgins, when due, by anybody; the August premiums were not paid. On the September policy the September instalment was not paid by Ruby. When the August instalment of purchase price was due, Ruby only paid the bills necessary to provide the first Cairn instalment, and did not pay the bills covering the rest of the payment due to Williams & Co. As Johnson and Higgins were also liable to Willis and Faber in the future for the instalments due on Nov. 12, 1919, and Feb. 12, 1920, they not unnaturally became anxious and put pressure on Ruby and Williams & Co. by threats to cancel the insurance. Ruby succeeded in procuring a loan from the Equitable Trust, which enabled Ruby and Williams & Co. to discharge the instalment due to the Cairn Line on Oct. 23, and the premiums due up to Sept. 10, 1919. The latter were paid as to the May policies by Williams & Co. on Oct. 24 to Johnson and Higgins; as to the September policy, on Oct. 24 by cheque from Ruby. But Johnson and Higgins were naturally anxious about the payment of the instalments of premium on the May and September policies due on Nov. 12, 1919. They obtained from Williams & Co. on Oct. 24 a letter:

> "We further agree that in the event that the proportionate premiums hereinbefore mentioned, due as of Nov. 12, 1919, and Feb. 12, 1920, are not paid on the said mentioned dates, we will surrender to you, for cancellation, policies enumerated as above, endorsed by all of the payees and parties at interest mentioned therein, as follows: 'Losses, and returns, if any, payable to Johnson and Higgins,' "

and they allege that Ruby, by the Moultons, father and son, and Mr. Berry, all the shareholders, also assented to such future cancellation in respect of non-payment. Mr. Berry had already assented to this on Aug. 29. On Nov. 12 another instalment of the premiums on the May and September policies was due. It was not paid, and Johnson and Higgins, at the request of Williams & Co., and with the consent of the English underwriters, cancelled the May and September policies for non-payment of premiums. They warned Ruby they were going to take this step if the premiums were not paid, on Nov. 7, and told Ruby they had cancelled on Nov. 16. Ruby made no protest or payment.

Then came the tragic event that the *Hurona* was lost in the Mediterranean on Nov. 26. At Williams's request Johnson and Higgins had effected through Willis and Faber policies with English underwriters, including the defendants, to cover Williams & Co.'s interest in the *Hurona*: "Loss, if any, payable to the Williams company." On Nov. 27 came the news of the loss of the *Hurona*, and Ruby, who had been told of the cancelling of the May and September policies, did not know what to do. On Nov. 29 they claimed on Barnett, their vendor, and on Johnson and Higgins. On Dec. 31 they "formally withdrew" their claim, and on Feb. 4 they "cancelled their release," i.e., the document of Dec. 31. They were apparently not clear what effect taking any benefit under the "November policies" would have on any objection of theirs to the cancellation of the "May and September policies." They attempted to make an agreement whereby the policy moneys then being collected under the "November policies" would be used to discharge certain debts for which Ruby were liable. As appears from the documents, these policy moneys were ultimately used to discharge the $250,000 lent by the Equitable Trust, for which Ruby were liable and for which the Trust had a charge on the ship, bills for purchase price for which Ruby were liable, and crew's wages. Litigation of various sorts went on in the United States. Ruby sued the American underwriters on the ground that the American policies, which had special provisions about cancelling, were not properly cancelled, and succeeded. Ruby were defendants in an action brought by Williams & Co. for balance of accounts in respect of the *Hurona*, and counter-claimed for sums due to them. This action ultimately collapsed for want of funds on either side. Ruby sued Johnson and Higgins for damages for wrongful cancellation of the May and September policies. This claim of Ruby was decided against them by two Federal courts of the United States, and an attempt to get the decision reversed or quashed by writ of certiorari to the Supreme Court of the United States failed. The English underwriters had paid in full on their "November policies," which they had written in substitution for the "May and September policies," and which, of course, they would not have written but for their belief that the original policies were cancelled. Lastly, just before the Statute of Limitations would have taken effect the present action was started by Ruby against the English underwriters, based on the allegation that the "May and September policies" had never been cancelled so as to bind Ruby.

The defendants' chief defence is that in the circumstances, by the law of New York, Johnson and Higgins had power to relieve themselves from further personal liability for premiums which Ruby would not pay, by cancelling the policy with the assent of the underwriters, but without the assent of Ruby, who had not paid the premiums. This is a question of New York law, and, therefore, of fact. The best evidence of the fact, in my opinion, is that Ruby has failed in two Federal courts in an action against Johnson and Higgins for wrongful cancellation of these policies, and that the Supreme Court has declined to interfere with this decision. I decline to sit in an appeal from American courts on American law except in a very clear case. In addition, we have evidence from two American lawyers, one an ex-judge of the Supreme Court, in favour of the defendants, and one in favour of Ruby. I understand the result of the evidence to be that the courts of the United States are readier than the English to relieve one party to a contract of his obligations when the other party has broken some of his obligations, particularly when the party asking for relief will be placed under onerous obligations to third parties, against which he will get no effective protection unless he can help himself by getting rid of those obligations. I agree with the view of ROCHE, J., that the relevant law, the law of New York, justified Johnson and Higgins in cancelling the policies, and that the English underwriters could accept cancellation from Johnson and Higgins for non-payment of premiums by the assured without being liable to Ruby, the assured.

It is a collateral defence that Ruby in fact assented to the cancellation by the brokers of the policies if Ruby did not pay the premiums. ROCHE, J., has found that those representing Ruby did so assent when the September policies were placed, and on or about the time of the meeting of Oct. 24, when the premiums then long overdue were paid up to date and warning was given that prompt cancellation would follow further default. The position of Williams & Co. is made clear by the letter of Oct. 24. That letter represented the result of an oral agreement with Williams & Co. in a small room in which Mr. Becker, of Johnson and Higgins, was for a quarter of an hour discussing the matter with Williams & Co., the two Moultons and Berry, all the shareholders in Ruby, being present. [His Lordship then reviewed the evidence of those at this meeting and continued:] I agree with the view of ROCHE, J., on this point.

Failure on these two points defeats the plaintiffs, but, in addition, I am of opinion that their action in taking benefits under the November policies, which were substitutes for the May and September policies, prevents them from claiming under the May and September policies. The November policies were only written by the English underwriters in substitution for the May and September policies and in the belief that the latter were validly cancelled. The English underwriters cannot be liable both under the May, September and the November policies. An election to claim, followed by taking benefits under one set of policies, must prevent claims on the other. I abstain from expressing a final opinion on whether Ruby was ever a person insured under the May policies. The English decisions of

Irving v. *Richardson* (3), *Watson* v. *Swann* (4), and *Boston Fruit Co.* v. *British and Foreign Marine Insurance Co.* (5) establish that the point to be looked for is the intention at the time of effecting the insurance, and that is the intention of the principal at the time he instructs the insurance to be effected, not of the broker. It looks very much as if Williams & Co., whatever their contractual obligation to Ruby, at the time they gave instructions intended to insure for the two mortgagees, Cairns and Barnett, in $530,000, the amount of the two mortgages. But the matter is very complicated, and with three reasons for deciding against the plaintiffs, I need not embark on the consideration of a difficult fourth point. Ruby may have claims against Williams & Co., but has not chosen to fight them out. I agree substantially with the judgment of ROCHE, J., and am of opinion that the appeal should be dismissed with costs.

I am asked by **ROMER, L.J.**, to say that he agrees with the judgment I have just delivered.

GREER, L.J.—I have had the opportunity of carefully reading the judgment of SCRUTTON, L.J. I agree that this appeal should be dismissed for the reasons stated by SCRUTTON, L.J., and I do not find myself in a position to add anything that would be useful in this case.

Appeal dismissed.

Solicitors: *Middleton, Lewis, & Clarke*; *Parker, Garrett & Co.*

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

THE ZIGURDS

[HOUSE OF LORDS (Lord Atkin, Lord Tomlin, and Lord Russell), December 14, 1933]

[Reported [1934] A.C. 209; 103 L.J.P. 28; 150 L.T. 303; 39 Com. Cas. 178; 18 Asp.M.L.C. 475; 50 T.L.R. 162]

Chose in Action—Assignment—Equitable assignment—Notice—Sufficiency—"We hold captain's authority to collect freight per this steamer's cargo against which we have made payments."

The master of the steamship *Z.*, on arrival at the port of West Hartlepool, gave an equitable assignment of the freight to the respondents, who were the ship's agents, and had made necessary disbursements for the *Z.* The agents then wrote the following letter to the receivers of the cargo, who were liable to pay the freight: "*S.S. Zigurds.* We beg to give you notice that we hold captain's authority to collect the freight per this steamer's cargo against which we have made payments."

Held: the respondents' letter to the receivers of the cargo was a good notice of their equitable charge, and as between them and the appellant, who was an earlier equitable assignee of the freight, but had given no notice of his assignment, the respondents were entitled to priority.

Notes. As to equitable assignments of choses in action, see 4 HALSBURY'S LAWS (3rd Edn.) 492 et seq., and for cases see 8 Digest (Repl.) 573 et seq.

Appeal from an order of the Court of Appeal (SCRUTTON, LAWRENCE, and GREER, L.JJ, [1933] P. 87), reversing a decision of LANGTON, J.

The respondents, E. A. Casper, Edgar & Co., Ltd., had acted as agents for the Latvian steamship *Zigurds* at West Hartlepool in March, 1931, and in that capacity had made various disbursements on behalf of the vessel. Before making any such disbursements, and, as a condition of so doing, the respondents obtained from the master of the *Zigurds* a document in the following terms:

> "Please pay the freight for my vessel, the *Zigurds*, and all demurrage which may be payable under the charter to my agents, Messrs. E. A. Casper, Edgar & Co., Ltd., and oblige."

Upon receiving this document the respondents wrote the following letter to Messrs. Churchill and Sim, who were the receivers of the cargo by whom freight was payable:

> "Dear Sirs,—*S.S. Zigurds*: We beg to give you notice that we hold captain's authority to collect the freight per this steamer's cargo, against which we have made payments.—Yours faithfully, for E. A. Casper, Edgar & Co., Ltd. —(Signed) D. EDGAR, director."

The freight was also claimed by the appellant, Alfred Harris Smith, an earlier equitable assignee. The Court of Appeal held that the respondents' letter was a good notice of their assignment, and that as between the respondents and an earlier equitable assignee of the freight, by whom no notice had been given, the respondents were entitled to priority. Alfred Harris Smith appealed.

Sir Gerald Hurst, K.C., and *Harry Atkins* for the appellant.

W. P. Spens, K.C., and *J. V. Naisby*, for the respondents, were not called upon to argue.

LORD ATKIN.—In this case the question that arises before the House is a question as to the priority of equitable assignments. It arises in respect of a ship called the *Zigurds*, which in 1929 was sold to a Latvian firm, and in respect of the purchase of which the appellant made an advance towards the purchase price for which he took a statutory mortgage on the ship. At the same time he took a supplementary agreement in writing which is alleged to be an equitable assignment of the freight of future voyages, and, for the purposes of this case, it is to be assumed that that document did in fact give him an equitable assignment of the freight. In February, 1931, the ship was at West Hartlepool with a cargo of timber, and the respondents were appointed the ship's agents. They appear to have known of the financial position of the ship at that time, which certainly was not a very satisfactory one; there were defaults on the mortgage and there were claims in respect of other matters which it is unnecessary to deal with. The respondents were unwilling to undertake the duty of agents of the ship at West Hartlepool, in so far as it involved making disbursements on the ship's behalf, unless they got security over the freight. The ship's master, having authority, which is not disputed, to make such arrangement, did arrange with the respondents that they should have that security and he gave the agents a document on March 2, 1931, which is said to be in a printed form such as is taken by all ship's agents of foreign ships, and, perhaps, of British ships as well, entitling them to receive the freight. The document is on the ship's broker's paper, and says:

> "Dear Sir, Please pay the freight for my vessel, the *Zigurds*, and all demurrage which may be payable under the charter to my agents, Messrs. E. A. Casper, Edgar & Co., Ltd., and oblige, Yours faithfully, F. KRAUKLIS, Master."

It will be noticed that that is not in itself in terms an authority to the agents to receive the freight, but it purports to be a notice to the freight payers to pay to the agents, although, no doubt, it comes to the same thing. The question might possibly have arisen whether that document in ordinary form in ordinary circumstances would amount to an equitable assignment of the freight, and the authority of a judge having great weight in these matters—the late BAILHACHE, J.—was produced, which appears to be a decision that it would not. As far as that matter is concerned, I merely desire to say that it must be left open, because it is not necessary for the decision of this case.

On the facts of this particular case it is now not disputed that there was in fact an equitable assignment constituted by the intention of both parties that this

A authority should, in fact, represent an equitable assignment to the agents of the freight, giving them a charge over the freight, as against the disbursements they might make on the ship's behalf. Therefore, for the purposes of this case, there must be taken to be two equitable assignments—(i) that given in 1929 to the appellant, and (ii) that given in 1931 to the respondents. The question then arises as to the priority of these two equitable assignments, and it is not disputed that B that priority would depend upon the date at which notice of the equitable assignment was given to the debtor. No notice was given of the appellant's equitable assignment at all, and, therefore, the question remains whether or not the respondents did give notice of their equitable assignment. The notice that they gave was this. On March 5, 1931, they wrote to Messrs. Churchill and Sim, who are a very well-known firm and deal in timber at this port and many other ports, in C these terms:

> "Messrs. Churchill and Sim, London. Dear Sirs,—*S.S. Zigurds*: We beg to give you notice that we hold captain's authority to collect the freight per this steamer's cargo, against which we have made payments.—Yours faithfully, for E. A. Casper, Edgar & Co., Ltd.—(Signed) D. EDGAR, Director."

D The question is whether that is a notice to Messrs. Churchill and Sim that the respondents did hold an equitable assignment or charge on the freight to which they would have to give effect.

It appears to me that there is only one possible construction of that document. I think it was given for the purpose of making it plain to Messrs. Churchill and Sim that the ship's agents did in fact hold a charge upon the freight and that they E had made disbursements by virtue of that charge—"against which we have made payments." On the other hand, I think there can be no doubt at all that any reasonable firm of business people, used to this kind of business, would understand that that letter was given to them for the express purpose of letting it be made known to them that there was in fact held by the brokers an equitable charge over this freight and that they, Messrs. Churchill and Sim, must not pay to anybody else. F If that was the result of that communication, it appears to me to have been a perfectly effective notice of an equitable charge. It is suggested that it is not that at all, but that it was merely a notice of an ordinary authority to collect freight, in pursuance of which the brokers might, if so disposed, make advances for which they would have, if they did collect a freight, a lien. I have already said I must not be supposed to assent to the proposition that that is the only effect G of an authority given in ordinary circumstances by the master of a foreign ship, but, whether that be so or not, upon an ordinary notice, it appears to me quite plain that these words "against which we have made payments" convey to the recipients that here there was an equitable charge in respect of which they must govern their conduct accordingly.

For these reasons it seems to me that the decision given by the Court of Appeal H is quite correct and cannot be challenged. I therefore move your Lordships that this appeal should be dismissed, with costs.

LORD TOMLIN.—I agree.

LORD RUSSELL.—I also agree.

Appeal dismissed.

I Solicitors: *Constant & Constant*; *Middleton, Lewis, & Clarke*, for *Middleton & Co.*, West Hartlepool.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re OGDEN. BRYDON *v.* SAMUEL

[CHANCERY DIVISION (Lord Tomlin), March 16, 1933]

[Reported [1933] Ch. 678; 102 L.J.Ch. 226; 149 L.T. 162; 49 T.L.R. 341; 77 Sol. Jo. 216]

Will—Gift—Uncertainty of object—Distribution among political bodies—Ascertainment possible of all bodies within description.

A testator, who died in 1932, by his will left part of the ultimate residue of his estate to a legatee "to be by him distributed amongst such political federations, associations, or bodies in the United Kingdom (other than four Liberal Associations lastly hereinbefore mentioned) having as their objects, or one of their objects, the promotion of Liberal principles in politics, as he shall in his absolute discretion select, and in such shares and proportions as he shall in the like discretion think fit. . . ." The legatee gave evidence that he could, by inquiry, ascertain all the bodies which could come within the description in the will.

Held: the class benefited was capable of ascertainment and in a specified area, and, therefore, there was no uncertainty in the field of selection and the gift was not bad for uncertainty.

Per LORD TOMLIN: The question is one of degree in each case, whether, having regard to the language of the will and the circumstances of the case, there is such uncertainty as to justify the court in coming to the conclusion that the gift is bad.

Notes. Applied: *Re Gestetner (decd.)*, [1953] 1 All E.R. 1150. Approved: *I.R. Comrs.* v. *Broadway Cottages Trust. I.R. Comrs.* v. *Sunnylands Trust*, [1954] 3 All E.R. 120.

As to gifts in a will which are void for uncertainty, see 34 HALSBURY'S LAWS (2nd Edn.) 41 et seq., 219 et seq., and for cases see 44 Digest 609 et seq.

Cases referred to:

(1) *Houston* v. *Burns*, [1918] A.C. 337; 87 L.J.P.C. 99; 118 L.T. 462; 34 T.L.R. 219, H.L.; 8 Digest (Repl.) 396, *889*.

(2) *A.-G.* v. *National Provincial and Union Bank of England*, [1924] A.C. 262; 40 T.L.R. 191; 68 Sol. Jo. 235; sub nom. *Re Tetley, A.-G.* v. *National Provincial and Union Bank of England*, 93 L.J.Ch. 231; 131 L.T. 34, H.L.; 8 Digest (Repl.) 397, *892*.

(3) *Grimond or Macintyre* v. *Grimond*, [1905] A.C. 124; 74 L.J.P.C. 35; 92 L.T. 477; 21 T.L.R. 323, H.L.; 8 Digest (Repl.) 396, *882*.

(4) *Re Gwyon, Public Trustee* v. *A.-G.*, [1930] 1 Ch. 255; 99 L.J.Ch. 104; 46 T.L.R. 96; 73 Sol. Jo. 833; 142 L.T. 321; 8 Digest (Repl.) 323, *68*.

(5) *Bowman* v. *Secular Society, Ltd.*, [1917] A.C. 406; 86 L.J.Ch. 568; 117 L.T. 161; 33 T.L.R. 376; 61 Sol. Jo. 478, H.L.; 8 Digest (Repl.) 359, *378*.

Adjourned Summons.

The testator Henry Joseph Ogden, by his will, dated Nov. 30, 1928, gave the ultimate residue of his estate in certain percentages to various institutions, societies, and associations, and he gave 4 per cent. thereof to the Right Hon. Sir Herbert Samuel,

> "to be by him distributed amongst such political federations, associations, or bodies in the United Kingdom (other than four Liberal associations lastly hereinbefore mentioned) having as their objects, or one of their objects, the promotion of Liberal principles in politics, as he shall in his absolute discretion select, and in such shares and proportions as he shall in the like discretion think fit (the receipt of the said Sir Herbert Samuel to be a good discharge to my trustees)."

A The testator died on April 6, 1932, and the share bequeathed to Sir Herbert Samuel was approximately £4,000. The trustees of the will took out this summons to determine inter alia the question whether the gift to Sir Herbert Samuel was a valid and effectual gift or failed for uncertainty, or otherwise, so that the share of the testator's estate represented by the gift was undisposed of. Sir Herbert Samuel stated in an affidavit that he could ascertain by inquiry all the objects which could B come within the description contained in the bequest.

Belsham for the trustees.

Daynes, K.C., and *H. Lloyd Williams*, for Sir Herbert Samuel, referred to *Houston* v. *Burns* (1), *Re Tetley* (2), and *Grimond or Macintyre* v. *Grimond* (3).

C. Stafford Crossman, for the Attorney-General, referred to *Re Gwyon, Public* C *Trustee* v. *Attorney-General* (4).

Richmount for the Manchester Royal Infirmary and Dispensary, one of the residuary legatees.—The only intention is to give for the promotion of Liberal principles. That is not an absolute gift, and it is not a charitable gift, for the objects are not charitable objects. The gift, therefore, is void. [He referred to *Bowman* v. *Secular Society, Ltd.* (5).]

D *H. L. Hart* (*Wilfred Hunt* with him), for one of the residuary legatees, adopted the last argument.

LORD TOMLIN.—The only question which calls for a decision in this case is the effect of a gift in the will of a testator who left his residue to "the institutions, societies and persons hereinafter named." There follows a long list of institutions E with a percentage attached to each name. Some of the institutions are obviously charitable and some are obviously not. The last item in the list is in these terms. [His Lordship read the terms of the bequest to Sir Herbert Samuel, and continued :] It is with this last item that I am concerned.

The case has been argued upon the assumption that, for the moment, it is not necessary to consider whether or not such a gift as is contained in the item in F question is good as a charitable gift, and the view which I am about to express is expressed upon the assumption that there is no question of charity in the case. The question propounded is whether, upon the footing that the gift is not charitable, it is bad for uncertainty, or upon the ground that it is subject to a trust which is invalid. I do not think that it is in dispute that a gift to a corporation or a voluntary association of persons, for the general purposes of such corporation or G association, is an absolute gift, and primâ facie a good gift, and, as no question of perpetuity can be involved in such a case, it seems unnecessary to consider whether the gift is charitable or not. The validity of the gift does not depend upon its being charitable, but upon its being an absolute gift. The principle was indicated by LORD PARKER, who says in *Bowman* v. *Secular Society, Ltd.* (5) ([1917] A.C. at p. 442):

> H "The abolition of religious tests, the disestablishment of the Church, the secularization of education, the alteration of the law touching religion or marriage, or the observation of the Sabbath, are purely political objects. Equity has always refused to recognise such objects as charitable. It is true that a gift to an association formed for their attainment may, if the association be unincorporated, be upheld as an absolute gift to its members, or, if the asso- I ciation be incorporated, as an absolute gift to the corporate body; but a trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift."

Applying these principles to this case, and leaving out of account the question whether there is an illegal trust, all that I have to consider is whether there is such uncertainty in the field of selection that it is impossible for the selector to determine from which institutions he is to select. If so, the bequest is bad on the ground of uncertainty. The question is one of degree in each case, whether, having regard to the language of the will and the circumstances of the case, there is such uncertainty as to justify the court in coming to the conclusion that the gift is bad.

It is to be observed that in the present case the field of selection is

> "political federations, associations or bodies in the United Kingdom . . . having as their objects, or one of their objects, the promotion of Liberal principles."

I have the evidence of Sir Herbert Samuel, who has referred to a number of bodies which come within the description, and states that he can ascertain by inquiry all the bodies which can come within that description, and I take the view that upon that evidence, and the language of the will, and having regard to the principles laid down from time to time, there is certainty here in the field of selection. It comes within the words of Lord Atkinson in *Houston* v. *Burns* (1) ([1918] A.C. at p. 845):

> "I do not think that this case has the slightest resemblance to those in which property is vested in trustees to be applied for the support or benefit of such institutions of a particular class as may be in existence, or in the course of creation, in any given town or area at the time at which the will speaks. There is no vagueness or uncertainty in such cases at all."

It seems to me that here you have a class capable of ascertainment and in a specified area, and, in my view, the bequest is not void on the ground that the field is too vague. I hold, therefore, that the gift is not bad for uncertainty.

There remains the argument that there is some illegal trust attached to the subject-matter of the gift. Here, if there be a trust, it must be found in the language of the will. I am unable, in the express language which the testator has employed, to find any trust, and there is nothing to justify the implication of one. Counsel for the Manchester Royal Infirmary and Dispensary has suggested that there is a trust for the promotion of Liberal principles. The reference to Liberal principles is a reference to the characteristic by which those in the field of selection are to be identified. I can find no trust at all. Consequently, I hold that when the bodies have been selected from the prescribed field, the gift to each body will be an absolute gift for the purposes of such body, and accordingly valid.

Solicitors: *Radford, Frankland, & Mercer*; *Gilbert Samuel & Co.*; *Gregory, Rowcliffe & Co.*, for *Parkinson, Slack, & Needham*, Manchester; *Treasury Solicitor.*

[*Reported by* J. H. G. Buller, Esq., *Barrister-at-Law.*]

RAS BEHARI LAL AND OTHERS *v.* THE KING EMPEROR

[PRIVY COUNCIL (Lord Atkin, Lord Thankerton and Sir George Lowndes), July 3, 27, 1933]

[Reported 102 L.J.P.C. 144; 150 L.T. 3; 50 T.L.R. 1; 77 Sol. Jo. 571; 30 Cox, C.C. 17]

Criminal Law—Trial—Juror—Disqualification—Inability to understand language in which trial conducted—Evidence—Miscarriage of justice rendering conviction invalid.

On an appeal to His Majesty in Council from a decision of the High Court of Patna, in which the appellants had been convicted and sentenced, evidence was given that one of the jurors did not know sufficient English to follow the address of the lawyers, the judge's charge, or the evidence in English.

Held: the effect of the incompetence of a juror was to deny to the accused an essential part of the protection accorded to him by law, and so the result of the trial in the present case was a clear miscarriage of justice; consideration of the question whether or not a juror was competent for physical or other reasons did not invade the privacy of the discussions in the jury box or retiring room, nor did it seek to inquire into the reasons for the verdict, and, consequently, it did not infringe the rule that, in order to set aside a verdict, evidence by a juror was not admissible to prove what discussions had taken place between the jurors; evidence by a juror or by a third person was admissible to prove the juror's disqualification; and, therefore, the convictions and sentences must be set aside.

R. v. *Thomas* (1) (p. 726 post), disapproved.

Notes. Distinguished: *R.* v. *Kelly*, [1950] 1 All E.R. 806. As to competency of jurors to give evidence, see 10 HALSBURY'S LAWS (3rd Edn.) 480, and for cases see 30 DIGEST (Repl.) 272, 273, 292–294.

Cases referred to:

(1) *R.* v. *Thomas*, post p. 726; [1933] 2 K.B. 489; 102 L.J.K.B. 646; 149 L.T. 544; 49 T.L.R. 546; 77 Sol. Jo. 590; 30 Cox, C.C. 14; 24 Cr. App. Rep. 91, C.C.A.; 30 Digest (Repl.) 293, *662*.

(2) *Ellis* v. *Deheer*, [1922] 2 K.B. 113; 91 L.J.K.B. 937; 127 L.T. 431; 86 J.P. 169; 38 T.L.R. 605; 66 Sol. Jo. 537; 20 L.G.R. 625, C.A.; 30 Digest (Repl.) 288, *583*.

(3) *Ex parte Morris* (1907), 72 J.P. 5, D.C.; 30 Digest (Repl.) 273, *401*.

(4) *Mansell* v. *Reginam* (1857), 8 E. & B. 54; Dears & B. 375; 8 State Tr. N.S. 831; 27 L.J.M.C. 4; 22 J.P. 19; 4 Jur.N.S. 432; 169 E.R. 1048, Ex. Ch.; 30 Digest (Repl.) 253, *91*.

(5) *R.* v. *Wakefield*, [1918] 1 K.B. 216; 87 L.J.K.B. 319; 118 L.T. 576; 82 J.P. 136; 34 T.L.R. 210; 62 Sol. Jo. 309; 26 Cox, C.C. 222; 13 Cr. App. Rep. 56, C.C.A.; 30 Digest (Repl.) 266, *295*.

Appeal by special leave against a judgment and order of the High Court of Judicature at Patna which confirmed a judgment and order of the sessions judge of Patna sitting with a jury of seven, convicting the appellants of offences punishable under ss. 148 and 302 of the Indian Penal Code and sentencing to death all the appellants except one.

One of the grounds of appeal to the High Court was that one of the jurors did not know the English language in which the jury had been addressed by pleaders on behalf of the prosecution and defence, and in which the charge of the learned judge had been delivered. That contention was supported by an affidavit upon which the court refused to rely, as it was not based on the deponent's own knowledge. On the last day of the hearing a further affidavit was tendered, but was A rejected as too late. Upon an application for special leave to appeal the Judicial Committee directed the High Court of Patna to hold an inquiry. The result of that inquiry was that a report was made that the juror in question did not know sufficient English to follow the address of the lawyers, the judge's charge, or the evidence in English. After consideration of that report special leave to appeal was granted to the appellants. It was admitted by counsel for the Crown that on the B finding of the report the convictions could not be maintained.

D. N. Pritt, K.C., and *C. Sidney Smith* for the appellants.
A. M. Dunne, K.C., and *W. Wallace* for the Crown.

July 3. **LORD ATKIN.**—This is an appeal by special leave. The appellants were tried by the sessions judge of Patna, sitting with a jury of seven. They were C found guilty by a majority verdict of six to one on charges of murder and rioting. Appellants Nos. 1–7 were sentenced to death and No. 8 to transportation for life. They appealed to the High Court, but their appeal was dismissed. The sentences on appellants Nos. 2, 3, 6 and 7 were subsequently commuted by the local governor to transportation for life. On their application for leave to appeal to His Majesty in Council it was asserted that one of the seven jurors did not understand English, D the language in which some of the evidence appears to have been given, and in which the addresses of counsel were made and the charge of the sessions judge was delivered. This contention had been put forward on their behalf in their appeal to the High Court. It was originally supported by an affidavit upon which the learned judges of that court properly refused to rely. A second affidavit to the same effect of a more reliable character was tendered on the last day of the hearing, E but was rejected as too late, and the appeal was (as already stated) dismissed. In these circumstances an inquiry was by order of His Majesty in Council directed to be held by the High Court as to the truth of the allegations so made. The High Court reported that the juror in question did not know sufficient English to follow the address of the lawyers and the judge's charge or the English evidence. It was after consideration of this report and upon this ground that special leave to appeal F was granted.

On the appeal coming on for hearing before the Board counsel for the Crown has not impugned the correctness of the report and has admitted that on this finding the convictions cannot be maintained. In their Lordships' opinion, this is necessarily the correct view. They think that the effect of the incompetence of a juror is to deny to the accused an essential part of the protection accorded to him by law G and that the result of the trial in the present case was a clear miscarriage of justice. They have no doubt that in these circumstances the conviction and sentence should not be allowed to stand. They think it was most unfortunate that this matter was not fully inquired into by the High Court when the appeal was before it. Had the learned judges been satisfied then of the truth of the facts now established, it would have been open to them under the provisions of s. 423 of the Criminal Procedure H Code, if they so thought fit, to have reversed the findings and sentences of the sessions judge and ordered the appellants to be re-tried, a course which, in their Lordships' opinion, would have fully met the ends of justice.

Since the hearing of the case their Lordships have had their attention directed to *R.* v. *Thomas* (1), a decision of the Court of Criminal Appeal given on the very date upon which this present case was before their Lordships. Owing to the I remarkable fact that there is no official shorthand note of judgments delivered by the Court of Criminal Appeal their Lordships might have been in a difficulty if they had not had the advantage of seeing an advance copy of the report to be published in the Criminal Appeal reports. In that case the appellant had been convicted at the Merioneth Quarter Sessions of sheep-stealing. He appealed on the ground, among others, that two of the jurors had not sufficient knowledge of the English language to enable them to follow the proceedings. His counsel sought to use affidavits by the jurors in question to that effect. The court refused to receive the evidence and dismissed the appeal against the conviction, although on other grounds they reduced the sentence. It would appear from the report that the judgment was based in part upon the well-established ground that for the purpose of setting aside the verdict evidence is not admissible by jurors to prove what discussions took place in the jury box or in the jury room. It was further based upon the proposition that when a verdict is delivered in the sight and hearing of all the jury without protest their assent is conclusively inferred. The suggestion was made arguendo, but does not seem to have been decided, that if a juror was disqualified by law the objection could not be entertained after verdict.

If their Lordships agreed with all the grounds of this decision they would have had to consider whether, notwithstanding the lack of opposition by the prosecution, they would have interfered with the decision of the High Court at Patna. But with the greatest respect for the learned members of the Court of Criminal Appeal they are unable to accept the reasons given for this decision. The question whether a juror is competent for physical or other reasons to understand the proceedings is not a question which invades the privacy of the discussions in the jury box or in the retiring room. It does not seek to inquire into the reasons for a verdict. If the alleged defect of the juror could be proved at all aliunde there seems to be no reason why the evidence of the juror himself should not be available either for or against the allegation. It would seem remarkable that if evidence of neighbours could be given that a juror did not understand English, it should not be open to the prosecution to produce the strongest evidence possible by calling the juror himself to show that he fully understand the proceedings. Similarly, their Lordships are unable to accept the view that any presumption of assent by all the jurors to a verdict given in their presence is decisive of, or, indeed, relevant to, the question. The problem is whether the assent so given or inferred is of a competent juror, i.e., in such a case as the present, not so incapacitated from understanding the proceedings as to be unable to give a true verdict according to the evidence. The objection is not that he did not assent to the verdict, but that he so assented without being qualified to assent.

It is noteworthy that in *Ellis* v. *Deheer* (2) evidence was permitted to be given that some of the jurors, though present in court, were not able to see or hear the foreman give their verdict, and that the evidence of the fact was the evidence of the jurors themselves. The judgments draw pointed attention to the distinction between evidence of what takes place in the jury box and jury room, and evidence of what takes place in open court. Accepting the evidence, the Court of Appeal granted a new trial. There is an interesting case of *Ex parte Morris* (3), where a rule for a certiorari was applied for to quash a conviction at quarter sessions on the ground that one of the jurors was intoxicated. The only evidence was that of a solicitor based on information. The court (PHILLIMORE and WALTON, JJ.) refused the rule on the ground that the evidence was insufficient, but gave leave to renew it, and said that, if it were renewed, there should be an affidavit as to the circumstances from one of the other jurymen.

So far as *R.* v. *Thomas* (1) is a decision as to the admissibility of evidence of the juror himself it is true that it does not cover the present case, for in India there was evidence other than that of the jurors concerned, though at the inquiry some of the jurors impugned were, in fact, called. Their Lordships have already stated their difficulty in accepting the view that the evidence even of the jurors was inadmissible. But so far as *R.* v. *Thomas* (1) decides that no evidence is admissible after verdict to establish the inability of a juror to understand the proceedings their Lordships definitely disagree with it. A valuable contribution to the discussion is made in *Mansell* v. *Reginam* (4) by LORD CAMPBELL delivering the judgment of the Court of Queen's Bench on a writ of error. The plaintiff in error had been convicted of murder, and one cause of error assigned was that the presiding judge at the trial had directed a juror not to be sworn who had declared himself to have a conscientious objection to capital punishment. Holding this to be no error, LORD CAMPBELL said:

> "We are not now to define the limits of this authority; but we cannot doubt that there may be cases, as if a juryman were completely deaf, or blind, or afflicted with bodily disease which rendered it impossible to continue in the jury box without danger to his life, or were insane, or drunk, or with his mind so occupied by the impending death of a near relation that he could not duly attend to the evidence, in which, although from there being no counsel employed on either side, or for some other reason, there is no objection made to the juryman being sworn, it would be the duty of the judge to prevent the scandal and the perversion of justice which would arise from compelling or permitting such a juryman to be sworn and to join in a verdict on the life or death of a fellow creature."

This duty has later been held to be a continuous duty throughout the trial. It would be remarkable indeed, if what may be "a scandal and perversion of justice" may be prevented during the trial, but after it has taken effect the courts are powerless to interfere. Finality is a good thing, but justice is a better. According to ordinary procedure in criminal trials the accused has a right of challenge either peremptory, or for cause; and it may very well be that if, knowing the alleged defect, he stands by and takes his chance of a verdict he is precluded from thereafter taking the objection. But if the cause of objection is in fact unknown to him, there appears to be no reason why the court in a proper case should not give effect to it.

The result of upholding the objection is that there has been a mistrial. In England the ordinary order would be in such circumstances to award a venire de novo as in the case of *R.* v. *Wakefield* (5), where a person not qualified and not summoned, personated on the jury a man who was qualified and had been summoned. Their Lordships, however, think it desirable that any discretion as to any consequential order should be exercised by the High Court, and they content themselves, therefore, with humbly advising His Majesty that the appeal should be allowed, that the dismissal of the appeal by the High Court should be reversed, and the convictions and sentences set aside, leaving the representatives of the Crown in India to take such steps in the matter of a re-trial as may be open to them there.

Appeal allowed.

Solicitors: *Hy. S. L. Polak & Co.*; *Solicitor to the India Office.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

NOTE

R. v. THOMAS

[COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Horridge and Humphreys, JJ.), July 3, 1933]

[Reported [1933] 2 K.B. 489; 102 L.J.K.B. 646; 149 L.T. 544; 49 T.L.R. 546; 77 Sol. Jo. 590; 30 Cox, C.C. 14; 24 Cr. App. Rep. 91]

The appellant was convicted in Wales, and on appeal leave was sought to refer affidavits by two of the jurors, alleging that they did not understand English sufficiently well to enable them to follow the proceedings.

Held: the affidavits ought not to be admitted.

Notes. Disapproved: *Ras Behari Lal* v. *King Emperor*, ante p. 723.

Cases referred to:

(1) *Raphael* v. *Bank of England* (1855), 17 C.B. 161; 25 L.J.C.P. 33; 26 L.T.O.S. 60; 4 W.R. 10; 139 E.R. 1030; 30 Digest (Repl.) 293, *652*.

(2) *Ellis* v. *Deheer*, [1922] 2 K.B. 113; 91 L.J.K.B. 937; 127 L.T. 431; 86 J.P. 169; 38 T.L.R. 605; 66 Sol. Jo. 537; 20 L.G.R. 625, C.A.; 30 Digest (Repl.) 288, *583*.

Appeal against conviction and sentence.

The appellant was convicted of sheep stealing at Merionethshire Sessions and sentenced to twelve months' imprisonment with hard labour. The evidence at the trial was given partly in English, and partly in Welsh, an interpreter being present in court throughout. Counsel for the Crown, who was present at the trial, stated that the oath was administered in English, but that he could not recollect whether each individual juror repeated the oath.

George Bankes for the appellant.
J. Jones Roberts for the Crown.

The judgment of the court was delivered by

LORD HEWART, C.J.—The only ground of appeal suggested is that two members of the jury did not understand English sufficiently well to follow the evidence or the speeches or the summing-up. The appellant, it is to be observed, was defended by counsel and no question of that sort was raised at the trial nor was any protest made for some weeks afterwards. Counsel for the appellant has endeavoured to persuade the court that it ought to look at affidavits by two members of the jury showing that they did not sufficiently well understand the English language. In our opinion, we ought not to look at these affidavits. I am not going to review the mass of authority on this point and will refer to three matters only. In the first place, this was a case of felony and in cases of felony every juror as he or she comes to the Book to be sworn, unless challenged, takes the oath or makes an affirmation in a prescribed form. That form, which is familiar, is in the English language, and it is clear that that oath was taken in the present case. With regard to this class of affidavits the matter seems to the court to come within the mischief referred to by WILLES, J., in *Raphael* v. *Bank of England* (1) (4 W.R. at p. 11):

> "If either the affidavit is as to what was passing in the mind of the particular juryman or as to what took place in the jury room, in the latter case it is not admissible and in the former it does not lie in the mouth of a person who hears and makes no objection to come afterwards to alter the verdict by the explanation that he dissented in a voice which the counsel, with all his vigilance, and the judge did not hear."

Finally, in *Ellis* v. *Deheer* (2), BANKES, L.J., said ([1922] 2 K.B. at p. 118):

> "When a verdict is delivered in the sight and hearing of all the jury without protest their assent to it is conclusively inferred."

It needs little reflection to see how wide a door would be opened if the contrary doctrine were to prevail. We think, therefore, that this conviction must stand.

Conviction affirmed: sentence reduced to six months' imprisonment.

Solicitors: *Rhys Roberts & Co.*, for *Guthrie, Jones, & Jones*, Dolgelley; *Robert Griffith*, Blaenau Festiniog.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

CLEOBURY MORTIMER RURAL DISTRICT COUNCIL *v.* CHILDE

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Humphreys, JJ.), May 17, 18, 1933]

[Reported [1933] 2 K.B. 368; 102 L.J.K.B. 580; 149 L.T. 495; 97 J.P. 217; 49 T.L.R. 485; 31 L.G.R. 268]

Rates—Sporting rights—Severance from occupation of land—Reservation in agreement for tenancy of agricultural land—Liability of owner of land—Rating Act, 1874 (37 *&* 38 *Vict., c.* 54), *s.* 3 (2), *s.* 6 (3).

An owner of agricultural land let it to a tenant by an agreement in writing not under seal, reserving to himself the sporting rights.

Held: there had been an effective severance of the sporting rights from the land within the meaning of the Rating Act, 1874, s. 3 (2) and s. 6 (3); although, by reason of s. 67 of the Local Government Act, 1929, such rights could no longer be rated, as formerly, under s. 6 (1) of the Act of 1874, they remained a rateable hereditament, and under s. 6 (3) of the Act of 1874 the owner was rateable in respect of them.

Notes. As to rating of sporting rights, see 27 HALSBURY'S LAWS (2nd Edn.) 376, 431, 432, and for cases see 38 DIGEST 500, 571, 572. For Rating Act, 1874, see 20 HALSBURY'S STATUTES (2nd Edn.) 72.

Cases referred to:

(1) *Swayne* v. *Howells*, [1927] 1 K.B. 385; 96 L.J.K.B. 148; 136 L.T. 326; 91 J.P. 16; 43 T.L.R. 14; 24 L.G.R. 578; (1926–31), 1 B.R.A. 183, D.C.; 38 Digest 443, *139*.

(2) *Towler* v. *Thetford Rural District Council* (1929), 99 L.J.K.B. 258; 143 L.T. 45; 94 J.P. 77; 28 L.G.R. 108; (1926–31), 1 B.R.A. 298; Digest Supp.

(3) *Lord Hastings* v. *Walsingham Revenue Officer*, [1930] 2 K.B. 278; 99 L.J.K.B. 385; 143 L.T. 474; 94 J.P. 136; 46 T.L.R. 425; 74 Sol. Jo. 298; 28 L.G.R. 304; (1926–31), 1 B.R.A. 402, D.C.; Digest Supp.

(4) *R.* v. *Inhabitants of Thurlstone* (1859), 1 E. & E. 502; 28 L.J.M.C. 106; 32 L.T.O.S. 275; 23 J.P. 565; 5 Jur.N.S. 820; 7 W.R. 192; 120 E.R. 997; 38 Digest 571, *1089*.

Case Stated by Salop justices.

A complaint was preferred by the rural district council of Cleobury Mortimer, the appellants, against the respondent, Roland Ivo Lacon Childe, under the Distress for Rates Act, 1849, and the Rating and Valuation Act, 1925, calling upon him to show cause why he had not paid and refused to pay a general rate, made on April 6, 1932, amounting to £8, to which he had been duly rated and assessed and for which due demand had been made by the appellants.

Upon the hearing of the complaint, it was admitted or proved that the appellants were the rating authority for the rural district of Cleobury Mortimer. The general rate was duly made on April 6, 1932, and published according to law. A demand note was served upon the respondent in respect of the rate set forth in the summons. The assessment referred to on the demand note related to an entry in the valuation list for the time being in force in the parish of Kinlet, in the said rural district, in respect of "sporting rights—The Birch." The respondent was the owner of a farm comprising agricultural land known as "The Birch," in the parish of Kinlet, and at all material times the farm was let by the respondent to a tenant at a rental under an agreement in writing, but not under seal, reserving to the respondent the sporting rights over the said agricultural land. The sporting rights over the said agricultural land were in the hands of the respondent. The said agricultural land was exempt from rates under s. 67 of the Local Government Act, 1929. The respondent had declined and refused to pay the sum of £8, being the amount demanded from him in respect of the rate.

On the part of the respondent it was contended that the sporting rights were not severed from the occupation of the land, inasmuch as there was no document under seal which could create a severance in law; that, assuming the sporting rights were severed from the occupation of the land, the sporting rights, being severed from the land and not let, and the respondent, as owner, receiving rent for the land, under, and by virtue of, s. 6 of the Rating Act, 1874, the sporting rights should not be separately valued and were not separately rateable, and that any separate rate in respect thereof was bad in law; that, in any event, the respondent was not the person to be rated; and that the sporting rights were part of the agricultural land, and under the provisions of s. 67 of the Local Government Act, 1929, were de-rated.

On the part of the appellants it was contended that upon the facts proved or admitted the sporting rights were severed from the occupation of the land within the meaning of the Rating Act, 1874; that sporting rights severed, but not let, constituted separate rateable hereditaments; that by reason of the provisions of the Rating and Valuation Acts, 1925 to 1928, and the Local Government Act, 1929, the machinery for rating such sporting rights contained in s. 6 (1) of the Rating Act, 1874, was rendered inoperative, and that it was, therefore, necessary to refer to s. 6 (3) of the Rating Act, 1874, to ascertain the person to be rated in respect of such sporting rights, and that under the subsection the respondent was the person to be rated in respect thereof; and that the incorporeal hereditament consisting in sporting rights severed from the occupation of the land but not let was excepted from the definition of agricultural land in the Rating and Valuation Acts, 1925 to 1928, and was not entitled thereunder to exemption from rates.

The following cases were cited: *Swayne* v. *Howells* (1), *Towler* v. *Thetford Rural District Council* (2), and *Lord Hastings* v. *Walsingham Revenue Officer* (3).

The justices came to the determination that in the premises no warrant of distress should issue, and the question upon which the opinion of the court was desired was whether, upon the above statement of facts, the justices came to a correct determination and decision in point of law, and, if not, what should be done in the premises.

By the Rating Act, 1874:

> "Section 3: . . . From and after the commencement of this Act the Poor Rate Acts shall extend to the following hereditaments . . . that is to say, . . . (2) To rights of fowling, of shooting, of taking or killing game or rabbits, and of fishing, when severed from the occupation of the land . . ."
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> "Section 6: (1) Where any right of fowling, or of shooting or of taking or killing game or rabbits, or of fishing (hereinafter referred to as a right of sporting) is severed from the occupation of the land and is not let, and the owner of such right receives rent for the land, the said right shall not be separately valued or rated, but the gross and rateable value of the land shall be estimated as if the said right were not severed; and in such case if the rateable value is increased by reason of its being so estimated, but not otherwise, the occupier of the land may (unless he has specifically contracted to pay such rate in the event of an increase) deduct from his rent such portion of any poor or other local rate, as is paid by him in respect of such increase; and every assessment committee [now "valuation officer": see Local Government Act, 1948, s. 70, Sched. I], on the application of the occupier, shall certify in the valuation list or otherwise the fact and amount of such increase. (3) Subject to the foregoing provisions of this section the owner of any right of sporting, when severed from the occupation of the land, may be rated as the occupier thereof."

By the Local Government Act, 1929:

> "Section 67: (1) No person shall, in respect of any period beginning on or after the appointed day, be liable to pay rates in respect of any agricultural land or agricultural buildings or be deemed to be in occupation thereof for

> rating purposes, and notwithstanding anything in the principal Act, or in the Rating and Valuation (Apportionment) Act, 1928, no such land or buildings shall be included in any rate made in respect of a period beginning on or after that date. (2) For the purposes of valuation lists in force at the appointed day, agricultural land and agricultural buildings shall be deemed to have no rateable value, and, notwithstanding anything in the enactments hereinbefore in this section mentioned, no particulars with respect to such land or buildings shall be included in any subsequent valuation list."

Erskine Simes for the appellants.
H. A. Tucker for the respondent.

LORD HEWART, C.J.—This is a Case Stated by justices for the county of Shropshire. It arises in the following way. At a petty sessions holden at Cleobury Mortimer on Sept. 20, 1932, a complaint preferred by the rural district council, the appellants, against Roland Ivo Lacon Childe, the respondent, under the Distress for Rates Act, 1849, and the Rating and Valuation Act, 1925, calling upon the respondent to show cause why he had not paid, and refused to pay, a certain general rate, namely, the general rate made on April 6, 1932, amounting to £8, to which he had been duly rated and assessed, and for which due demand had been made by the district council, was heard and determined, and upon that hearing the justices determined that a warrant of distress should not issue. The question for us is whether they came to a correct determination in point of law.

The Case raises a difficult question with regard to the rating of sporting rights. On the part of the appellants it was contended that sporting rights severed, but not let, constituted separate rateable hereditaments; that by reason of the provisions of the Rating and Valuation Acts, 1925 to 1928, and the Local Government Act, 1929, the machinery for rating such sporting rights contained in s. 6 (1) of the Rating Act, 1874, was rendered inoperative; and that it was, therefore, necessary to refer to s. 6 (3) of the Rating Act, 1874, to ascertain the person to be rated in respect of such sporting rights, and that under the subsection the respondent—that is, the owner—was the person to be rated in respect thereof. Finally, it was contended that the incorporeal hereditament consisting in sporting rights severed from the occupation of the land, but not let, is excepted from the definition of agricultural land in the Rating and Valuation Acts, 1925 to 1928, and is not entitled thereunder to exemption from rates.

I have come to the conclusion that the contentions of the appellants are correct, and I come to that conclusion especially upon s. 3 (2) of the Rating Act, 1874, which refers to

> "rights of fowling, of shooting, of taking or killing game or rabbits, and of fishing, when severed from the occupation of the land,"

and s. 6 (3) which provides:

> "Subject to the foregoing provisions of this section, the owner of any right of sporting, when severed from the occupation of the land, may be rated as the occupier thereof."

The main questions, I think, were determined by this court in the comparatively recent case of *Lord Hastings* v. *Walsingham Revenue Officer* (3). The present case is not a case in which the sporting rights were let to some third person. The sporting rights were reserved by the landlord himself. I think, therefore, that the contention of the appellants was correct, and that this appeal ought to be allowed.

AVORY, J.—I have come to the same conclusion. The question raised is complicated by the provisions of the Rating and Valuation Acts, 1925 to 1928, and particularly by the provisions of the Local Government Act, 1929, s. 67. If the present case fell to be decided only under the Rating Act, 1874, there would be no question that it came within s. 6 (1) of that Act. The first question to be determined under the Act of 1874 would be whether in fact the right of sporting

A in the present case was severed from the occupation of the land. There is no question that it was not let. If it appears that the right of sporting was severed from the occupation of the land, then, as I have said, the case would have clearly come within s. 6 (1) of the Act of 1874.

Upon the question whether the right of sporting in this case was severed from the occupation of the land, we have had authorities cited to us which undoubtedly B show that a grant of sporting rights over land can only be validly made by deed under seal. It has been contended in this case for the respondent that there was no severance, because there was no grant of any sporting right under seal. But the question whether there was a grant of a sporting right does not arise in this case, because what in fact happened was that the present appellant let the land over which the sporting right was exercised, reserving to himself the right of C sporting. I think that counsel for the appellants was right in saying that those decisions have no application to a case like the present, where the owner of the land has let the land and reserved to himself the right of sporting, and that there was in fact a severance in this case within the meaning of s. 6.

The only authority which seems directly to touch this point is *R.* v. *Inhabitants of Thurlstone* (4), where WIGHTMAN, J., said (28 L.J.M.C. at p. 106):

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> "The tenant is only liable to be rated to that which he at present beneficially occupies, and the effect of the reservation in the agreement [a reservation of the right of sporting] coupled with the Act 1 & 2 Will. 4, c. 32, is to separate the right to the game and shooting from the other beneficial occupation."

But having arrived at the conclusion that, under the Act of 1874, the case would E have fallen within s. 6 (1), it is clear that, by the effect of the Local Government Act, 1929, it is impossible to apply the provisions of that subsection to the present case, because, the Act of 1929 having said that agricultural land shall be deemed to have no rateable value, it is impossible to say that the rateable value is increased by reason of the sporting right having been severed and not let. While, however, that is the result of the Act of 1929, no one has ever suggested that the subsequent F legislation has repealed, either expressly or impliedly, the provisions of s. 3 (2) of the Act of 1874, which made this right of sporting a rateable hereditament. If it remains a rateable hereditament, it is clear that somebody must be liable to be rated for it.

The respondent contended, first of all, that the sporting rights were not severed from the occupation of the land, inasmuch as there was no document under seal G which could create a severance in law. I have already dealt with that point. Next he contended that, assuming that the sporting rights were severed from the occupation of the land, the sporting rights being severed from the land and not let, and the respondent as owner receiving rent for the land under and by virtue of s. 6 of the Rating Act, 1874, the sporting rights should not be separately valued, and were not separately rateable, and that any separate rate in respect thereof was H bad in law. That, again, I have dealt with in pointing out that it is impossible to apply, in the present state of legislation, the provisions of s. 6 (1). He further contends that, in any event, the respondent was not the person to be rated. Somebody must be the person to be rated, and there is clearly nobody else who can be. Section 6 (3) provides:

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> "Subject to the foregoing provisions of this section the owner of any right of sporting, when severed from the occupation of the land, may be rated as the occupier thereof";

and sub-s. (4) provides:

> "For the purposes of this section the person who, if the right of sporting is not let, is entitled to exercise the right . . . shall be deemed to be the owner of the right."

Therefore, it is clear, under sub-ss. (3) and (4) of s. 6, that he is the person who is to be rated as the occupier of the sporting right, and is also to be deemed the owner.

The last contention of the respondent was that the sporting rights were part of the agricultural land, and under the provisions of s. 67 of the Local Government Act, 1929, were de-rated. That point has been expressly dealt with by this court in *Lord Hastings* v. *Walsingham Revenue Officer* (3), the headnote of which summarises the judgment in these words:

> "Where sporting rights over agricultural land are severed but not let the person exercising those rights is not entitled to the exemption from rates conferred on the occupiers of agricultural land by the Agricultural Rates Act, 1929."

For these reasons I agree that this appeal should be allowed, and that the distress warrant should issue.

HUMPHREYS, J.—I am of the same opinion; and I should be content to state so without adding anything of my own, since the judgment of my brother Avory has really covered the whole of the ground, but for the fact that the first point raised by counsel for the respondent is a point of substance on which there appears to be no direct authority. Counsel says that the effort which was made in this case by the owner of both the land and the sporting rights to sever the sporting rights from the occupation of the land, which effort was made by an agreement in writing, failed for the reason that the document in question was not under seal; and many cases have been quoted to us in which the courts have held that an attempt to sever sporting rights from the occupation of land has failed on that ground. Why? The reason in each case appears to me to be that sporting rights, being an incorporeal hereditament, cannot be successfully conveyed except by deed. However, in this case no attempt has been made to convey that incorporeal hereditament at all. What has been done has been to bring into existence an instrument which admittedly is a perfectly good instrument for the purpose of letting the land. In that instrument there is a reservation of the rights of the owner over the sporting. In other words, no interference is created with the existing position as to the rights of sporting. All that is done is to grant a tenancy of the land. Therefore, the reasons which underlie these various decisions appear to me not to apply at all to this case.

I think that, although there is no direct authority, the case which my brother Avory has referred to, *R.* v. *Inhabitants of Thurlstone* (4) (28 L.J.M.C. at p. 109), is to some extent in accordance with the view which I have expressed. It is true, as was pointed out by my brother Avory in the course of the argument, that case is a little complicated by the fact that reference was made in it to the Game Act, 1831, which is still extant and of full force and effect. I cannot help thinking that, if the grant in that case, which was a grant by parol only, reserving to the owner the sporting rights, had been, as according to the argument it must have been, a perfectly nugatory agreement, some indication of that would have been found in the judgments of the three judges who gave separate judgments. So far from that being so, each of them, in different language, expressed the view that the parol agreement was an effective agreement for the purpose of transferring the right to the occupation of the land, on the one hand, and reserving to the grantor the sporting rights, on the other. The words of Wightman, J., are:

> "The tenant is only liable to be rated for that which he at present beneficially occupies, and the effect of the reservation in the agreement is to separate the right to the game and shooting from the other beneficial occupation."

Hill, J., observes as follows:

> "The true question is: What is the hereditament of which the person rated [the tenant] was the occupier? Was the right of shooting separated from the land? The present tenant took the land as distinctly separated from the right

> of shooting, as if Lord Scarbrough had himself previously granted the right of shooting to some third person."

That case does appear to me to be an authority, at least, to some extent, for the proposition which was contended for here on behalf of the appellants. I think that the result of the agreement which was entered into in this case was to sever the right of sporting from the occupation of the land. So much for the first point.

The second point appears to me one of very little substance at all. It is a mere matter of machinery; but it does raise a question which was designedly left open by my Lord in his judgment in *Lord Hastings* v. *Walsingham Revenue Officer* (3), when my Lord observed ([1930] 2 K.B. at p. 290):

> "I refrain from the task which has been indicated to the court of settling the form of valuation list which is suitable to the new circumstances"

—that being a case in which the court held that where sporting rights over agricultural land are severed, but not let, the person exercising those rights was not entitled to exemption from rates conferred on the occupier of agricultural land. The position that arises seems to be this. Counsel for the respondent contends, and rightly, that primâ facie he is entitled to call in aid sub-s. (1) of s. 6 of the Rating Act, 1874, which provides that where sporting rights are severed from the occupation of the land and are not let, the person who has to pay rates in the first instance in respect of those sporting rights is the tenant. He is not to be rated separately in respect of those sporting rights, but the value of the land which he occupies, and in respect of which he is rated, is to be enhanced by the proper amount, as a result of those sporting rights which attach to it. He is to pay an enhanced value; and then he is to be able to get back from the owner, who has reserved to himself the rights of sporting, that extra amount by way of deduction from the rent.

In the present case, however, the position is complicated by the Acts, which are shortly known as the De-rating Acts, one of which is the Local Government Act, 1929, which by s. 67 provides in effect that the tenant who has taken this land is not to be rated at all in respect of it, and no particulars with regard to that holding of his are to be entered in the valuation list at all. Therefore, unless some new entry is to be made in the valuation list in respect of these sporting rights which he has not got and which expressly, by the terms of the agreement under which he holds the land, he is not to have, then the valuation list will be silent with regard to this matter. I desire to guard myself against being supposed to say that, if the valuation list had included the name of this tenant and a reference to the land which he occupied, and had rated that tenant in respect of the sporting rights, that would have been illegal, so that this court could have upset that valuation list. I reserve that question, because s. 6 (1) still remains, and in terms applies to the facts of this case. But common sense points out that, if it is possible to achieve the same result in a simpler way, that other method clearly ought to be adopted. That which is contended for by counsel for the respondent is obviously a roundabout, expensive, and most ineffective way of arriving at that which everybody agrees is to be the ultimate result, namely, that the owner is to be at the expense of paying these rates in respect of the sporting rights which are his and which he has reserved to himself.

Although I have some little doubt about the matter, I agree with the other members of the court on the whole that sub-s. (3) of s. 6 is brought into operation as a result of this complicated legislation—legislation which, of course, was never contemplated when the Rating Act, 1874, was passed; and that it may be said that this is a case in which the owner of the right of sporting which is severed from the occupation of the land may be rated as the occupier thereof. That course being taken, it seems to me to do justice in the case. On the whole, I think that there is no legal objection to our reading the section in that way, and saying that the words: "Subject to the foregoing provisions," which are to be found at the commencement of sub-s. (3) may be satisfied where one gets a case in which, as a result of the subsequent legislation, sub-s. (1) of s. 6 is for practical purposes inoperative and unworkable. I agree that the appellants in this case succeed.

Appeal allowed.

Solicitors: *J. J. McIntyre*, for *J. H. Thursfield*, Kidderminster; *Marcy, Hemingway, & Sons*, Bewdley.

[*Reported by* T. R. Fitzwalter Butler, Esq., *Barrister-at-Law.*]

MILNER *v.* ALLEN

[King's Bench Division (Lord Hewart, C.J., Avory and Branson, JJ.), January 13, 1933]

[Reported [1933] 1 K.B. 698; 102 L.J.K.B. 395; 149 L.T. 16; 97 J.P. 111; 49 T.L.R. 240; 77 Sol. Jo. 83; 31 L.G.R. 161; 29 Cox, C.C. 629]

Road Traffic—Notice of intended prosecution—Reference in notice to possible prosecution for dangerous driving—Charge of careless driving subsequently preferred—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 21 (*c*).

By s. 21 of the Road Traffic Act, 1930: "Where a person is prosecuted for an offence under any of the provisions of this Part of this Act relating respectively to the maximum speed at which motor vehicles may be driven, to reckless or dangerous driving, and to careless driving, he shall not be convicted unless either (a) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of the provisions aforesaid would be taken into consideration; or (b) within fourteen days of the commission of the offence a summons for the offence was served on him; or (c) within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence." A notice was sent by registered post to the driver of a motor car informing him that he had been reported "for the question of prosecution to be considered in respect of your having driven a motor car . . . in a manner dangerous to the public" at a specified time and place. An information for careless driving under s. 12 of the Road Traffic Act, 1930, was subsequently preferred against the driver.

Held: the notice was sufficient, its object being to take back the recollection of the accused to the facts on which reliance was to be placed by the prosecution, and it not being necessary that the notice should specify the particular section of the Act under which the prosecution was to take place, or that at the time when the notice was served the police should have definitely made up their minds to prosecute.

Notes. Followed: *Russell* v. *Read* (1949), 113 J.P.Jo. 111. Referred to: *Venn* v. *Morgan*, [1949] 2 All E.R. 562.

As to notice of prosecution under the Road Traffic Acts, see 31 Halsbury's Laws (2nd Edn.) 680, 681, and for cases see Digest Supps., tit. Street Traffic, case no. 245b et seq. For Road Traffic Act, 1930, see 24 Halsbury's Statutes (2nd Edn.) 569.

Case referred to:

(1) *Jessopp* v. *Clarke* (1908), 99 L.T. 28; 72 J.P. 358; 24 T.L.R. 672; 6 L.G.R. 686, D.C.; 42 Digest 871, *203*.

Case Stated by Rochester justices.

The respondent, the chief constable of Rochester, preferred an information under s. 12 of the Road Traffic Act, 1930, against the appellant, Edward Cecil Milner, charging him that he on May 2, 1932, in the said city unlawfully did drive a motor car on a certain road there without due care and attention. No warning was given to Milner at the time of the alleged offence, and no summons was served on him within fourteen days, but on May 4 a notice in the following form was sent to him by registered post by the respondent:

> "SIR,—In accordance with the provisions of the Road Traffic Act, 1930, s. 21, I have to give you notice that you have been reported for the question of prosecution to be considered in respect of your having driven a motor car, PK 8770, in a manner dangerous to the public in High Street, Rochester, at 9.45 a.m. on Monday, May 2, 1932, by overtaking a horse-drawn vehicle and cutting in between same and a motor omnibus proceeding in the opposite direction.—Yours faithfully, H. C. ALLEN, Chief Constable."

The appellant objected that this notice was bad on the grounds (a) that it was not a notice of an intended prosecution, but only of the fact that the question of prosecution would be considered; and (b) that, if it was a notice of an intended prosecution, it was a notice of a prosecution for driving recklessly or in a manner dangerous to the public under s. 11 of the Act of 1930, whereas he was charged with driving without due care and attention under s. 12. It was contended for the respondent that a notice relating to dangerous driving under s. 11 was sufficient to cover a charge of careless driving under s. 12, and that the appellant was not in any way prejudiced.

The justices were of opinion that the requirements of s. 21 had been complied with, and that the appellant was not in any way prejudiced in his defence, but that the notice served on him gave him adequate notice of the essential facts in the case and the summons was for an offence of less serious nature than that specified in the notice. They, accordingly, convicted him. The appellant appealed.

L. Vine for the appellant.
J. D. Cassels, K.C., and *G. A. Thesiger* for the respondent.

LORD HEWART, C.J.—In this case the only point is whether the respondent has complied with s. 21 of the Road Traffic Act, 1930. It is contended on the part of the appellant that the section has not been complied with by reason of the terms of the notice dated May 4, 1932. That notice referred to s. 21; it referred to a prosecution; it referred to the day and the hour, and it set out the material facts which were alleged against the defendant, namely, that he drove his car so as to overtake a horse-drawn vehicle and cut in between it and a motor omnibus proceeding in the opposite direction.

In my opinion, para. (c) of s. 21 ought to be read in close connection with para. (a) of s. 21. The object of the notice is to take back the recollection of the motorist to the facts upon which reliance is to be placed. I do not know that the matter can be more aptly expressed than in the Case, where the justices use these words:

> "We were of the opinion that the requirements of s. 21 of the Road Traffic Act, 1930, had been complied with, and that the said Edward Cecil Milner was not in any way prejudiced in his defence."

The notice served on him gave him adequate notice of the essential facts in the case, and the summons was for an offence of a less serious nature than was indicated in the notice under s. 21 of the Road Traffic Act, 1930. Counsel for the appellant has spoken throughout as if the words "in a manner dangerous to the public" were to be regarded as a term of art referring, and referring only, to s. 11 of the Act. I do not take that view. I think in regard to the point on the words "intended prosecution" the judgment of LORD ALVERSTONE, C.J., in *Jessopp* v. *Clarke* (1) is useful and in point.

In my opinion, this notice was a sufficient compliance with s. 21 of the Act, and the appeal ought to be dismissed. A

AVORY, J.—I am of the same opinion. I do not and cannot assent to the argument of counsel for the appellant that the words in para. (c) of s. 21, "a notice of the intended prosecution specifying the nature of the alleged offence" necessarily mean that the notice must be a notice of the particular section of the Act under B which the prosecution is contemplated. Nor do I assent to the argument that at the time when that notice is given it is necessary that the police officer or other authority should have definitely made up his mind which particular charge is to be made. In my opinion, the notice which was given in the present case was a sufficient notice of an intended prosecution and specified the nature of the alleged offence and the time and place where it was alleged to have been committed. I C do not think that the appellant can be heard to complain, even if the notice did suggest that he might be charged under s. 11, that in point of fact he was only summoned for an offence less serious than that under s. 11. I agree, therefore, that the appeal should be dismissed.

BRANSON, J.—I agree. I agree that para. (c) of s. 21 has to be read in connection with para. (a). Paragraph (a) applies where a motorist is stopped at D the time when the offence is committed; para. (c) when for one reason or another the motorist was not stopped. I can see no reason for supposing that the legislature intended that the motorist who was not stopped at the time the offence was committed was to have better particulars, either of the actual offence with which he might be charged or of the fixed intention of the chief constable to charge him with some offence, than the motorist who was stopped at the time when the offence E was committed. With regard to the particularity of the notice required I would only add this, that the words of para. (c) are "specifying the nature of the alleged offence" and not, as one would suppose they would have been had it been the intention that the actual offence should be particularised, "specifying the offence" or "the particular offence." With regard to the other point, it seems to me that the words "a notice of the intended prosecution" can in this collocation mean no F more than a notice that a prosecution was in contemplation. There is no reason for applying to the word "intended" the meaning that that intention should have been irrevocably arrived at before the notice is sent out. I agree entirely with what has been said by my Lord and my brother AVORY, and that this appeal should be dismissed.

Appeal dismissed. G

Solicitors: *Amery-Parkes & Co.*; *Sir Ernest Hiley*, for *John L. Percival*, Rochester.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

Re BORWICK. BORWICK *v.* BORWICK

[Chancery Division (Bennett, J.), February 1, 2, 3, 7, 8, March 1, 1933]

[Reported [1933] Ch. 657; 102 L.J.Ch. 199; 149 L.T. 116; 49 T.L.R 288; 77 Sol. Jo. 197]

Settlement—Condition—Certainty—Condition subsequent—Forfeiture of contingent interest—"if he be or become a Roman Catholic or not be openly or avowedly Protestant."

Settlement—Condition—Condition hampering parents' religious upbringing of child—Forfeiture of interest if child "be or become a Roman Catholic or not be openly or avowedly Protestant."

One of the clauses in a settlement contained a condition that "if any grandchild of" (the settlor) "shall at any time before attaining a vested interest" (i.e., before attaining the age of twenty-one, if a male, or attaining that age or marrying, if a female) "under the trusts hereinbefore declared be or become a Roman Catholic, or not be openly or avowedly Protestant, such grandchild shall thereupon forfeit and lose one moiety of all the same right and interest in the capital or income of the said trust premises and of all other benefits (if any) conferred upon him or her by these presents." Three of the grandchildren became Roman Catholics before attaining a vested interest.

Held: the condition was void because (i) it was a condition subsequent framed to defeat, in part, the grandchildren's contingent interests, and its validity was to be determined by the same considerations as applied to conditions subsequent framed to defeat a vested interest: *Egerton* v. *Lord Brownlow* (1) (1853), 4 H.L.C. 1, followed; (ii) it operated to restrain or hamper the parents of the grandchildren from doing their parental duty in regard to the religious instruction of their children: principle expressed in Sheppard's "Touchstone," vol. I, p. 132, and by Parker, J., in *Re Sandbrook, Noel* v. *Sandbrook* (2), [1912] 2 Ch. 471, applied; (iii) it was impossible for a court on the date of execution of the settlement to see precisely and distinctly what facts and circumstances would make it possible to say of an infant affected by the condition that he had either become a Roman Catholic or was not openly and avowedly a Protestant, and the condition was, therefore, also void for uncertainty: dictum of Lord Cranworth in *Clavering* v. *Ellison* (3) (1859), 7 H.L.Cas. at p. 725, applied.

Notes. Considered: *Re Talbot-Ponsonby's Estate, Talbot-Ponsonby* v. *Talbot-Ponsonby*, [1937] 4 All E.R. 309. Referred to: *Re Tegg, Public Trustee* v. *Bryant*, [1936] 2 All E.R. 878; *Re Samuel, Jacobs* v. *Ramsden*, [1942] Ch. 1; *Re Piper, Dodd* v. *Piper*, [1946] 2 All E.R. 503.

As to conditions interfering with the right of parents to control the religious instruction of their children, see 34 Halsbury's Laws (2nd Edn.) 106, para. 141.

Cases referred to:

(1) *Egerton* v. *Lord Brownlow* (1853), 4 H.L.C. 1; 8 State Tr. N.S. 193; 23 L.J.Ch. 348; 21 L.T.O.S. 306; 18 Jur. 71; 10 E.R. 359; 12 Digest (Repl.) 269, *2072*.

(2) *Re Sandbrook, Noel* v. *Sandbrook*, [1912] 2 Ch. 471; 81 L.J.Ch. 800; 107 L.T. 148; 56 Sol. Jo. 721; 44 Digest 444, *2686*.

(3) *Clavering* v. *Ellison* (1859), 7 H.L.C. 707; 29 L.J.Ch. 761; 11 E.R. 282; affirming (1857), 8 De G. M. & G. 662; affirming (1856), 3 Drew. 451; 44 Digest 440, *2667*.

(4) *Re May, Eggar* v. *May*, [1917] 2 Ch. 126; 86 L.J.Ch. 698; 117 L.T. 401; 33 T.L.R. 419; 61 Sol. Jo. 577; 44 Digest 478, *2961*.

(5) *Re Edwards, Lloyd* v. *Boyes*, [1910] 1 Ch. 541; 79 L.J.Ch. 281; 102 L.T. 308; 26 T.L.R. 308; 54 Sol. Jo. 325; 35 Digest 708, *76*.

(6) *Hirsch* v. *Protestant School Comrs. of Montreal*, [1928] A.C. 200; 97 L.J.P.C. 40; 138 L.T. 650; 44 T.L.R. 287; 72 Sol. Jo. 137, P.C.; Digest Supp.

(7) *Re Borwick's Settlement, Woodman* v. *Borwick*, [1916] 2 Ch. 304; 85 L.J.Ch. 732; 115 L.T. 183; 32 T.L.R. 583; 60 Sol. Jo. 567; 28 Digest 250, *1062*. A

(8) *Partridge* v. *Partridge*, [1894] 1 Ch. 351; 63 L.J.Ch. 122; 70 L.T. 261; 44 Digest 478, *2960*.

(9) *Re Boulter, Capital and Counties Bank, Ltd.* v. *Boulter*, [1922] 1 Ch. 75; 91 L.J.Ch. 250; 126 L.T. 653; 66 Sol. Jo. (W.R.) 14; 44 Digest 459, *2804*.

(10) *Re W., W.* v. *M.*, [1907] 2 Ch. 557; 77 L.J.Ch. 147, C.A.; 28 Digest 279, *1305*. B

(11) *Re Dickson's Trust, Ex parte Dickson* (1850), 1 Sim.N.S. 37; 20 L.J.Ch. 33; 15 Jur. 282; 61 E.R. 14; 16 L.T.O.S. 168; 44 Digest 462, *2825*.

(12) *Hodgson* v. *Halford* (1879), 11 Ch.D. 959; 48 L.J.Ch. 548; sub nom. *Re Lyon, Re Jacobs, Hodgson* v. *Halford*, 27 W.R. 545; 44 Digest 452, *2748*.

(13) *Perrin* v. *Lyon, Lyon* v. *Geddes* (1807), 9 East, 170; 103 E.R. 533, L.C.; 44 Digest 456, *2778*. C

(14) *Talbot* v. *Earl of Shrewsbury, Doyle* v. *Wright, Talbot and Berkeley* (1840), 4 My. & Cr. 672; 9 L.J.Ch. 125; 4 Jur. 380; 41 E.R. 259, L.C.; 28 Digest 279, *1306*.

Adjourned Summons. The following statement of the facts is substantially taken from the judgment: D

By a deed poll dated Aug. 31, 1910, Lord Borwick of Hawkshead, one of the plaintiffs, who was then Sir Robert Hudson Borwick, made a settlement of ordinary stock in Arthur Guinness, Son, & Co., Ltd., for the benefit of his children and grandchildren. By cl. 4 of this deed poll four sums of such stock, each of £10,000, were appropriated for four daughters of the settlor, namely, Clarice May Warner (wife of William Ward Warner), Vanessa Margaret Dormer (wife of Edward Henry Dormer), Mary Dorothea Woodman (wife of Leonard Cecil Woodman), and Nancy Beatrice Croft (wife of Henry Page Croft). Another sum of £10,000 of such stock was appropriated for Robert George Alec Morris, and the defendant Gweneth Caulfield, then Gweneth Morris, the two children of Hilda Morris, a deceased daughter of the settlor. E F

By cl. 5 of the deed poll trusts were declared of these five sums of stock, the sums appropriated to the settlor's said four daughters being referred to as the daughters' portions, and the sum appropriated for the said children of the deceased daughter being referred to as the grandchildren's portions. After provisions giving to each of the settlor's said four daughters a protected life interest in the sum of stock appropriated to her, the clause contained a declaration that the trustee of the said deed poll should stand possessed of the grandchildren's portions and the investments for the time being representing the same, and from and after the death of each daughter of the said Sir Robert Hudson Borwick (other than the said Hilda Morris) of the share of each daughter upon trust as to both the capital and income thereof for all or any of the grandchildren or grandchild (including the children of the said Hilda Morris) of the said Sir Robert Hudson Borwick, being a child or children of all or any of his same five daughters who, being male, should attain the age of twenty-one years, or, being female, should attain that age or marry, if more than one in equal shares as tenants in common per capita and not per stirpes. G H

Clause 6 of the deed poll was in the following terms:

> "Provided always and the said Sir Robert Hudson Borwick doth hereby direct and declare that the actual division and distribution of the daughters' portions and the grandchildren's portions shall not take place until the death of the last survivor of all the four daughters of the said Sir Robert Hudson Borwick namely the said Clarice May Warner Vanessa Margaret Dormer the wife of Edward Henry Dormer Mary Dorothea Woodman the wife of Leonard Cecil Woodman and the said Nancy Beatrice Croft and that until that event shall happen the trustee may in his discretion and subject to the provisions contained in cl. 9 hereof apply the whole or any part of the income of the portion of any deceased daughter (including for this purpose the grandchildren's portions as I

> being the portion of the deceased daughter Hilda Morris) for the maintenance education advancement or for travelling expenses or otherwise for the benefit of the children or child (whether minors or of full age) of such deceased daughter (including the said Hilda Morris) but so that not more than £500 per annum be applied in favour of any one child and so that the trustee may either himself apply the same or may pay the same to the guardians of the children or child or may pay the same to the children or child personally if of full age And shall until the expiration of a period of twenty-one years after the date of these presents invest and accumulate the surplus of such income in augmentation of the capital of the share from which it shall have proceeded."

Clause 15 of the deed poll contained provisions forfeiting in part the interests of the beneficiaries thereunder upon the happening of specified events. The provisions of this clause relevant to the questions for decision were as follows:

> "And that if any grandchild of the said Sir Robert Hudson Borwick shall at any time before attaining a vested interest under the trusts hereinbefore declared be or become a Roman Catholic or not be openly or avowedly Protestant, such grandchild shall thereupon forfeit and lose one moiety of all the share right or interest in the capital or income of the said trust premises and of all other benefits (if any) conferred upon him or her by these presents, and all the share interest and benefit of any grandchild so forfeited and lost as aforesaid whether original or accruing under this provision shall go to and be divided among or held in trust for the person or persons who would have been entitled thereto if such grandchild incurring such forfeiture had thereupon died and if more than one in the shares in which they would have been so entitled thereto."

At the date of the deed poll the following persons, children of the settlor's said five daughters, were in existence, namely, the said Robert George Alec Morris, then aged twelve years and eight months; the defendant Gweneth Caulfield, then aged five years and nine months; the defendant Clarice Joan Ward Candar Dower, then Clarice Joan Ward Warner, and aged eight years and nine months; the defendant Felicity Caroline Mary Ward Robinson, then Felicity Caroline Mary Ward Warner, and aged three years and ten months; the defendant Robert Francis Edward Baptiste Dormer, then aged six years and two months; the defendant Cecilia Mary Margaret Wilberforce, then Cecilia Mary Margaret Dormer, and aged four years and nine months; the defendant John Geoffrey Wootton Woodman, then aged three years and five months; and the defendant Hilda Elizabeth Mary Croft, then aged one year and one month. Since the date of the said deed poll the said Robert George Alec Morris died under the age of twenty-one, and the following further children of the settlor's said daughters were born, namely, the defendant Margaret Louise Ward Warner, born on June 11, 1911; the defendant Geoffrey Henry Dormer, born on May 13, 1920; and the defendant Nancy Diana Joyce Croft, born on March 31, 1912; Michael Henry Glendower Page Croft, born on Aug. 20, 1916; and Anne Rosemary Dorothea Croft, born on April 2, 1918. There were, therefore, eight grandchildren of the settlor and children of his said daughters living at the date of the deed poll, of whom the eldest was just under thirteen years of age and the youngest was one year and six months old. Since the date of the deed poll one of these died, and five children of the settlor's daughters were born and are still living. Of these, four are still infants, the youngest being the defendant Geoffrey Henry Dormer, who will be thirteen years old on May 13, 1933. The settlor's daughter, Vanessa Margaret, married Captain Edward Henry Dormer on June 24, 1903. He was, and is, a Roman Catholic. Their three children, the defendants Robert Francis Edward Baptiste Dormer, Mary Margaret Wilberforce, and Geoffrey Henry Dormer, were baptised in accordance with the rites of the Roman Catholic Church, and with respect to these three defendants the affidavit of the plaintiff Robert George Borwick, filed on behalf of the plaintiffs, contains these statements in paras. (xi), (xii) and (xiii):

> "(xi) The defendant Cecilia Margaret Mary Wilberforce was baptised a Roman Catholic and has remained and still is a Roman Catholic. (xii) The defendant Robert Francis Edward Baptiste Dormer was baptised a Roman Catholic, but some years ago changed his religion. (xiii) The infant defendant Geoffrey Henry Dormer was baptised a Roman Catholic and still is a Roman Catholic." A

Mary Dorothea Woodman, one of the said settlor's daughters, died on April 2, 1915.

From the date of the settlement until Aug. 31, 1931, on which date the accumulation period of twenty-one years referred to in the deed poll expired, the trustees of the settlement expended, in accordance with their powers in that behalf, part of the income of the £10,000 portion attributable to the deceased daughter, Mrs. Morris, for the benefit of her children, and accumulated the unexpended balance. Since the death of the settlor's daughter, Mrs. Woodman, in 1915, the trustees similarly accumulated the unexpended part of the income of her £10,000 portion after making payments in accordance with their powers for the benefit of her son, the defendant John Geoffrey Wootton Woodman. All such accumulations were added to the capital of the stirpital shares whence they respectively arose. B C

Upon those facts the plaintiffs, who are the trustees of the deed poll, issued the originating summons and asked, among other questions, Question 3, upon which judgment was referred. Question 3 is in the following terms: D

> "Whether, and if so to what extent, the interest of (a) the defendant Robert Francis Edward Baptiste Dormer, (b) the defendant Cecilia Margaret Mary Wilberforce, and (c) the infant defendant Geoffrey Henry Dormer respectively in the surplus income referred to in Question 1 of this summons and in the capital and income generally of the daughters' and grandchildren's portions are in the events which have happened cut down by virtue of the provisions of cl. 15 of the said settlement." E

The Hon. Charles Russell for the trustees.

Vaisey, K.C., and *G. D. Johnston*, for one of the three grandchildren named in the summons, whose interests might be liable to forfeiture, referred to *Re May, Eggar* v. *May* (4), *Re Edwards, Lloyd* v. *Boyes* (5), and *Hirsch* v. *Protestant School Comrs. of Montreal* (6). F

Eardley Wilmott, for the remaining two of the three grandchildren, referred to *Re May* (4), *Re Sandbrook, Noel* v. *Sandbrook* (2), *Re Borwick's Settlement, Woodman* v. *Borwick* (7), *Partridge* v. *Partridge* (8), and *Re Boulter, Capital and Counties Bank, Ltd.* v. *Boulter* (9).

Fergus Morton, K.C., and *Charles Harman*, for persons interested in upholding the forfeiture clause, referred to *Re W., W.* v. *M.* (10), and *Re May* (4). G

Manning, K.C., and *C. M. M. Romer*, for other parties interested in upholding the forfeiture clause, referred to *Clavering* v. *Ellison* (3), *Re Dickson* (11), *Hodgson* v. *Halford* (12), *Perrin* v. *Lyon* (13), *Talbot* v. *Earl of Shrewsbury* (14), and THEOBALD ON WILLS (8th Edn.), pp. 703, 705.

Gavin Simonds, K.C., and *D. Ll. Jenkins*, for other parties interested in upholding the forfeiture clause, referred to *Re May* (4). H

Wilfrid Hunt, *E. J. T. G. Bagshawe*, and *H. O. Danckwerts* for other parties interested in upholding the forfeiture clause.

Cur. adv. vult.

March 1. **BENNETT, J.**, read a judgment in which he stated the facts and continued: No answer was made by the defendant Mrs. Wilberforce or on behalf of the defendant Geoffrey Henry Dormer to the facts deposed to by the plaintiff Mr. Robert Geoffrey Borwick in paras. (xi) and (xiii) of his affidavit. The defendant Robert Francis Edward Baptiste Dormer has filed an affidavit in which he states what he has done and what his own views have been in respect to religious matters since he was a young boy. From this affidavit it appears that until the year 1921, when he left Eton, he attended a Roman Catholic Church on Sundays, and that he was confirmed in a Roman Catholic Church, and that after he left Eton he gradually drifted away from Roman Catholicism, but in the year 1927 he met the lady who is I

A now his wife, and who was of the Lutheran faith, and thenceforward ceased to have any connection with the Roman Catholic faith, and he concludes his affidavit with these three paragraphs:

> "I was married in March, 1928, in a Lutheran Church at Copenhagen, and I have been associated with and have regarded myself as a definite member of B the Church of England ever since; and whenever I go to church it is always to a Church of England or a Lutheran, or some other Protestant Church, whether with my wife or otherwise, and I have never attended a Roman Catholic service for many years. (xiii) It was a long time after I had definitely left the Roman Catholic faith that I heard of the Borwick settlement, and I never knew that it contained any reference to religious faith and to an extent C debarred a Roman Catholic from participation or reduced his interest until June of this year, when I was informed that the trustees of the settlement were taking these proceedings. In fact, I had never heard any details of the Borwick settlement before these proceedings. I had merely heard some time back, in a casual and quite a general way, that there was some settlement by which, when my mother and my aunts died, I should come in for something, D but I had no definite information as to what it was, and I knew nothing whatever about it at the time I became twenty-one. I was not informed, and did not know in August, 1931, that by reason of the expiration of the twenty-one years from the settlement I had become entitled to participate in any funds or accumulations under the settlement. My leaving the Roman Catholic faith was, therefore, purely of my own inclination, and was in no way influenced by E the provisions of the settlement regarding the Roman Catholic faith, which provisions I knew nothing of until just recently. (xiv) In these circumstances, I submit that I have not forfeited any part of my rights under the Borwick settlement."

On behalf of the defendants other than the defendants Robert Francis Edward Baptiste Dormer, Cecilia Margaret Mary Wilberforce, and Geoffrey Henry Dormer, F it was argued that with respect to each of these last-named three defendants each of them was or had become a Roman Catholic before attaining a vested interest in the trust premises, and that accordingly the provisions for forfeiture contained in cl. 15 of the deed poll had come into operation, with the result that these defendants respectively had forfeited and lost one moiety of all their shares, right, or interest in the capital and income of the trust premises and of all other benefit G conferred upon them respectively by the deed poll.

For the defendants Robert Francis Edward Baptiste Dormer, Cecilia Margaret Mary Wilberforce, and Geoffrey Henry Dormer, it was argued that the provisions for forfeiture contained in the clause in question were void, because the provisions were contrary to public policy, or uncertain as to the moment of their operation, or impossible of performance. These arguments were founded on the basis that H the provisions in the clause are conditions subsequently framed for the purpose of destroying, if and when they were fulfilled, an existing interest in the property, and, being such, were to be construed with the same strictness as conditions subsequently framed to destroy a vested interest have to be construed.

It is necessary, therefore, in the first place, to construe the deed in order to decide whether the foundation on which the defendants concerned rest their arguments I exists. It is clear that the capital and income of the daughters' portions and of the grandchildren's portions are by virtue of the provisions contained in cll. 5 and 6 of the deed held in trust for such of the children of the settlor's named five daughters as being males attain twenty-one, or being females attain that age or marry. The interests of the grandchildren in question are plainly contingent and are subject to the interests defined in the deed of the settlor's four named daughters who were alive at the date of it.

It is also clear that the forfeiture provisions which I have stated, and which are to be found in cl. 15 of the deed, are, upon the assumption that they are valid, so framed that, if they are fulfilled, they will at the moment of fulfilment destroy A the respective interests of the grandchildren in a moiety of their interests before such interests vest. The language of cl. 15 is not open to doubt. It contemplates first some event happening before a grandchild attains a vested interest, and then provides that upon the happening of that event the grandchild concerned shall thereupon forfeit and lose one moiety of his or her share, right, or interest. Such language makes it plain that the settlor contemplated the possibility of the condition B being fulfilled during minority, with the immediate consequence at the moment of its fulfilment of a forfeiture.

As a matter of construction, therefore, I have come to the conclusion that the provisions for forfeiture of a moiety of the grandchildren's interests contained in cl. 15 of the deed poll are conditions subsequent framed to defeat, in part, the grandchildren's contingent interests in the trust premises. As such their validity C is, in my judgment, to be determined by the same considerations as apply to conditions subsequent framed to defeat a vested interest: see *Egerton* v. *Lord Brownlow* (1).

Having reached this conclusion, the next question to be considered is what, on the true construction of the language of cl. 15 of the deed, are the facts and circumstances relating to and surrounding each grandchild which, on the assump- D tion that the conditions are valid, enable you to predicate of a grandchild that he or she is or has become a Roman Catholic, or that he or she is not openly or avowedly Protestant. A close examination of the language, and of the circumstances in which and the ages of the persons to whom the tests have to be applied, at once shows the difficulties there are in construing the clause.

On Aug. 31, 1910, the date of the deed, the defendant Robert Dormer was just E over six years old, the defendant Mrs. Wilberforce was just under five years, and the defendant Hilda Elizabeth Mary Croft was one-and-a-half years old. Could it have been said on Sept. 1, 1910, of both or either of the first two of these defendants that they were then or had become Roman Catholics, or of the third that she was not openly or avowedly Protestant?

The defendant Geoffrey Dormer was born on May 13, 1920. It is contended that F he has now become a Roman Catholic. No one has indicated or suggested the moment of time at which he became one, and no one has given any particulars or evidence of facts on which the conclusion that he is a Roman Catholic is based, except the fact that he was baptised in accordance with the rites of the Roman Catholic Church.

Anne Rosemary Croft was born on April 2, 1918. If the condition is valid, she G has, of course, forfeited a half of her contingent interest in the trust premises, if it has been possible to say of her at any moment during her short life of just under fifteen years that she was not openly or avowedly Protestant.

The defendant Clarice Joan Ward Candar Dower was born on Nov. 15, 1901, and married on April 25, 1922, on which date her interest in the capital and interest of the trust premises vested. The defendant Robert Dormer was then eighteen; his H sister, Mrs. Wilberforce, was seventeen. Had both of these defendants, on April 25, 1922, forfeited a moiety of their respective shares and interests in the capital and income of the trust premises, and, if so, in what order? It is essential to be able to answer these questions in order to know the extent of the defendant Clarice Candar Dower's vested interest in the capital and income of the trust premises on April 25, 1922. I

Counsel for the defendants, whose interests are not said to be affected by the condition in question, passed, I think, somewhat lightly over what seems to me to be questions not altogether free from difficulty. Mr. Jenkins said in effect that the question whether the defendants whose interests are in question were or had become Roman Catholics ought to be looked at broadly and answered by the court as it would be answered by a man of common sense. He said it really was not a lawyer's question at all, and any experienced sensible man of the world would say without hesitation that Robert Francis Dormer, Mrs. Wilberforce, and Geoffrey

Dormer were Roman Catholics, and that, in the case of the first two, had become such before attaining vested interests.

Mr. Manning, when pressed to suggest som moment of time at which any one of the defendants concerned had become Roman Catholics, was unable to suggest one. He recognised, I think, the necessity of determining the moment of time when the event happened, and I think the difficulty of determining it, and his solution of the difficulty, was an inquiry before a Master. That solution, it seems to me, leaves all the difficulties open. Into what is the Master to inquire? Into the state of the grandchild's mind during the whole of his or her minority? Or does the answer to the question depend upon such religious practices to which the grandchild has conformed, and for how long has an infant to conform to the practices of a particular branch of the Christian Church before it can be predicated of him or her that he or she is a member of it?

I do not propose to answer these questions, because the view I take of the law makes it unnecessary for me to do so. I will assume that the three defendants concerned have become Roman Catholics and that the two of them who are now of age became so before they respectively attained vested interests in their shares. The condition is intended to operate during minority, and is to operate because during that period infants either become members of a particular branch of the Christian Church or are not openly or avowedly members of another Church. Infants are, or ought to be, instructed in religious matters by their parents, and as a general rule have no choice of their own in such matters. The parents' duty is to be discharged solely with a view to the moral and spiritual welfare of their children, and ought not to be influenced by mercenary considerations affecting the infant's worldly welfare.

SHEPPARD, in his "TOUCHSTONE," vol. I, p. 132, lays down the law as regards the validity of conditions in these terms:

> "All conditions annexed to estates, being compulsory, to compel a man to do anything that is in its nature good or indifferent; or, being restrictive, to restrain or forbid the doing of anything which, in its nature, is malum in se, as to kill a man, or the like; or malum prohibitum, being a thing forbidden by any Statute or the like; all such conditions are good, and may stand with the estates. But if the matter of the condition tend to provoke or further the doing of some unlawful act, or to restrain or forbid a man the doing of his duty, the condition for the most part is void."

PARKER, J., tested the validity of a condition subsequently by those principles in *Re Sandbrook, Noel* v. *Sandbrook* (2). The condition for forfeiture in that case was contained in a will and was in these terms:

> "And I declare that if at any time on or before the 31st day of December, 1927, whether one or both of my grandchildren shall live with or be or continue under the custody, guardianship or control of their father, Doctor T. G. Duncan Cooper, or be in any way directly under his control, all benefits, profits, and income provided to be given under this my will to both or either one of them, as the case may be, shall thereby cease and determine, and it shall be at all times and under all circumstances an absolute condition of either one or both of them receiving any income, benefit, or legacy under this my will that he or she or both of them shall separately and individually continue to live free from his direct influence and control."

With respect to that condition, PARKER, J., made the following observations ([1912] 2 Ch. at p. 476):

> "It appears to me that this condition is inserted in the will with the direct object of deterring the father of these two children from performing his parental duties with regard to them, because it makes their worldly welfare dependent on his abstaining from doing what it is certainly his duty to do, namely, to bring his influence to bear and not give up his right to the custody, the control,

> and education of his children; and it seems to me it is also a direct consequence of a condition of this sort that the discretion of the court with regard to the custody and maintenance of its wards is equally interfered with. If, for example, I myself—these children being now wards—thought it was for their benefit to direct that they should spend the next year or so with their father (who is a medical officer on furlough from the Malay States) at the seaside under his direct control, I should be fettered in exercising the discretion vested in me by the knowledge that, if I exercised it in this way, I might endanger their worldly welfare and cause them to forfeit what has been given to them under the will. It appears to me, therefore, that the condition is directly within the principle, as laid down at p. 132 of Sheppard's 'Touchstone,' that a condition is bad which operates to restrain or forbid a man from doing his duty."

I propose to apply the principles contained in Sheppard's "Touchstone," to which I have referred, to the conditions contained in cl. 15 of the deed poll of Aug. 31, 1910. I ask myself, would or might the parents of the three defendants concerned have been deterred from discharging, or hampered or influenced in discharging, their parental duty in regard to the religious instruction they were to give to their children by reason of the condition? I ask myself whether, if I had now to determine what religious instruction the infant Geoffrey Dormer was to receive, I should be fettered in exercising my discretion by the knowledge that if I directed him to be instructed in his father's faith I might endanger his worldly welfare. The answer to both these questions must, I think, be in the affirmative, and from that answer it follows, in my judgment, that the condition is void because it operates to restrain a man from doing his duty.

In my judgment, the condition is also bad in law because of its uncertainty. In his speech in the House of Lords in *Clavering* v. *Ellison* (3), Lord Cranworth, dealing with the validity of conditions subsequent which operate to defeat a vested estate, says (7 H.L.C. at p. 725):

> "I consider that, from the earliest times, one of the cardinal rules on the subject has been this: that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the proceeding vested estate was to determine."

There is, in my judgment, no reason for holding that these observations are not applicable to a condition subsequent which operates to destroy a contingent interest.

Again, I ask myself: Was it possible for a court on Aug. 31, 1910, to see precisely and distinctly what facts and circumstances would make it possible to say of an infant affected by the condition that he had either become a Roman Catholic or was not openly and avowedly Protestant? I answer that question in the negative. I do not think anybody could have said at that date what they were, and I do not think that any two people would have agreed as to what they were; and so, as I have said, I hold the condition bad in law on the ground of uncertainty.

I express no opinion at all on the other questions dealt with before me. Accordingly, I answer the third question of the summons by saying that the capital and income of the three defendants in question are not cut down by virtue of the provisions of cl. 15 of the settlement. That settles the whole of the questions.

Declaration accordingly.

Solicitors: *Charles Russell & Co.*; *Beckingsales & Naylors*; *Travers-Smith, Braithwaite & Co.*; *Guscotte, Wadham, Tickell & Co.*; *Withers & Co.*; *Park, Nelson & Co.*; *Mag, Mag, & Deacon.*

[*Reported by* J. H. G. Buller, Esq., *Barrister-at-Law.*]

Re COLLINGS. JONES *v.* COLLINGS

[Chancery Division (Farwell, J.), June 21, 1933]

[Reported [1933] Ch. 920; 102 L.J.Ch. 337; 150 L.T. 19]

Will—Money—Money on deposit at bank.

By her will the testatrix left her estate to be divided between her brother and two sisters and then declared: "All my money left to my brother and sisters unused at their death is to go to a good lifeboat society." The brother predeceased the testatrix. Part of his share under the will consisted of money on deposit at the bank of the testatrix.

Held: on construction of the will, "money" therein meant money in the strict legal sense; even if used in that sense it included money on deposit account at a bank as well as money on current account; and, therefore, the brother's share of the money on deposit at the testatrix's bank on his death formed part of the gift to a lifeboat society.

Notes. On the meaning, generally, of "money" in a will, see *Perrin* v. *Morgan*, [1943] 1 All E.R. 187; [1943] A.C. 399.

As to the meaning of "money" and kindred phrases in a will, see 34 Halsbury's Laws (2nd Edn.) 253 et seq., and for cases see 44 Digest 720 et seq.

Cases referred to:

(1) *Re Glendinning, Steel* v. *Glendinning* (1918), 88 L.J.Ch. 87; 120 L.T. 222; 63 Sol. Jo. 156; Digest Supp.

(2) *Re Taylor, Taylor* v. *Tweedie*, [1923] 1 Ch. 99; 91 L.J.Ch. 801; 127 L.T. 684; 38 T.L.R. 850; 66 Sol. Jo. 693, C.A.; 44 Digest 582, *4049*.

(3) *Re Price, Price* v. *Newton*, [1905] 2 Ch. 55; 74 L.J.Ch. 437; 93 L.T. 44; 53 W.R. 600; 44 Digest 565, *3824*.

(4) *Manning* v. *Purcell* (1855), 7 De G. M. & G. 55; 3 Eq. Rep. 387; 24 L.J.Ch. 522; 24 L.T.O.S. 317; 3 W.R. 273; 44 E.R. 21, L.JJ.; 44 Digest 711, *5560*.

Adjourned Summons.

The testatrix left all she possessed to be divided between her brother Montague and her sisters the defendants, Alice Mabel Collings and Evelyn Ethel Balls, subject to certain legacies. Then she declared as follows: "All my money left to my brother and sisters unused at their death is to go to a good lifeboat society." Her brother Montague predeceased her, and she died on Sept. 8, 1932. At the date of her death her property consisted, inter alia, of certain stocks, £11 in cash, £1,240 7s. 1d. on drawing account at her bank, and £2,092 0s. 2d. on deposit account at her bank. This summons was taken out to decide the question whether Montague's share of the money on deposit account at the bank was included in the gift to a lifeboat society, or whether it fell into residue.

W. T. Elverston for the plaintiff, the sole executor.

J. Leonard Stone, for the residuary legatees, referred to *Re Glendinning, Steel* v. *Glendinning* (1), *Re Taylor, Taylor* v. *Tweedie* (2), and *Re Price, Price* v. *Newton* (3).

H. O. Danckwerts for the Attorney-General. The case is fully covered by the decision in *Manning* v. *Purcell* (4), where it was expressly decided that money on deposit account at a testator's bank must be considered as passing under the term "moneys."

P. H. L. Brough for other parties.

FARWELL, J.—The question to be determined on this will is one which, having regard to the state of the authorities, is not free from doubt. The testatrix gave "all my money left to brothers and sisters unused at their death to go to a good lifeboat society." I have already held that "money" in this case means money in the strict sense.

The question I now have to determine is whether "money" in this will includes money on deposit. It is conceded that the term "money" in its strict sense must include cash in hand and money on drawing account at the bank, but it is said that money which is on deposit at the bank is not properly "money" at all, because it is not immediately available. The testatrix could only have obtained it by giving notice to the bank, and until she had given such notice and that notice had expired the money would not be available for use.

I must now consider the authorities upon this point, which seem to be not altogether easy to reconcile. In *Manning* v. *Purcell* (4) one of the questions which had to be determined was the meaning of a bequest of "all my moneys." There the testator had two balances standing to his credit at his bank, one an ordinary current account and the other secured by deposit notes bearing interest. The question which was debated and decided in that case was whether or not the term "all my moneys" included both the ordinary current account and the deposit account. When the matter came before STUART, V.-C., he decided that both the accounts passed under the bequest of "all my moneys." There was an appeal to the Court of Appeal on this question, and both the lords justices seem to have had some little doubt. KNIGHT-BRUCE, L.J., says:

> "With regard to the balance standing to the testator's credit at his bankers which did not bear interest, that balance as well as the money in his house at the time of his death must unquestionably be considered as passing under the term 'moneys.' I have some doubt as to the other portion of the balance at his bankers, inasmuch as it could not be dealt with by ordinary cheques, but would have required some notice; my doubt, however, is not so strong as to justify me in dissenting from what the Vice-Chancellor has decided in this respect. It is only a doubt, and I cannot act against his judgment upon a doubt."

The result of that is that KNIGHT-BRUCE, L.J., affirmed the view taken by STUART, V.-C. When TURNER, L.J., dealt with this point he said (7 De G. M. & G. at p. 67):

> "The next question is, as to the general balance standing to the testator's credit on a general current account at his banker's. I think this must be considered as the testator's moneys at his death. Looking at the ordinary language and usage of mankind, when a man says 'I have so much money at my bankers,' he considers and treats it as his money; and when he speaks of all his money he includes the balance at his bankers. No doubt it is properly only a debt due from the bankers, but the ordinary usage of mankind treats it as money. Then there is this further question. There was at the testator's death a sum standing to his credit upon a deposit account with his bankers for which he had taken a deposit note bearing interest. Upon this I have felt considerable doubt; but, I think, that that also must be considered as 'moneys' of the testator within the meaning of the will. The substance of the case is that the testator had two distinct accounts at his bankers, the one a current account and the other an account which he treated as a reserve fund, but which was not, therefore, the less his moneys."

It is to be noted that in that case the testator had not given "all my moneys at my bankers"; he gave "all my moneys," and the Court of Appeal in that case, affirming the Vice-Chancellor, decided that the term "all my moneys" does include, and is wide enough to include, not only money on current account, but moneys standing to a deposit account.

That decision was considered by YOUNGER, J., in *Re Glendinning*, *Steel* v. *Glendinning* (1), but the question which the learned judge had to determine in that case was not quite the same as that which I have to determine, because the gift was "all my moneys in the bank." It seems to me that those words possibly have a different meaning from the words "all my moneys," and that the use of such words may render it easier to come to the conclusion that a gift of "all my moneys at the

A bank" includes money on deposit as well as on current account than where the only gift is of "all my money." YOUNGER, J., in deciding that question, referred to *Manning* v. *Purcell* (4), and he quotes the passage from the judgment of TURNER, L.J., which I have just read. He then says (120 L.T. at p. 223):

> "Whether in that case notice was expressed to be necessary to withdraw the money on deposit is not clear, and upon the whole reading of the report it may B be that it was not, for KNIGHT-BRUCE, L.J., had some doubt about the money passing, because he thought it could not be dealt with by ordinary cheques, but would require some notice; but, nevertheless, his doubt was not so strong as to justify him in dissenting from the judgment appealed from. I prefer to treat the matter as one of substance, as TURNER, L.J., did; I do so the more readily because of the fact that notice in the case of such accounts is now C notoriously a formality, rarely if ever in practice insisted upon. Accordingly, I hold that the deposit money here was included in the testator's 'moneys at my bank' and passed accordingly."

The importance of that judgment for my purpose is that YOUNGER, J., treats TURNER, L.J., as having decided in terms that the gift of "all my moneys" includes D a gift of money on deposit.

There have been decisions, to which my attention has been called, on the meaning of the words "ready money," and FARWELL, J., in *Re Price*, *Price* v. *Newton* (3) held that ready moneys did not include money on deposit at a bank. That, I think, is a different case from the one I have to consider, because the term "ready money" may have a different meaning from "money" alone, and for this reason E I do not think that these cases as to the meaning of "ready money" really assist me, although counsel for the residuary legatees made a gallant attempt to bring this case within those decisions by having recourse to the word "unused," which the lady had used in her will. I cannot, however, see that "all my money unused at their death" is any the less applicable to the money on current account. It seems to me no help can be derived from the use of the word "unused" in this case.

F In those circumstances the position would seem to be that there is a decision of the Court of Appeal in *Manning* v. *Purcell* (4) which, on the face of it, appears to determine that the word "moneys" includes money on deposit at the bank. But there is a much more recent decision of the Court of Appeal which has given me some difficulty, and to which I must refer—the decision in *Re Taylor*, *Taylor* v. *Tweedie* (2). In that case the question was as to the meaning of the gift in the G will: "The money I have and am entitled to now and at any future time," and then another gift of

> "the remaining two-thirds of my money, including the money which I have now and that which I am entitled to now or at any future time."

It appears that the testatrix possessed at the time of her death stock, shares, and securities to the value of £16,000; cash in the house and uncashed money orders H for a total of £8 9s. 2d.; £821 cash at the West Brighton branch; and further moneys at the London branch of the London County, Westminster, and Parr's Bank, both accounts, I understand from the report, being on current account; a sum of money in the hands of some solicitors; and £1,000 lent on mortgage. The question was what passed under the term "money." The Court of Appeal, varying the decision of PETERSON, J., came to the conclusion that there was nothing in the I context in the will in that case which enabled the court to put any meaning on the word "money" other than its strict meaning, and that, accordingly, only that passed under the gift of money which was strictly money. So far as I can see from reading the report, no question as to the distinction between money on deposit and money on current account was argued, nor did it arise for decision in that case, for I can find no suggestion that there was in that case money on deposit; but there are undoubtedly passages in the judgments of two of the learned lords justices which would seem to indicate that in their view money on deposit account cannot be included in the phrase "money" when it is used strictly.

I do not think there is anything to be found in the judgment of the Master of the Rolls on this particular point which assists me. He came to the conclusion that the word "money" used in the will meant money in its strict sense, but I do not think he says in terms what the word "money" means in its strict sense. WARRINGTON, L.J., however, makes a statement in these terms ([1923] 1 Ch. at p. 108):

> "Now the only principle established by the authorities is, I think, correctly stated by the learned judge in the following words:
>
> > 'Money is to be treated in the strict sense unless there be a context which shows something to the contrary.' "

That is the end of the quotation from PETERSON, J.'s judgment. Then the lord justice goes on:

> " 'Money in the strict sense' means, as I understand, money actually in hand as cash, or at the bank on drawing account, and certainly does not include such items of property as in this case have been held to pass."

YOUNGER, L.J., says ([1923] 1 Ch. at p. 110):

> "In other respects the principles to be applied are not in debate. There is a legal sense, which in the absence of a context is the sense that must be attributed to the word 'money' when used in a will. In its strict legal sense the word is confined to ready money actually in hand. The popular sense of the word is quite different. A gift by a testatrix of her money, or of all her money, would, in popular language, be the equivalent of a gift of her fortune —of her 'brass,' to use a north-country phrase—of her whole personal estate, perhaps even of her entire property, real and personal, to use more technical terms."

If I am to treat those statements as deciding that the word "money" in its strict sense is to be confined to ready money, it would seem on the other authorities, to which I have already referred, that it would not include money on deposit. Further, WARRINGTON, L.J., in stating what is included in the word "money" in its strict sense, does say it includes money in hand as cash, or at a bank on drawing account, and he would appear to be drawing a distinction between money on deposit and money on current account.

That being so, I am in this difficulty, that on the one hand I have a decision of the Court of Appeal in *Manning* v. *Purcell* (4), which seems to me to decide that money, even in its strict sense, includes money on deposit at the bank, and I have in *Re Taylor*, *Taylor* v. *Tweedie* (2) expressions of opinion by two of the learned lords justices which, I think, clearly indicate the contrary view. But in *Re Taylor*, *Taylor* v. *Tweedie* (2), as I have already said, I cannot find that the question whether or not money on deposit at the bank passed under the term "money" was a matter which had to be determined by the court. It does not seem to me to have been argued, nor does it seem to have been a question which it was necessary for the court to decide. I cannot find that the decision of *Manning* v. *Purcell* (4) was referred to in any way, nor do I think their Lordships' attention was drawn particularly to this question as to the distinction between money on deposit and money on current account. In those circumstances it seems to me that I am bound by the earlier decision of the Court of Appeal, which, I think, goes to decide that where there is a gift of moneys, even used in its strict sense, the term includes moneys not only on current account at the bankers, but also money on deposit. To what conclusion I should have come if the matter had been open to me it is unnecessary to consider. If the decision in *Manning* v. *Purcell* (4) is a decision on the point, and I think it is, it seems to me that I am bound to follow it. I do not think, notwithstanding the sentences I have read from the judgment of the learned lords justices in *Re Taylor*, *Taylor* v. *Tweedie* (2), that I should be justified in disregarding the earlier decision, which was an exact decision on the point which does not seem to me to have arisen in the Court of Appeal in the later case.

In those circumstances I hold that the gift of moneys here includes the substantial sum which was on deposit at the lady's bankers at the time of her death.

Solicitors: *Treasury Solicitor*; *Nordon, Hugh Jones, & Flinn*, for *Wittey, Denton, & Pawsey*, Colchester.

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law*.]

Re A DEBTOR (No. 29 of 1931).
Ex parte DEBTOR *v.* PETITIONING CREDITORS

[COURT OF APPEAL (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), October 27, 30, 1933]

[Reported [1934] Ch. 280; 103 L.J.Ch. 130; 150 L.T. 126; 50 T.L.R. 38; [1933] B. & C.R. 228]

Solicitor—Right of audience—Bankruptcy—Proceedings in county court—No need to sign court roll—Solicitors Act, 1843 (6 *&* 7 *Vict.*, *c.* 73), *s.* 27.

The provision in s. 27 of the Solicitors Act, 1843, and Order LIV, r. 7, of the County Court Rules, 1903, that a solicitor should not be allowed to appear and practise in a county court until he had signed the roll of solicitors of the court, **held** not to apply to proceedings in bankruptcy, for s. 70 of the Bankruptcy Act, 1870, had conferred on a solicitor an unqualified right to practice in a bankruptcy court and that right had been preserved by s. 151 of the Bankruptcy Act, 1883, and, therefore, a solicitor might practise in such proceedings in an inferior court without signing the court roll.

Notes. The need, generally, for a solicitor to sign the roll of a county court before practising therein was terminated by s. 182 of the County Courts Act, 1934. Section 27 of the Solicitors Act, 1843, has been replaced by s. 2 of the Solicitors Act, 1957. As to right of audience in bankruptcy, see s. 152 of Bankruptcy Act, 1914.

As to a solicitor's right of audience generally, see 31 HALSBURY'S LAWS (2nd Edn.) 70 et seq., and for cases see 42 DIGEST 43 et seq. For Solicitors Act, 1957, see 37 HALSBURY'S STATUTES (2nd Edn.) 1053; for Bankruptcy Act, 1914, s. 152, see ibid., vol. 2, p. 433.

Cases referred to:

(1) *Re Broadhouse, Ex parte Broadhouse* (1867), 2 Ch. App. 655; 36 L.J.Bcy. 29; 17 L.T. 126; 15 W.R. 1154, L.JJ.; 42 Digest 43, *331*.

(2) *Re Barnett, Ex parte Reynolds* (1885), 15 Q.B.D. 169; 54 L.J.Q.B. 354; 53 L.T. 448; 33 W.R. 715; 1 T.L.R. 433; 2 Morr. 147, C.A.; 42 Digest 44, *334*.

(3) *Skinner* v. *Northallerton County Court Judge*, [1899] A.C. 439; 68 L.J.Q.B. 896; 80 L.T. 814; 63 J.P. 756; 15 T.L.R. 433; 6 Mans. 274, H.L.; 4 Digest 39, *333*.

Appeal by the debtor from an order of a Divisional Court in Bankruptcy (CLAUSON and LUXMOORE, JJ.).

Donald Geddes for the debtor.

S. R. Sidebottom for the petitioning creditors.

LORD HANWORTH, M.R.—This appeal fails. The point that is raised is an important one, and it is this. A solicitor conducted some proceedings in bankruptcy in the Brentford County Court, a county court which has jurisdiction in A bankruptcy. One of the rules of the county court, among the general provisions of the Act applicable to the court, is that by r. 7 of Order LIV:

> "No solicitor shall be allowed to appear for any person in a court until he has signed a roll or book to be kept for that purpose by the registrar."

When the bill of the solicitor in this case was in suit the objection was taken that B the solicitor could not recover by reason of the fact that he had not signed the roll and had not conformed, therefore, with the provisions of r. 7 of Order LIV. The county court judge felt the difficulty and allowed the objection. That decision went before the Divisional Court which sits in bankruptcy. The position of that court is particular in this sense. When there is an appeal from a county court it goes to a Divisional Court, and that Divisional Court must be so composed that the C judge to whom bankruptcy business is assigned in the High Court shall be a member of it. Thus the Divisional Court was composed of CLAUSON, J., and LUXMOORE, J., CLAUSON, J., being the judge at the present time to whom the duty is assigned by the Lord Chancellor of taking bankruptcy business. I point that out because that emphasises the point that the court from which this appeal is taken—the county court—was sitting in bankruptcy, and the case comes before the Court of Appeal D sitting in bankruptcy. We have, therefore, to consider the matter from the point of view of courts which have jurisdiction in bankruptcy, beginning at the county court and going up to the Court of Appeal.

By s. 70 of the Bankruptcy Act, 1869, it is provided:

> "Every attorney and solicitor of the Superior Courts shall be, and may practise as a solicitor of, and in the court of bankruptcy, and in matters before the chief E judge or registrars, in the London court of bankruptcy, in court or in chambers."

There is no question but that the county courts were given jurisdiction in bankruptcy, and that section is, I think, admitted to be one which would carry the right of audience and of practice in the bankruptcy court if it were still in operation. But, as he points out, in the Act of 1883 that section was repealed. There is no F limitation to the repeal of the Act of 1869. I think it is repealed in toto subject to the preservation of the words which are now found in the Interpretation Act, 1889, and in sub-s. (2) of s. 169 of the Bankruptcy Act, 1883. So, said counsel for the debtor, it is not possible to rely upon s. 70. But the Bankruptcy Act, 1883, contains s. 151, which provides:

> "Nothing in this Act, or in any transfer of jurisdiction effected thereby, shall G take away or affect any right of audience that any person may have had at the commencement of this Act, and all solicitors or other persons who had the right of audience before the chief judge in bankruptcy shall have the like right of audience in bankruptcy matters in the High Court."

It will be observed that that section refers, as, indeed, did s. 70, particularly to H the High Court, and generally to all courts having jurisdiction in bankruptcy. It appears to me that s. 151 safeguards the position and enables the solicitor to have the same rights that he had under s. 70. In other words, in the case of a county court sitting in bankruptcy it was not necessary for a solicitor to comply with r. 7 of Order LIV, which has application to the general business of the county court and not to the particular business in bankruptcy. I

Again, counsel said that s. 151 refers to a right of audience which means that the solicitor can be heard, but it does not refer to a right to practise. I think that involves some confusion of thought. The audience which is given to solicitors is in respect of their own clients. They are not entitled to appear for persons who are not their own clients. They are not barristers. The distinction, I think, is well explained in *Re Broadhouse, Ex parte Broadhouse* (1). The question which arose there before the Court of Appeal was whether or not a commissioner in bankruptcy at the time when the Bankruptcy Act, 1861, was in operation, was bound or not bound to hear a person who, although a duly admitted solicitor of the court, did not appear as the solicitor of the party for whom he purported to appear. Section 212 of the Act of 1861 says this:

> "Every solicitor of the High Court of Chancery now or hereafter admitted as a solicitor of the court of bankruptcy may practise as such solicitor in the said court or in any district court, and as to all matters before the commissioner or in chambers may appear and plead without being required to employ counsel."

Lord Cairns, speaking in reference to that, said this (2 Ch. App. at p. 658):

> "That section, in my opinion, did nothing more than this, it absolved the solicitor from the necessity of appearing by counsel, and authorised him to appear in his own person, but did not, in any way, alter the ordinary character in which alone a solicitor is entitled to appear in any court, namely, as the solicitor of a particular client. His appearing in that character is the condition of his being heard, and for obvious reasons. The main object of allowing and favouring the appearance of a solicitor as representing another person is that the court should have before it a person who, on the one hand, is under an obligation to the court because he is one of its officers, and, on the other hand, is under an obligation to the suitor because he is in privity with him, and is the actual person who represents him."

Those words neatly present the position of the solicitor and his right of audience. It is not a general right to appear and to be heard on behalf of any person whom the solicitor may choose to represent. It is a right limited to the persons for whom he is acting in his character as a solicitor. When one applies that definition to s. 151 and finds the words "and all solicitors who had the right of audience," and so on, one sees that the phrase "right of audience" is used as a term of art, and in the qualified sense to which I have referred. Section 151 re-appears in the Act of 1914 as s. 152:

> "And nothing in this Act shall take away or affect any right of audience that any person may have had at the commencement of this Act."

Indeed, I think counsel for the debtor in his argument admitted that if s. 151 by its terms gave to the solicitor the right to act in bankruptcy, and that the audience was not limited in the sense in which he suggested, the point that he had taken must fail.

For these reasons I think the appeal fails. I will only add this. I think it would be a serious matter if I did not say that my view of s. 2 of the Solicitors Act, 1843, is that it refers to the Roll of Solicitors which is now in the charge of the Law Society, with regard to which, as Master of the Rolls, I have a particular duty, and which enables solicitors to prove that they are solicitors by their names being found upon that roll. I will also add this. The Law List is made by statute receivable in all courts as proof of the fact that a solicitor is upon that roll, and I must not be taken in any way to allow that any possible doubt could arise as to the meaning and purpose of s. 2, or what is the roll therein contemplated. That point, however, is one which does not arise in the present case, because if we are satisfied upon what I would call the point as to the bankruptcy jurisdiction of the county court, it is not necessary to go into the wider question which Mr. Geddes suggested might possibly be arguable. For these reasons, I think that the appeal fails.

SLESSER, L.J.—I am of the same opinion. This appeal raises important questions alike to solicitors and the public, and has been very clearly and very usefully argued. But when the matter is properly considered I think the argument put forward on behalf of the debtor is on a false foundation. Under the Solicitors Act, 1843, the question had to be considered what was the position of solicitors in the superior courts of law at Westminster and in the inferior courts. As my Lord pointed out, s. 2 is a section which is dealing with the admission of solicitors to the Roll of Solicitors.

Section 27 is dealing with questions of practising in different courts, and provides A that when persons seek to practise in inferior courts they must sign the roll of that court. Under the bankruptcy jurisdiction there is not that division between the superior and the inferior courts which we find recognised in the Solicitors Act, and which, of course, always has existed in general. By the Bankruptcy Act, 1861, the Court of Bankruptcy is one court, as is there explained, and this fact has had an effect on the whole bankruptcy legislation ever since which is exercised both B in London and in the country. It was provided in the Act of 1861 that there should be a Court of Bankruptcy which was to exercise all the jurisdiction, if any, possessed "by the court for the relief of insolvent debtors in England." Those words appear in s. 1. Then s. 2 says:

> "The present commissioners of the court of bankruptcy shall continue to be commissioners of the court" C

in London. Then s. 3 says:

> "The judge of every county court shall have and exercise within his respective district the like jurisdiction, powers, and authorities as are vested in the commissioners of the district courts of bankruptcy."

So that this distinction between superior and inferior courts with regard to several D matters, including practising solicitors, contemplated by there being a separate roll of practice under s. 27 of the Solicitors Act, 1843, though not rolls of admission as solicitors, does not really exist in the same way in the undivided court of bankruptcy. That is made quite clear by the section dealing with the right of solicitors to appear in the Court of Bankruptcy (s. 212 of the Act of 1861), which says:

> E
>
> "Every solicitor of the High Court of Chancery, now or hereafter admitted as a solicitor of the court of bankruptcy, may practise as such solicitor in the said court or in any district court, and as to all matters before the commissioners or in chambers may appear and plead without being required to employ counsel."

So that it is quite clear after 1861 a solicitor could appear before the court of F bankruptcy either in London or in the district courts without any obligation to sign any roll as provided by the Solicitors Acts. The whole question to be considered is, therefore: Has that position been altered since 1861? In my opinion, when the legislation is properly considered, it has not been altered, and solicitors now possess the same right to appear, without signing the roll of the county court, as they possessed in 1861. I should add that the Bankruptcy Act, 1869, preserves G the right of a solicitor to appear and be heard without employing counsel which existed in the Act of 1861.

The reason I come to that conclusion is this. By s. 151 of the Bankruptcy Act, 1883, it is in terms provided:

> "Nothing in this Act, or any transfer of jurisdiction effected thereby, shall take away or affect any right of audience that any person may have had at H the commencement of this Act."

That is absolutely general. Then it goes on to speak specifically of the High Court of Justice—

> "and all solicitors or other persons who had the right of audience before a chief judge in bankruptcy shall have the like right of audience in bankruptcy I matters in the High Court."

As a matter of fact it has been held in *Re Barnett, Ex parte Reynolds* (2) that that right extends to a right of audience on an appeal to the Divisional Court from a county court sitting in bankruptcy. One other authority which I will cite is *Skinner* v. *Northallerton County Court Judge* (3), where LORD HALSBURY points out that the county court judge sitting in bankruptcy has for the purposes of bankruptcy jurisdiction the High Court jurisdiction. He says ([1899] A.C. at p. 441): "The statute itself has made the county court the High Court for this purpose"—

that is for the purposes of exercising bankruptcy jurisdiction. Therefore counsel for the debtor, in spite of his careful and ingenious argument, is unable to show to my satisfaction that the solicitor has lost any of the rights which were conferred upon him of audience before the court in 1861. That really concludes this case, because I understand counsel to concede, as, indeed, he must, that the rules of practice of the county court are not applicable to the case of bankruptcy. They are framed under a different statute and by a different authority, and, therefore, in my view, he cannot rely upon them. The bankruptcy rules are made by the Lord Chancellor with the concurrence of the President of the Board of Trade, and the county court rules are made by five judges and three other persons, who frame rules and orders indicating the practice of the county court. Therefore, it is impossible to argue that this rule is a bankruptcy rule. That, in my view, concludes the matter.

ROMER, L.J.—I quite agree. With all respect to the learned county court judge who took the opposite view, and with all deference to the excellent argument of counsel for the debtor, I confess the matter seems to me to be reasonably plain. Section 27 of the Solicitors Act, 1843, in effect provided that no solicitor should practise in a county court unless and until he had signed the roll of that court. Having regard to the limited nature of a solicitor's right of audience in a county court, it necessarily follows that his right of audience was subject to the same condition. As he could not practise without signing the roll, it would necessarily follow that he could not be heard until he had signed the roll. That section, primâ facie, applies to the county court whatever jurisdiction it may be exercising, but, as is pointed out by CLAUSON, J., who delivered the judgment of the Divisional Court, s. 70 of the Bankruptcy Act, 1869, gives an unconditional right of practising to a solicitor when the county court is exercising its bankruptcy jurisdiction. That being so, it necessarily follows that his right of audience in bankruptcy matters in a county court was unconditional. But s. 70 of the Act of 1869 was repealed by the Bankruptcy Act, 1883, because it repealed the whole Act. Unless we find in this Bankruptcy Act, 1883, some saving clause, it would necessarily follow that the solicitor's right of practice, and therefore of audience in the county court, when exercising its bankruptcy jurisdiction, at once would become conditional upon his signing the roll. But s. 151 of the Act of 1883, as was pointed out by the Master of the Rolls, says:

> "Nothing in this Act shall take away or effect any right of audience that any person may have had at the commencement of this Act."

It is no doubt strange that the right of practising is not in terms referred to, but only the right of audience. Yet it does seem to me necessarily to follow that if the solicitor's right of audience in the county court is to remain unaffected necessarily his right of practising must also remain unaffected. His right of audience depends upon his right of practising, because it is a limited right of audience, limited in the sense pointed out by the Master of the Rolls.

That being so, it seems to me to follow that, having regard to s. 151 of the Bankruptcy Act, 1883, CLAUSON, J., was quite right when he said:

> "We can find in the Act of 1883 nothing which appears to affect the position of solicitors with regard to practising before county courts in their bankruptcy jurisdiction."

That is sufficient to dispose of this case, and, in my opinion, for these reasons this appeal fails.

Appeal dismissed.

Solicitors: *Wild & Co.*; *Trollope, Winckworth, Crump, & Sprott.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re RUSSIAN BANK FOR FOREIGN TRADE

[CHANCERY DIVISION (Maugham, J.), January 16, 25, 26, 27, 31, February 1, 22, 1933]

[Reported [1933] Ch. 745; 102 L.J.Ch. 309; 149 L.T. 65; 49 T.L.R. 253; 77 Sol. Jo. 197; [1933] B. & C.R. 157]

Company—Winding-up—Foreign company—English branch—Nationalisation of company abroad—Winding-up "just and equitable"—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *ss.* 296, 337, *and* 338 (1) (*d*).

Company—Winding-up—Foreign company—English branch—Nationalisation of company abroad—Jurisdiction to wind-up whether or not company dissolved abroad or had ceased completely to exist as a company after nationalisation—Claim by Crown to property as bona vacantia—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *ss.* 296, 337, *and* 338 (1) (*d*).

Company—Winding-up—Foreign company—English branch—Nationalisation of company abroad—Possible right of foreign State to residue of assets—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 338 (1) (*d*).

Crown—Bona vacantia—Foreign company—Winding-up—Nationalisation of company abroad—Cessation of existence of company.

On Dec. 14, 1917, the R. Bank, a Russian bank which carried on business and had a branch in London, was nationalised by a Russian decree. The London branch thereupon ceased to carry on business, although it had creditors and assets in England. On Dec. 14, 1917, Z. was owed £23,000 by the bank, but it was disputed whether the debt was primarily due to him in London or in Russia. At all material times the bank was an unregistered company within the meaning of s. 337 of the Companies Act, 1929 (which corresponded to s. 398 of the Companies Act, 1948). On a petition by Z., supported by other creditors, of whom one had a debt which seemed to be situate in England, for the winding-up of the bank, the petitioning creditors relied on the provisions of s. 338 (1) (d) of the Companies Act, 1929, that an unregistered company might be wound-up "(i) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs; (ii) if the company is unable to pay its debts; (iii) if it is just and equitable that the company should be wound-up."

Held: (i) as the corporate powers of the bank, if not its corporate existence, had been destroyed in Russia by the 1917 decree, and as since then no attempt had been made to pay its creditors in England, it was "just and equitable that the company should be wound-up."

(ii) there was jurisdiction to wind-up the bank under the provisions of s. 338 (1) (d) whether or not it had been dissolved or had completely ceased to exist as a company under or by virtue of the laws of Russia: *Re Russian and English Bank* (1), [1932] 1 Ch. 663, followed.

(iii) as the bank might have completely ceased to exist as a company the order for winding-up should be made without prejudice to any possible claim by the Crown to the property of the bank in this country as bona vacantia.

(iv) if Z.'s debt were primarily payable in Russia it had ceased to exist: *Princess Paley Olga* v. *Weisz* (2), [1929] 1 K.B. 718, applied; but if it was primarily payable in London it could not be extinguished or transferred to Russia by the Russian decrees: *The Jupiter* (*No. 3*) (3), [1927] P. 122, 250, and *Employers' Liability Assurance Corpn.* v. *Sedgwick, Collins & Co.* (4), [1926] 1 K.B. 1; [1927] A.C. 95, considered and applied.

(v) notwithstanding the general rule that a disputed debt may not form the basis of a creditor's petition for winding-up a company, and the fact that, for the reasons stated above, the court was not satisfied that the petitioning creditor was a creditor, an order for a compulsory winding-up should be made because the petitioners would in the circumstances be otherwise without a remedy: *Re Russian and English Bank* (1), [1932] 1 Ch. 663, followed.

(vi) the fact that the Russian government, a foreign sovereign State, might be entitled to the residue of the assets of the bank was no reason why the court should decline to exercise its jurisdiction to make the winding-up order: *Morgan* v. *Larivière* (5) (1872), L.R. 7 Ch. App. 550, (1875), L.R. 7 H.L. 423, considered and applied: dictum of Scrutton, L.J., as to that case in *Aksionairnoye Obschestvo Dlia Mechanicheskoyi Obrabotky Diereva A. M. Luther* v. *James Sagor & Co.* (6), [1921] 3 K.B. at p. 555, dissented from.

Notes. The Companies (Consolidation) Act, 1908, and the Companies Act, 1929, have been repealed. The provisions of the Act now in force, the Companies Act, 1948, corresponding to s. 274 of the Act of 1908, and to s. 338 (1) (d), s. 337, and s. 296 of the Act of 1929, are respectively s. 407, s. 399 (5), s. 398, and s. 354.

Considered: *Re Banque des Marchands de Moscou*, [1954] 2 All E.R. 746. Referred to: *Compania Naviera Vascongada* v. *S.S. Cristina*, [1938] 1 All E.R. 719; *Haile Selassie* v. *Cable and Wireless, Ltd.*, [1938] 3 All E.R. 384; *Dairen Kisen Kabushik Kaisha* v. *Shiang Kee*, [1941] A.C. 373; *Re Tovarishestvo Manufactur Liudvig-Rabenek*, [1944] Ch. 404; *Frankfurther* v. *Exner, Ltd.* (1947), 177 L.T. 257; *Re Banque des Marchands de Moscou (Koupetschesky), Royal Exchange Assurance* v. *The Liquidator*, [1952] 1 All E.R. 1269; *Bank voor Handel en Scheepvaart* v. *Slatford*, [1951] 2 All E.R. 779.

As to the grounds for winding-up an unregistered company, see 6 Halsbury's Laws (3rd Edn.) 803, para. 1617, and as to winding-up a foreign company, see ibid. 843, para. 1729; and for cases on these subjects see 10 Digest (Repl.) 1304–1306, *9182–9194*. As to judicial notice of the acts of the Soviet government after the Russian revolution, see 7 Halsbury's Laws (3rd Edn.) 283, para. 600, note (i), and 26 Halsbury's Laws (2nd Edn.) 254–255, para. 568, note (t); as to the territorial factor in the application of foreign law, see 7 Halsbury's Laws (3rd Edn.) 8, para. 9; as to foreign expropriatory legislation, see ibid. 9, para. 11; as to the dissolution of foreign corporations, see ibid. 13, para. 22; as to the English liquidation of dissolved foreign corporations, see ibid., para. 24; as to the situation and proper law of a debt, see ibid. 75, para. 140. For the Companies Act, 1948, s. 354, s. 398, s. 399 (5), s. 407, see 3 Halsbury's Statutes (2nd Edn.) 728, 753, 754, 759.

Cases referred to:

(1) *Re Russian and English Bank*, [1932] 1 Ch. 663; 101 L.J.Ch. 226; 147 L.T. 57; 48 T.L.R. 282; 76 Sol. Jo. 201; [1931] B. & C.R. 140; Digest Supp.

(2) *Princess Paley Olga* v. *Weisz*, [1929] 1 K.B. 718; 98 L.J.K.B. 465; 141 L.T. 207; 45 T.L.R. 365; 73 Sol. Jo. 283, C.A.; 11 Digest (Repl.) 612, *421*.

(3) *The Jupiter (No. 3)*, [1927] P. 122, 250; 97 L.J.P. 33; 137 L.T. 333; 43 T.L.R. 741; 17 Asp.M.L.C. 250, C.A.; 11 Digest (Repl.) 613, *423*.

(4) *Sedgwick, Collins & Co.* v. *Rossia Insurance Co. of Petrograd*, [1926] 1 K.B. 1; 95 L.J.K.B. 7; 133 L.T. 808; 41 T.L.R. 663, C.A.; affirmed sub nom. *Employers' Liability Assurance Corpn.* v. *Sedgwick, Collins & Co.*, [1927] A.C. 95; 95 L.J.K.B. 1015; 42 T.L.R. 749; sub nom. *Sedgwick, Collins & Co.* v. *Rossia Insurance Co. of Petrograd*, 136 L.T. 72, H.L.; Digest Supp.

(5) *Morgan* v. *Larivière* (1872), 7 Ch. App. 550; 26 L.T.N.S. 859, L.C.; reversed (1875), L.R. 7 H.L. 423; 44 L.J.Ch. 457; 32 L.T. 41; 23 W.R. 537, H.L.; 8 Digest (Repl.) 578, *265*.

(6) *Aksionairnoye Obschestvo Dlia Mechanicheskoyi Obrabotky Diereva A. M. Luther* v. *James Sagor & Co.*, [1921] 3 K.B. 532; 90 L.J.K.B. 1202; 125 L.T. 705; 37 T.L.R. 777; 65 Sol. Jo. 604, C.A.; 11 Digest (Repl.) 325, *19*.

(7) *Lazard Bros. & Co.* v. *Banque Industrielle de Moscou*, [1932] 1 K.B. 617; 101 L.J.K.B. 65; 146 L.T. 240, C.A.; affirmed sub nom. *Lazard Bros. & Co.*

v. *Midland Bank, Ltd.*, [1933] A.C. 289; 102 L.J.K.B. 191; 148 L.T. 242; 49 T.L.R. 94; 76 Sol. Jo. 888, H.L.; 10 Digest (Repl.) 1299, *9161*.

(8) *Re Higginson and Dean*, [1899] 1 Q.B. 325; 68 L.J.Q.B. 198; 79 L.T. 673; 47 W.R. 285; 15 T.L.R. 135; 43 Sol. Jo. 153; 5 Mans. 289, D.C.

(9) *R.* v. *Lovitt*, [1912] A.C. 212; 81 L.J.P.C. 140; 105 L.T. 650; 28 T.L.R. 41, P.C.; 8 Digest (Repl.) 546, *28*.

(10) *New York Life Insurance Co.* v. *Public Trustee*, [1924] 2 Ch. 101; 93 L.J.Ch. 449; 131 L.T. 438; 40 T.L.R. 430; 68 Sol. Jo. 477, C.A.; 11 Digest (Repl.) 436, *798*.

(11) *English, Scottish and Australian Bank, Ltd.* v. *I.R. Comrs.*, [1932] A.C. 238; 101 L.J.K.B. 193; 146 L.T. 330; 48 T.L.R. 170; 8 Digest (Repl.) 546, *30*.

(12) *Lecouturier* v. *Rey*, [1910] A.C. 262; 79 L.J.Ch. 394; 102 L.T. 293; 26 T.L.R. 368; 54 Sol. Jo. 375, H.L.; 11 Digest (Repl.) 386, *467*.

Petition for the winding-up of the Russian Bank for Foreign Trade. The following statement of facts is taken from the judgment:

This was a petition presented by one Phillip Zinn, who claimed to be a creditor for £23,000 and upwards, for the compulsory winding-up of the Russian Bank for Foreign Trade, hereinafter called "the bank." The bank was established in St. Petersburg under the laws of the former Empire of Russia in 1871 as a company with limited liability. The main object of the company was to carry on business as bankers, to discount Russian and foreign bills, and to act as agents for customers in the purchase and sale of goods. The capital of the bank, originally 7,500,000 roubles, ultimately amounted to 60,000,000 roubles divided into 240,000 shares of 250 roubles each. The principal place of business was St. Petersburg; but the bank was authorised by its statutes to open branches elsewhere, and branches were in fact opened in, amongst other places, London and Paris.

The bank commenced to carry on business at 61 and 62, Gracechurch Street, London, in the year 1909, and on Feb. 5, 1909, the requisite particulars with regard to the bank under s. 274 of the Companies (Consolidation) Act, 1908 (which corresponded to s. 407 of the Companies Act, 1948), were filed with the Registrar of Companies.

The names and addresses of persons in this country authorised to accept service on behalf of the bank were registered with the Registrar of Companies. The petition had been served on those persons pursuant to an order of the registrar, and no question had been raised as to the validity of such service. The bank carried on its business in London and elsewhere, and incurred a number of debts in this country, and was said to have considerable assets in this country. At all material times, prior, at any rate, to Dec. 14, 1917, the date of a decree nationalising the Russian banks, the bank consisted of more than eight members.

The debt of the petitioning creditor was disputed. Apart from this, the question arose as to the effect of the Russian revolutionary legislation on the bank itself in Russia, and on the branch in this country.

The facts as to this legislation, and as to the nature of the petitioning creditor's debt, are set out in the judgment.

D. B. Somervell, K.C., and *H. S. G. Buckmaster* for the petitioner and a supporting creditor.

Fergus Morton, K.C., *C. R. Havers*, and *M. Wolff* for certain shareholders at the beginning of the hearing, but not subsequently.

Oscar Kean for a supporting creditor.

W. P. Spens, K.C., *Harold Murphy*, and *A. J. Halpern* for the persons de facto carrying on the London branch of the bank, and for an opposing creditor.

Maurice Berkeley for a supporting creditor.

Stafford Crossman for the Attorney-General.

Cur. adv. vult.

Feb. 22. **MAUGHAM, J.,** read a judgment in which he stated the facts and continued: The most convenient course will be for me to state my view with regard to the Russian legislation and the position of the bank before dealing with the question whether there is a proper petitioner. The expert witnesses on Soviet law were on the one side Mr. Serge Konkevitch and on the other Mr. Samuel Dobrin. They have both had long experience in the practice of Russian law, both before and since the Revolution of October, 1917, and they are eminently qualified to assist in the elucidation of the relevant decrees. Each of them has made affidavits, and each of them has been cross-examined at considerable length before me. Various courts in this country have had to consider the true effect of the same Russian decrees in the light of the expert evidence given in particular cases; and I have even had the advantage of three decisions of the House of Lords dealing with the statutes in question from different points of view. The last of these cases was *Lazard Bros. & Co.* v. *Midland Bank, Ltd.* (7) in which the House of Lords affirmed an appeal from the Court of Appeal. In the speech of LORD WRIGHT, in which the other learned Lords concurred, it is pointed out that the question of the effect of the foreign law must depend on the evidence given with regard to such law, and that no earlier decision of the court can relieve the judge of the duty of deciding the question on the actual evidence given in the particular case.

In this case the decrees in question begin with a decree on the nationalisation of banks passed on Dec. 14, 1917, and followed within a few weeks by a decree of the People's Commissaries signed by Lenin on Jan. 26, 1918. These decrees are so close together in date that I think that they may properly be considered together. The first starts with a preamble referring to the desirability of

> "a resolute eradication of banking speculation and a complete liberation of the workers, peasants, and the whole labouring population from exploitation by banking capital,"

and of establishing a single People's Bank of the Russian Republic, namely, one "genuinely serving the interests of the people and the poorest classes"; and it is thereby decreed:

> "1. Banking is declared a State monopoly.
>
> "2. All existing joint stock banks and banking houses are amalgamated with the State Bank.
>
> "3. The assets and liabilities of the liquidated banks are taken over by the State Bank.
>
> "4. The method of amalgamation of joint stock banks with the State Bank shall be determined by a special decree.
>
> "5. The management of the business of joint stock banks is temporarily placed in the charge of the council of the State Bank.
>
> "6. The interests of small investors shall be fully safeguarded."

By the decree passed a few weeks later it was declared as follows:

> "1. The share capital (stock, reserve, and special) of former joint stock banks are transferred to the State Bank of the Russian Republic on the basis of complete confiscation.
>
> "2. All bank shares are declared null and void, and payment of dividends of any kind whatsoever is unconditionally stopped.
>
> "3. All bank shares must forthwith be surrendered by the present holders to the local branches of the State Bank.
>
> "4. The holders of bank shares which they cannot produce must submit to the branches of the State Bank register records of the shares in their holding, indicating their exact whereabouts. . . .
>
> "6. All transactions and deeds of transfer referring to bank shares are unconditionally prohibited. Persons taking part in such prohibited transactions and deeds are punished with imprisonment up to three years."

By a decree of April 18, 1918, further prohibitions were enacted in reference to the alienation of shares and securities. On Sept. 20, 1918, a resolution of the Council of the People's Commissaries was passed, which I understand has the effect of a statute. It was in the following terms:

> "1. To recognise that by the decree of Dec. 14, 1917, there is established the principle of monopolisation of banking in Russia by means of nationalisation (or liquidation) of all the then existing private and public credit institutions.
>
> "2. To instruct the People's Commissary of Finance to carry out urgently by administrative procedure the nationalisation (or liquidation) of all still existing credit institutions.
>
> "3. To direct the People's Commissary of Finance to submit to the Council of People's Commissaries periodical reports as to the course of nationalisation of banks and as to the position of banking."

On Dec. 10, 1918, certain instructions were approved by the People's Commissary of Finance on the method of nationalisation of private banks. These are lengthy, and I do not think it is necessary for me to refer to them in detail, since in the view I take of the matter they only remotely affect any question which I have to decide.

One of the matters in dispute on these decrees and resolutions between the expert witnesses as to Russian law is whether in the result a banking company such as the bank in the present case has ceased to exist by Soviet law for any purpose, or whether, as Mr. Dobrin contends, the bank would continue to exist as a legal entity so long as it had any continuing branch not taken over by the Soviet Government. The bank became from his point of view a shrinking entity which had had carved out of it the main body of its establishments whilst the remaining establishments would become a Soviet State agency as soon as the Soviet Government chose to call upon the persons responsible for those branches to hand them over to its representatives. Mr. Dobrin asserts that, according to Soviet law, the Soviet Government may order the persons responsible for the London branch to hand over that establishment (which must mean its assets) to a Soviet commissar whenever it is pleased so to order. I do not think that this is the view of Mr. Konkevitch, and I think that it is not a well-founded view, for, as will be seen later, the Soviet Government does not itself assert that the nationalisation decrees have an extra territorial effect. However, the question is mainly one of English law, and I shall endeavour to show that English views of private international law in no way justify the contention of Mr. Dobrin. Nor can I accept as correct his opinion that shares in banking companies could continue to exist after Jan. 26, 1918, according to Soviet law. The language of that decree, coupled with that of the previous decree, seems to me clearly to negative such a contention. How can a share, which is only a name for a bundle of rights, continue to exist when every right which it originally conferred has been destroyed and when the share certificate (according to Mr. Dobrin) is itself null and void? I find myself unable to grapple with this conception, except perhaps from a metaphysical standpoint, and again I must prefer the view of Mr. Konkevitch.

It may readily be admitted that legislation of the character in question leads to difficulties of interpretation, since the main object at that date was confiscation, and the language used is not that of lawyers. But the subsequent legislation is expressed in language which it is not difficult even for an English lawyer to understand.

On Jan. 19, 1920, the People's (State) Bank of the Soviet Republic was abolished by a decree which began by reciting that there was no longer any need to use that bank as an institution of State credit and that there was no necessity for the existence of separate banking institutions. By the decree all the assets and liabilities of the late People's Bank were transferred to the Central Budget and Accounts administration. In passing I note that the decree assumes that all the assets and liabilities of the former joint stock banks capable of being vested had already been vested in the People's Bank.

The Civil Code of the Russian Socialist Federal Soviet Republic came into force in October, 1923. It may be observed that by para. 3 interpretation of provisions of the code on the basis of laws of overthrown Governments and of practice of pre-revolutionary courts was forbidden. Articles 13 and 14 as translated were as follows:

> "Article 13.—As juristic persons are recognised associations of persons, institutions or organisations which can, as such, acquire rights of property, enter into obligations, sue and be sued in courts.
>
> "Article 14.—Juristic persons must have statutes or regulations confirmed and in proper cases registered by the governmental body empowered to do so. Partnerships of a kind determined in law which pursue economic purposes, instead of statutes, may have partnership agreements registered in an established manner. Legal capacity of a juristic person arises from the moment of the confirmation of the statutes (regulations), and in the cases where the registration of a juristic person is required by law, from the moment of such registration."

It is admitted that there was no registration of the bank under this code, and it seems to me that since Czarist regulations would not be recognised in the Soviet Republic, that it must follow that the bank cannot any longer be considered as possessing a juristic personality according to Russian law. In coming to this conclusion I again follow the opinion expressed by Mr. Konkevitch, and I am not able to understand the grounds on which Mr. Dobrin suggests that the extremely peculiar position of the bank puts that bank outside the provisions of s. 14 of the civil code.

If, then, it is material to determine whether the bank at the date of the petition to wind-up was a juristic person in any intelligible sense, I must express an opinion in the negative.

It is desirable to add that the position of the bank after the passing of the decrees in question, apart from the question whether it was dissolved as a corporation, was quite anomalous.

According to the statutes under which it was incorporated in the month of June, 1871, the bank had a capital divided into shares of 250 roubles each with provisions for an increase in the future with the confirmation of the Minister of Finance. The shares, according to the desire of the shareholders, might be made out in their name or to bearer. In Chapter 2 of the Statutes a number of limitations are placed on the powers of the bank; and it may be mentioned that the total of the amounts accepted by the bank, including its branches, as deposits and its other liabilities was not under any circumstances to exceed the bank's reserve and stock capital more than ten times. The management of the affairs of the bank was entrusted to the council and the board. The council was to consist of fifteen members elected at the general meeting from amongst the shareholders holding not less than seventy-five shares. Out of the total number of fifteen members of the council at least ten had to be permanent residents of St. Petersburg. The members of the council elected at the first general meeting would remain in that capacity for two years and thereafter five members of the council would have to resign annually on the expiration of three years' service. For the validity of the decision of the council not less than six members had to participate, and in the decision of some questions not less than ten. The powers and responsibilities of the council were carefully laid down in the statutes. The board was to consist of four members elected by the general meeting of shareholders from persons presented by the council, and the qualification was the holding of not less than one hundred shares. The board was to meet not less than once a week and there were careful provisions as to its duties. In Chapter 4 there were a number of articles providing for general meetings of shareholders, and it should be noted that the calling together of a general meeting was to be effected A by the board through an advertisement in the "Pravitelstvenny Vestnick" (Government News) and in one more St. Petersburg and one Moscow paper, at least six weeks before the date fixed for the meeting, stating the questions which it was proposed to have discussed by the shareholders. There were provisions for a quorum. No matters could be brought before the general meeting otherwise than through the board after a preliminary examination by the council. B

It is clear that after January, 1918 (if not before), none of these provisions could be complied with, and if the corporation continued to exist as a legal entity there was no possibility of carrying on its affairs according to the statutes under which it was formed. How a branch of the bank in England could continue to function in these circumstances it is difficult to understand. The suggestion that the managers of a branch were bound, according to the views of the Soviet Government, C to act as their agents and were treated as guilty of "sabotage" if they left their posts, is one which I think I can appreciate so far as regards any branch under the jurisdiction of that Government, but that is a question of municipal law and policy, with which I am not concerned, in relation to the persons in control of the branch of the bank in London. In the absence of any decree even purporting to impose an obligation or a responsibility on managers and employees in London, and with- D out, I may add, any provision for remunerating them, and irrespective of their domicile or nationality, I cannot think there is any ground for the contention that such managers and employees ought to be regarded as agents of the Soviet Government. It may be pointed out that fifteen years have elapsed since the nationalisation decrees above referred to, and so far as I know the Soviet Government has had no communication whatever with the persons in de facto control of the assets of E the bank in London. It has not sought to intervene in the affairs of this branch or of any other branch in this country of a Russian bank or a Russian insurance company. It seems from the evidence that the London branch is in fact controlled by persons residing in France, some or all of whom have escaped from Russia. I understand that the French courts take a very different view of the questions of private international law which arise from those taken in this country, and that F the bank is treated in France as an existing entity capable of carrying on business and of suing and being sued in the French courts. This serves to explain the de facto position, but I conceive that I am not justified in placing reliance on these facts in dealing with the problems that arise here.

In view of the substance of the nationalisation decrees and of the Russian Code, I doubt very much whether anything turns upon the theoretical correctness of my G conclusion that the bank has ceased to be a juristic entity. The Soviet decrees, so far as their jurisdiction extends, have taken away all the assets of the bank, and, as pointed out above, all the shares in the bank have been annulled or destroyed. The framers of the decrees of 1917 and 1918 were plainly not concerned with the continuance of the juristic existence of such an institution. They were not troubled with juristic theories: the decrees, as is admitted by both experts, were of a con- H fiscatory character. Bearing in mind that only a part of the present territory of the Soviet Republic was in the hands of the then revolutionary body, it seems to me idle to suppose that the central executive committee of All Russian Congress of Soviets could have intended that branches of banks whose head offices in Petrograd or Moscow had been taken over by State commissars were to be entitled to continue to function in the provinces or abroad until there had been a complete taking over I by the State of all such branches. This, as Mr. Konkevitch points out, would have entailed as regards those branches the withdrawal of money by depositors, the disappearance of valuables, and the transfer of money and of the bearer shares abroad. But I place little weight on this consideration. The decrees, as regards banks whose seats and principal offices were taken over by the State, must be regarded as so crippling the powers of the companies that, if not extinct, they could no longer exhibit any of the signs of life. At the best, and assuming that Mr. Dobrin is right in his view, the legal corporation, deprived as it was of its assets

A and its corporators, became no more than a legal conception. Its branch in England, if an old metaphor may be employed, is now a submerged wreck floating on the ocean of commerce. It has had for the past fifteen years neither compass nor officers nor crew; no one who could direct its movements. As a branch of the original bank it appears, however, to have or to have had creditors in this country, and if the petition before me is properly presented I am of opinion both that the B bank has ceased legally to carry on business, and that it is just and equitable that it should be wound-up. The essential features of the case are indeed of a simple character. A corporation created and established under a foreign legal system has been allowed by our laws to carry on business and to incur debts in this country. Its corporate powers, if not its corporate existence, have been destroyed in its country of origin; many years have elapsed, and no attempt has been made to pay C the creditors in this country. Can it be doubted that in such circumstances the court, if it has jurisdiction, ought to make an order which will secure as far as possible the payment of all just claims against the corporation?

The petition is presented under s. 338 of the Companies Act, 1929, and it is not in dispute that the bank is an unregistered company within the meaning of that section: (see s. 337). Under s. 338 (1) (d) the circumstances in which an unregis- D tered company may be wound-up are stated as follows:

> "(i) If the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs; (ii) if the company is unable to pay its debts; (iii) if the court is of opinion that it is just and equitable that the company should be wound-up."

E

It is plain that any one of these three circumstances is sufficient to justify the order. The question whether the words "if the company is dissolved" are equivalent to "has been dissolved" was decided in the affirmative in *Re Russian and English Bank* (1) by BENNETT, J., and accordingly his Lordship saw no reason for placing special reliance in that case on the provisions of s. 338 (2). Following the F decision in question, I hold that there is jurisdiction to wind-up the company under the provisions of the section whether or not the company has been dissolved or has completely ceased to exist as a company under or by virtue of the laws of the Soviet Government. It does not seem to me to be necessary to consider on the present occasion the difficulties that plainly arise in relation to the winding-up of a corporation which has already ceased to exist, and any order that may be made must be G made without prejudice to a possible claim by the Crown on the basis of the property in this country being bona vacantia: *Re Higginson and Dean* (8); see also s. 296 of the Companies Act, 1929, if applicable.

The position of the petitioner must now be considered. He claims to be a creditor for £23,000 and upwards representing proceeds of sale of flax and hemp sold by the London branch of the bank on his behalf from time to time and not H yet paid or accounted for. He has made certain affidavits, and was cross-examined on the hearing of the petition. On the other hand, Mr. Richard Arthur Merz, who claims to have been in the employ of the bank since the year 1900, has given evidence disputing that any sum is due to the petitioner on the ground, as I understand it, that the debt due to him was credited to him in the books of the Archangel branch of the bank, that this sum was taken over by the State Bank of the Northern I Province in September, 1919, and that the amount of sterling due to the petitioner was paid to Messrs. N. M. Rothschild & Sons on Oct. 3, 1918, for the account of the Archangel State Bank. I confess I have been unable to follow precisely what was done by the petitioner and the London branch of the bank, nor can I understand how the petitioner is affected by a payment to Messrs. Rothschild made apparently without any direction or authority from the petitioner. There is, however, a real question in dispute, and that is whether the debt to the petitioner was or was not locally situate in Russia at the date of the decree of 1917 and 1918 above referred to. If it was locally situate in Russia, it seems to me that, as the effect of the legislation, the debt is no longer due by the bank as a corporation, and that the only claim of the petitioner is against the Soviet State. By the decree of December, 1917, the assets and liabilities of the bank within Soviet territory were taken over by the people's bank, and this, in my opinion, involves the destruction of the original debt and a kind of statutory novation (in some sense perhaps only a theoretical one) where the State Bank became liable to discharge it. This legislation must be taken to be effective as regards property situate in the territory of the Soviet Republic (see *Princess Paley Olga* v. *Weisz* (2)), in which it was held that the English courts will not inquire into the legality of acts done by a recognised foreign Government against or in relation to its own subjects in respect of property situate in its own territory. It seems to me to be clear that the same principle must apply whether the property consists of chattels or of a debt regarded in this country as having a local situation. If, then, it were to be established that the debt of the petitioner was represented by a credit to him in the Archangel branch of the bank I should be of opinion that such debt had ceased to exist.

The petitioner, however, has sworn that if the Archangel branch was credited with the proceeds of the goods sold by the London branch on his instruction it was done without his authority. The effect of the correspondence in relation to the matter is not conclusive, and the evidence does not enable me to express a final opinion on the claim of the petitioner to be a creditor for a debt recoverable in London. If the debt was primarily recoverable in London, I am of opinion that it was not affected by the Soviet legislation, even though it was due to a person who was a Russian subject at the date of the nationalisation decrees. Its locality must be taken to be the place where the debt was in the ordinary course recoverable: see *R.* v. *Lovitt* (9); *New York Life Insurance Co.* v. *Public Trustee* (10); *English, Scottish and Australian Bank, Ltd.* v. *I.R. Comrs.* (11). The decrees in question could not, according to our laws, have the effect of extinguishing the debt, if locally situate here, or of transferring it to the Soviet Republic. This follows, I think, from the decisions of Hill, J., and the Court of Appeal in *The Jupiter* (*No. 3*) (3). It is interesting to note that the same view is taken by the R.S.F.S.R. itself in a circular dated April 12, 1922, and in a circular issued by the People's Commissariat of Justice to all District Courts, dated Sept. 26, 1923, which are set out in the elaborate judgment of Hill, J., above referred to. These circulars show that the Soviet Government does not regard the nationalising decrees as having any extra-territorial effect even as against Russian citizens. Moreover, it is evident that our courts have never entertained the view that a debt incurred here by a foreign corporation permitted to carry on business here under English law can be discharged by a foreign statute. An example is to be found in *Employers' Liability Assurance Corpn.* v. *Sedgwick, Collins & Co.* (4). It may be observed that the decrees of the Russian legislature in relation to insurance companies were on the same lines as those in relation to private banking companies at any rate to this extent, that the insurance businesses in Russia were nationalised so that the assets of such companies, so far as Russian statutes could effect such a result, were transferred to the Russian State. In the Court of Appeal, Sargent, L.J., in his judgment observed as follows (133 L.T. at p. 811):

> "Nor do I think that the position of creditors here as against property of the Rossia Insurance Co. here, such as debts owing to them from debtors in this country, is altered by legislation or decrees of the Russian sovereign power which 'nationalised' the undertaking and assets of the Rossia Insurance Co., that is, as I understand it, purported to transfer these assets from their private proprietors to the Russian nation as a whole. Effective as such legislation may be within the limits of Russian territory, it cannot determine the ownership of property locally situate in this country, such as debts owing from debtors here: see Dicey, Conflict of Laws, 2nd Edn., p. 310; and *Lecouturier* v. *Rey* (12), an analogous case with reference to the goodwill of a trade mark or trade name in England."

A This view was plainly concurred in by BANKES, L.J., in the same case, and it must also have been accepted as correct in the House of Lords.

If a winding-up order is made it is possible that the Russian Government may think fit, subject perhaps to the discharge of such liabilities as may be established, to make a claim to the residue, if any, of the assets, though this will involve a complete reversal of the view expressed in the circulars of 1922 and 1923 above B referred to. On the other hand, the Crown may have a claim to the whole of the assets as bona vacantia. These circumstances do not afford, in my opinion, a ground for declining to make an order. Counsel arguing on behalf of the bank placed considerable reliance on a dictum of SCRUTTON, L.J., in *Aksionairnoye Obschestvo Dlia Mechanicheskoyi Obrabotky Diereva A. M. Luther* v. *James Sagor & Co.* (6) ([1921] 3 K.B. at p. 555), and he suggested that the court has no juris- C diction to make a winding-up order, inasmuch as the Soviet Government is entitled, according to Mr. Dobrin, to take over the assets of the London branch, so that the case would come within the general rule that the court has no jurisdiction to entertain a proceeding against a foreign sovereign nor one in which the property of a foreign sovereign is involved. I should observe, however, that the Lord Justice was dealing with a case in which the Russian Government had passed a decree the D effect of which was to forfeit the property belonging to the plaintiffs locally situate in Russia. He expressed the opinion that if Mr. Krassin, the representative of the Russian Commercial Delegation in London, had brought the goods in question with him into England and had declared on behalf of his government that they were the property of the Russian Government, no English court could investigate the truth of that statement. To do so, he said, would not be consistent with the comity E of nations as between independent sovereign states. He then added this (125 L.T. at p. 715):

> "In *Morgan* v. *Larivière*, the opinions as to the power of the court to deal with a trust in which a foreign government was interested were obiter dicta—as the court held there was in fact no trust fund."

F I would observe with respect that when *Larivière* v. *Morgan* (5) was before the Court of Appeal, LORD HATHERLEY, then Lord Chancellor, considered with some elaboration the question whether the court could administer what was believed to be a trust fund, notwithstanding the circumstances that the French Government was largely interested in it and was not before the court; and he decided for reasons which, if I may say so, seem to me to have great weight that there was no objection G on that ground to an administration by the court. This in the Court of Appeal was a matter not of dictum, but of decision, and, supported as it is by a very clear statement of LORD CAIRNS in the House of Lords to the same effect (L.R. 7 H.L. at p. 430), I am bound to hold that the circumstance that a foreign government is or may be interested in a trust or other like fund is no reason why the court should decline jurisdiction. The proposition must go as far as this, that if a foreign H government make a claim to some interest in the assets which would reach the hands of a liquidator, the court must decline to make a winding-up order. For the reasons given I am unable to accede to this view. Of course, if I am right in thinking that the nationalisation decrees have no extra territorial operation, the R.S.F.S.R. have no claim to any of the property which is involved, and, as I have pointed out, this seems to be their own view.

I As stated above, I am not satisfied that the petitioner is in the peculiar circumstances a creditor. A similar difficulty existed in the case already cited, *Re Russian and English Bank* (1). BENNETT, J., held that, notwithstanding the general rule that a disputed debt may not form the basis of a creditor's petition for the winding-up of a company, the petitioners would in the circumstances be otherwise without a remedy and were entitled to proceed by a winding-up petition, and he accordingly made a compulsory order. Substantially, the same circumstances exist here and, moreover, in the present case there are two other creditors supporting the petitioner, one of whom seems to have a debt locally situate in this country. The Attorney-

General, it should be mentioned, has taken up an attitude of neutrality. He neither supports nor opposes the petition. So far as I can see, no harm can be done to anyone by the making of a winding-up order. On the whole, therefore, I think I am justified on this point in following the decision last mentioned, and in making the usual order for the compulsory winding-up of the company.

Solicitors: *Herbert Oppenheimer, Nathan, & Vandyk*; *Frank Tittmuss & Co.*; *Pittman & Davison*; *Stephenson, Harwood, & Tatham*; *Samuel Sebba*; *Treasury Solicitor.*

[*Reported by* Miss B. A. Bicknell, *Barrister-at-Law.*]

THE SEAPOOL

[Probate, Divorce and Admiralty Division (Langton, J., assisted by Trinity Masters), November 9, 10, 13, December 21, 1933]

[Reported [1934] P. 53; 103 L.J.P. 49; 151 L.T. 38; 50 T.L.R. 142; 18 Asp.M.L.C. 477]

Shipping—General average—"Extraordinary sacrifice . . . intentionally and reasonably made"—Vessel manœuvred against pier to avoid going aground —"Stranding"—York/Antwerp Rules, 1924, *Rules A, E, and Rule* 5.

In order to prevent his vessel from dragging ashore, the master of the plaintiffs' steamship allowed her to drift alongside a pier, and as a result substantial damage was done both to the pier and to the ship.

Held: in the circumstances there was an "extraordinary sacrifice" which was "intentionally and reasonably made" within Rule A of the York/Antwerp Rules, 1924, which resulted in a peril to the entire adventure being transformed into a peril to the ship alone, and, therefore, there was a general average act within Rule A, and the owners of the ship were entitled to contribution from the insurers of the cargo.

Per Langton, J.: "Stranding" in Rule 5 of the York/Antwerp Rules, 1924, means going with the bottom of the ship on the shore and not, e.g., running the ship against a pier which is attached to the shore from which it runs out into the sea, even though the ship bumps on the ground while she is lying against the pier.

Notes. The York/Antwerp Rules, 1924, have been replaced by the York/Antwerp Rules, 1950.

As to general average, see 22 Halsbury's Laws (3rd Edn.) 122 et seq. and 30 Halsbury's Laws (2nd Edn.) 592 et seq., and for cases see 29 Digest 231 et seq. and 41 Digest 592 et seq. For the York/Antwerp Rules, 1950, see 22 Halsbury's Laws (3rd Edn.) 446 et seq.

Cases referred to:

(1) *Austin Friars Steamship Co.* v. *Spillers and Bakers, Ltd.*, [1915] 3 K.B. 586; 84 L.J.K.B. 1958; 113 L.T. 805; 31 T.L.R. 535; 13 Asp.M.L.C. 162; 20 Com. Cas. 342, C.A.; 41 Digest 604, *4310*.

(2) *Norwich, etc., Co.* v. *Insurance Co. of N. America* (1902), 118 Fed. Rep. 307.

(3) *Barnard* v. *Adams* (1850), 10 How. 270.

Action for general average contribution.

The plaintiffs were the owners of the steamship *Seapool*, and claimed against the defendants, who were the insurers of a cargo of coal carried in the *Seapool* from

A the Tyne to Bagnoli, Italy, a general average contribution in respect of damage done to the *Seapool* and to the pier at Bagnoli, for which the plaintiffs had paid, by reason of the vessel having dragged her anchors and drifted against the pier, on Jan. 1, 1932. By the terms of the charterparty under which the coals in question were being carried it was provided that average, if any, should be settled according to the York/Antwerp Rules, 1924. The *Seapool* arrived at Bagnoli on Dec. 31, B 1932, and was anchored by a local pilot in a position of apparent safety off Nisida Island, about three-and-a-half to four ship's lengths to the southward and westward of Ilva pier. Early on the morning of Jan. 1 the wind veered round and increased to gale force with squalls, causing the *Seapool* to drag her anchors, and ultimately to part her port anchor cable. The *Seapool* was then in close proximity to the Ilva pier, and in danger, unless some action was taken, of dragging ashore on to a sandy C beach. It appeared to the master that, if he attempted to steam away, his vessel might strike the pier with her stern, damaging her counter and rudder, and that the safest course open to him was to allow the *Seapool* to fall with her side against the pier, as gently as he could manage it, with a view to subsequently getting clear. He, accordingly, took this course, and considerable damage was in consequence done, both to the vessel and to the pier. The plaintiffs claimed a general average D contribution in respect of the damage to the *Seapool* and the sum which they had to pay to the owners of the pier.

The York/Antwerp Rules, 1924, provide as follows:

> "Rule A: There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or E incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure. . . . Rule E: The onus of proof is upon the party claiming in general average to show that the loss or expense claimed is properly allowable as general average.
>
> "Rule 5.—Voluntary Stranding: When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would F inevitably drive on shore or on rocks, no loss or damage caused to the ship, cargo and freight, or any of them, by such intentional running on shore shall be made good as general average. But in all other cases where a ship is intentionally run on shore for the common safety, the consequent loss or damage shall be allowed as general average."

Raeburn, K.C., and *Carpmael* for the plaintiffs.
G *Le Quesne, K.C.*, and *Naisby* for the defendants.

Reference was made to *Austin Friars Steamship Co.* v. *Spillers and Bakers, Ltd.* (1), *Norwich, etc., Co.* v. *Insurance Co. of N. America* (2), and *Barnard* v. *Adams* (3).

Cur. adv. vult.

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Dec. 21. **LANGTON, J.**, read the following judgment.—This is a claim to contribution for general average. The plaintiffs are the owners of the steamship *Seapool*, and the defendants are insurers of a cargo of coals carried on board her. The *Seapool* is a single-screw steamship of 4,549 tons gross, 392 ft. long, 36 ft. beam, and with a dead-weight carrying capacity of 8,083 tons. She was laden I with a full cargo, and on the voyage in question was proceeding from Dunstan, in the Tyne, to Ilva Pier at Bagnoli, which lies in the Bay or Gulf of Pozzuoli, on the west coast of Italy. The charterparty under which the coals were carried provided that average, if any, should be settled according to the York/Antwerp Rules, 1924.

Both the facts and the law have given rise to acute controversy, and both have caused me some doubts and hesitation. The facts, as I find them, are these. The *Seapool* arrived off Bagnoli on Dec. 31, 1931, at 11.30 p.m. On that night she was anchored in a position of apparent security by a local pilot under the shelter off Nisida Island. Both her bower anchors were laid out, with sixty fathoms of cable on the starboard anchor and forty-five fathoms on the port anchor. The wind at that time was from the S.S.E., a fresh breeze, and the *Seapool* lay heading to the wind. She was anchored in a position about four hundred to five hundred yards north of the light on Nisida Island, and in that position she lay about three-and-a-half to four of her own ship's lengths to the southward and westward of Ilva Pier. Early in the morning of Jan. 1, 1932, at about 3 a.m., the wind, which had veered from the S.W. and increased in force, began to blow with squalls of gale force. A certain amount of sea got up in the comparatively narrow waters of the bay, and at the same time a swell from a rather more westerly direction than the wind began to come in from outside the bay.

In these circumstances, the *Seapool* began to drag her anchors. Two shackles from a chain were let out on each anchor but, either because the scope of cable was unequal, or because the port cable was the weaker, the port cable carried away. At the time that the port cable carried away, the vessel had drifted about two lengths to the N.N.E. The engines had been kept with steam on and with a pressure of about 165 lbs. on the main boilers, out of a possible 180 lbs. When the cable carried away they were ordered full ahead, with the intention of steaming to sea. After the port cable parted, the vessel dragged still closer to the pier, but the engines eventually checked the drag at a time when the vessel was still distant from the pier about two-thirds of her length, and with the end of the pier somewhat forward of her port beam. In this position, it will be seen that she had but very scanty room in which to make the necessary manœuvre to get head to sea by porting her helm. I do not know whether it would be right to say that she was broadside to the wind, but she was in a position in which the wind was on her starboard bow, and it was, therefore, impossible for her, unless she could get the wind on her port bow, to steam up to her anchor, get her anchor, and get to sea. The master of the *Seapool* gave a careful, and, to my mind, a trustworthy, account of his subsequent manœuvres, and described, in great detail, the kind of dilemma in which he was placed. He said the alternatives before him were

> "(i) to let my vessel drag ashore, (ii) to attempt to turn to sea, and (iii) to let my vessel drift broadside on to the end of the pier. Of those three, the worst, in my view, was to let my vessel drift ashore. I should then possibly lose my propeller, almost certainly damage my rudder, and, possibly, break my vessel's back by bumping on the shore. The one that was, at first sight, the most attractive, was to try and turn under port helm, get the wind on the port bow, and steam away. But I was already so close to the pier by the time I had considered this manœuvre that there was a danger of striking my stern with the somewhat vulnerable counter, and with the risk of damaging my propeller and my rudder, against the pier. The third alternative was the one which I adopted, which was to go ahead at first on the engines, then stop the engines, and let the weather drift her, as gently as I could manage it, with her broadside against the end of the pier."

He did outline a further alternative of steaming past the pier and attempting to turn to sea to the southward of the pier, but I rather doubt whether that alternative was clear in his mind at the crucial moment. The master of the *Seapool* was corroborated, in all essentials, in his description of the events by an exceptionally able and experienced chief officer, a Mr. Fenwick, who at the time of giving his evidence in this court, was, himself, the master of the *Seapool*. To my mind, he was an excellent witness, and, so far as one can see, he had nothing to gain by supporting an untrue story, and nothing to fear (since, in any case, he was not responsible for the misfortunes of the *Seapool* on this occasion) from telling the truth, if it happened to be other than what the master had described.

I think it is quite possible that in working the matter out the next day in comparative calm and safety on the other side of the bay, the story which they then put down (and it is material to note that they did put it down the same day) has acquired certain definite edges, and probably, perfections of detail, which were

A perhaps not present to their minds when faced with a sudden emergency in the early morning of Jan. 1. Both were subjected to a most careful and thorough cross-examination, and both these two witnesses—and subsequent witnesses—in their evidence revealed some divergencies of time and detail. Doubts were thrown by this cross-examination upon actual positions, upon the exact direction of the swell, upon how the seas were breaking over the ship, and how logs came to be
B written, erased, and re-written, and upon what was said, and what was omitted, in letters and protest, written and made concerning the events. I have weighed all that as carefully as I can; I have weighed the demeanour of the witnesses whom I saw and heard; and weighing them all up as carefully and conscientiously as I can, I do not think that those criticisms, reasonable and moderate as they were, shake the belief that I felt in these witnesses when they were giving their evidence.
C I am much strengthened in my view of their credibility by the fact that it is difficult to see why this story should have been invented—it is a daring and original story—for no particular purpose if it is untrue. A much simpler story would have been for the master and mate—who are both of them very intelligent people—to have made a case of overwhelming disaster. They would simply have said: "We were flung on the pier, we had not any chance, the gale got up very suddenly, and
D no precautions that seamen could have taken could have prevented disaster." There seems no reason for this elaboration, this instant elaboration the very next day, in very considerable and careful detail, and I have come to the unhesitating conclusion that the broad features of these stories are true.

The leading feature of the story is that there was a consultation between the master and chief officer on the bridge of the *Seapool* as to what should be done in
E the circumstances, in what I have described as a triple dilemma, which presented themselves. The fact that there was such a conversation is confirmed by one of the other officers who was on the bridge, but the broad feature of the conversation is this. The master proposed, and the chief officer agreed in the proposition, that the best thing to do was not to attempt to swing the ship and, thereby, jeopardise the propeller and rudder by striking the pier, but consciously to allow the ship to
F drift with her broadside against the pier. That is the conversation which has been spoken to in great detail, and confirmed by the chief officer, and which, I believe, actually took place, and it is, perhaps, noticeable in that I did not hear anything in the conversation of the suggestion of sliding past the pier and turning to the southward. That seems to me—without discrediting anything which the master and chief officer have said—may well have been one of the details which crept into
G their minds in the comparative calm of Baia on the other side of the bay. At the time that this decision was taken the master must have known—and, indeed, does not pretend not to have known—that very serious danger to the ship would quite possibly result and some probable damage to the pier, by the course which he was electing to take. To put a ship broadside against a pier which must have been for these purposes a grinding wall, is not a course which any shipmaster is at all
H anxious to follow, but the alternatives with which he was presented—drifting ashore or trying to swing, or doing damage to the vital portions of the ship—the propeller and the rudder—were even worse, and may have resulted in worse damage, not only to the ship but also to the cargo, and I think the master might quite reasonably weigh, at that moment, that the damage he was going to do by driving against the pier at least would not result in damage to the cargo, and might not damage the
I ship vitally. So that I feel that I am on reasonably sure ground when I say that the alternative present to the mind of the master at the time when he took this decision was an alternative of striking the pier or of going ashore, and of those two things he preferred and elected to take the evil of striking the pier. That it was no light evil is shown by the fact that the damage done to the ship was no less than £6,719, and the damage done to the pier has been assessed, as I understand, at £7,898. But having taken this alternative of allowing his ship to drift against the pier and to grind against the pier, he was enabled, by manœuvring his engines, I think astern, to get into position to the north side of the pier, and, by that means,

to get his vessel with the wind on her port bow, and thus was able to steam ahead, A pick up the ninety fathoms that still remained of his starboard cable, and get away to the other side of the bay. He steamed straight across the bay into the wind, and lay in perfect safety off Baia, on the other side of the bay.

Those are the facts on which the point arises as to whether there is in this case a good claim for general average, and since the parties agreed to be bound by the York/Antwerp Rules of 1924, it is to that code that one must turn in order to solve B this point. The important rules for the purpose are Rule A, Rule E, and Rule 5. Taking first Rule E, the onus of proof is upon the party claiming in general average to show that the loss or expense claimed is properly allowable as general average. As to the effect of this rule in the present case, there is no dispute. The plaintiffs agree that the burden is upon them. Taking next Rule 5, it bears the heading "Voluntary Stranding," and is in these terms: C

> "When a ship is intentionally run ashore, and the circumstances are such that if that course were not adopted she would inevitably drive on the shore or on rocks, no loss or damage caused to the ship, cargo, and freight by such intentional running on the shore shall be made good as general average. But in all other cases where a ship is intentionally run on shore for the common safety the consequent loss or damage shall be allowed as general average." D

Upon that rule, counsel for the defendants claimed that this was a voluntary stranding by the master, in that running the ship against the pier, or allowing the ship to drift against the pier was, within the terms of the rule, intentionally running on shore. His contention was that the pier, being attached to the shore, was part of the shore, and, therefore, if a ship were allowed to run against a pier it was the E same as if she were running on shore. If that were a good argument I think it would follow that this would not be a good claim in general average. On the other side, however, it was contended that "stranding" is a well-known term. It is a term that occurs in continental law, and in English law, and it has a well-ascertained meaning. "Stranding" means going with the bottom on the shore, and for my part, I have always so understood it. I find it difficult to imagine that F anybody could consciously have used language such as this if they had intended to include running a ship against the end of a pier, while the bottom of the ship was clear of the ground. It is true that some colour may be lent to the argument by the fact that, in this particular case, the ship appears to have bumped upon the ground whilst she was lying against the end of the pier; but apart from that—which seems to me an extraneous circumstance—I see very little colour in this G argument at all. The York/Antwerp Rules, 1924, were, to my certain knowledge, debated for a very long period before being finally settled, and the language of the rules was canvassed and chosen with quite unusual care. It was language chosen by people who were peculiarly conversant with, and peculiarly interested in, maritime matters and especially in maritime casualties, and I cannot think that they would have framed a rule and headed it "Voluntary Stranding" if they had not H meant to use the word "stranding" in what I have called the ordinary sense. Therefore, I think there is nothing in this point, and I do not think that Rule 5 applies to the present circumstances.

Accordingly, one is driven back to Rule A, which says:

> "There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for I the common safety for the purpose of preserving from peril the property involved in a common maritime adventure."

Now, the words of Rule A are, to my mind, not at all easy of interpretation, and I am sorry to say that no very great guidance from either the masters of the law or the prophets of the textbooks can be obtained to enlighten one as to the exact meaning of the rule. Where the masters of the law have spoken they have spoken with truly masterly caution upon this somewhat difficult subject, and where the prophets have spoken and written they have spoken with a wealth of disagreement that would do credit to doctors, so that I have been driven back very much upon my own resources in interpreting the meaning of Rule A.

As showing the caution with which this subject has been approached by the masters of the law, I may take the decision of LORD STERNDALE in a case which was pressed upon me with almost equal vehemence by both sides—*Austin Friars Steamship Co.* v. *Spillers and Bakers, Ltd.* (1) Counsel for the plaintiffs cited this case to me as providing excellent material for the construction of an a fortiori case—in the present instance a kind of fulcrum upon which he might turn his ship and get her head to sea. Counsel for the defendants, on the other hand, seized upon it equally eagerly, as affording a wealth of material for distinction, and as showing that this particular act was not a general average act, although the act in *Austin Friars Steamship Co.* v. *Spillers and Bakers*, Ltd. (1) was decided so to be. When I looked for guidance on the main point—that is to say, some enlightenment as to the meaning of Rule A—I found only this somewhat cold and comfortless phrase from PICKFORD, L.J. (as he then was):

> "I do not think it is necessary to lay down any general principles of law as to what is a general average act in the case of voluntary stranding, but in the circumstances of this case it seems sufficient to say that in my opinion this was a general average act."

Turning from that rather comfortless dictum, I have studied the works of MR. CARVER and MR. LOWNDES, but again I am afraid without very much enlightenment. A statement in MR. CARVER'S book, taken from the 7th Edn. at p. 545, s. 386, commended itself to me as being the clearest exposition that I could find. It is in these terms:

> "Where a common danger to the whole adventure has arisen not from the ordinary incidents of the voyage, but accidentally, and the master has intentionally sacrificed something to avoid that danger, we have the ingredients of a general average act, but there must be an extraordinary common danger, and a conscious giving away of something to meet it."

That, when compared with Rule A, seems to me to be a fair expansion, although, perhaps, not much of an expansion, of the rule itself—an expansion in the sense of making it a little clearer what the words of Rule A probably mean.

I think the best thing I can do in this case is to follow the caution of the masters of the law and confine myself to interpreting as closely as I can the meaning of Rule A, and frame my finding accordingly. Was there, then, in this case any extraordinary sacrifice? I think there was. I think, in this case, the master did "intentionally"—that is also one of the words of Rule A—"intentionally" sacrifice a portion of his ship. I think he made his conscious act of putting his ship against the pier, and I think he, by so doing, intended to, and did in effect, succeed in transforming what was a peril to the entire adventure, into a peril to the ship alone. If he did this, and did it with his eyes open to what he was doing, that seems to me to comply with the real underlying meaning of Rule A. He was confronted, as it seems to me, with the alternative of certain damage to his ship, and probable damage to the pier, as against a problematical worse damage to the whole adventure, and he elected to take the first of the two alternatives. He certainly did succeed in preserving his cargo from any loss or damage, and if it be necessary to decide—I am not sure that it is—whether his act was reasonably taken in the circumstances, I, for my part, think that it was a reasonable course to take. I say I am not certain whether it is necessary so to decide, because counsel put forward the argument that perhaps "reasonably" in Rule A only refers to expenditure, and that the rule should be read: "When any extraordinary sacrifice is intentionally made, or when any extraordinary expenditure is reasonably made." I do not know whether that is, or whether it is not, the correct reading, and I do not know that it is necessary so to decide, because, as I have said, for my part I think that this

was a reasonable thing for a man to do in the circumstances. I have put this point A
to the Elder Brethren for their consideration, and I think it is fair to say that they are not enthusiastic about the master's action in taking this alternative. They point out to me—and I have weighed it very carefully—that to put a vessel's side —more especially in the way of her engine-room—against the hard structure of a pier, in a swell, which necessitated that she would grind against the pier, is taking
a very serious risk. But, against that, I am impressed with the unknown danger— B
always perhaps more terrible to a shipmaster—of letting his ship go on to the ground. The fate of vessels which take even a sandy beach is various and difficult to forecast. Sometimes a very little damage is done, sometimes the worst possible damage is incurred, and the vessel—as the chief officer, I think, in this case predicted would have been the case—the vessel breaks her back. But it is an unknown
and, for that reason alone, a terrible danger to allow your vessel to go on sand, the C
nature and consistency of which you do not know. The Elder Brethren are, to this extent, with me—that they do not think it was an unreasonable thing for the master to have taken this step. I go a little further than that, and I think that it was a reasonable thing to do, with the time at his disposal and the knowledge of the circumstances which were at his disposal. He had not been there on this occasion
for more than a few hours of darkness and, although he had been there, apparently D
as an able seaman, some eighteen years before, it is unlikely that he made any special study of the sands which were, at that time, under his lee.

Therefore, in my view, this is a general average act and an extraordinary sacrifice was intentionally and reasonably made for the common safety and for the purpose of preserving from peril the whole property involved. Accordingly, I find that this
was a general average act and the plaintiffs are entitled to succeed. E

Solicitors: *Botterell & Roche*, for *Temperley, Tilly, & Hayward*, West Hartlepool; *Lightbounds, Jones, & Bryan*, for *Ingledew & Co.*, Newcastle-on-Tyne.

[*Reported by* Geoffrey Hutchinson, Esq., *Barrister-at-Law.*]

F

STEAD, HAZEL & CO. *v.* COOPER AND ANOTHER G

[King's Bench Division (Lawrence, J.), January 11, 12, 18, 1933]

[Reported [1933] 1 K.B. 840; 102 L.J.K.B. 533; 148 L.T. 384; 49 T.L.R. 200; 77 Sol. Jo. 117; [1933] B. & C.R. 72]

Company—Winding-up—Liquidator—Personal liability—Performance of company's contract without disclaimer—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 267 (2). H

A liquidator appointed by the court is an agent of the company in liquidation and is not in the same position as a receiver and manager appointed by the court, who is not such an agent, and there is no presumption that when a
liquidator performs a contract without disclaimer, or makes a new contract, I
describing himself as liquidator, he does so in his personal capacity. Nor is such a liquidator's position altered by s. 267 of the Companies Act, 1929, which, while conferring on him the right of disclaimer of onerous contracts, has not affected his personal rights or liabilities.

Notes. Section 267 (2) of the Companies Act, 1929, has been replaced by s. 323 (2) of the Companies Act, 1948.

As to the position of a liquidator, see 6 Halsbury's Laws (3rd Edn.) 581 et seq., and as to his right to disclaimer, see ibid. 686 et seq. For cases see 10 Digest

(Repl.) 915 et seq. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

(1) *Burt, Boulton, & Hayward* v. *Bull*, [1895] 1 Q.B. 276; 64 L.J.Q.B. 232; 71 L.T. 810; 43 W.R. 180; 11 T.L.R. 90; 39 Sol. Jo. 95; 2 Mans. 94; 14 R. 65, C.A.; 10 Digest (Repl.) 834, *5463*.

(2) *Re Anglo-Moravian Hungarian Junction Rail. Co., Ex parte Watkin* (1875), 1 Ch.D. 130; 45 L.J.Ch. 115; 33 L.T. 650; 24 W.R. 122, C.A.; 10 Digest (Repl.) 920, *6290*.

Action tried by LAWRENCE, J., without a jury.

By a contract dated Oct. 17, 1929, the plaintiffs, Stead, Hazel & Co., agreed to deliver to a company named Trent Mills (1920), Ltd., certain bales of cotton in monthly instalments from November, 1929, to August, 1930, at prices to be fixed during the month of delivery at buyers' option, cash before delivery. On March 12, 1930, an order was made for the winding-up of the company, and on May 16, 1930, the defendant Cooper was appointed liquidator by order of the court. After his appointment as liquidator, the defendant did not disclaim the contract, but on June 20, 1930, he wrote to the brokers who had negotiated it in the following terms:

> "Dear Sirs,—Trent Mill (1920), Ltd., in liquidation.—Following the interview that Mr. Collings, the manager, had with you on Tuesday last, this opportunity serves to solicit your co-operation in conforming with the requirements and regulations in the proceedings herein, with regard to the taking up of cotton purchased—that is to say, payment for such cotton and the charges to be made after actual delivery to me or my order. Thanking you in anticipation, Yours faithfully (Signed) D. COOPER, Liquidator."

The plaintiffs acceded to this request, and the contract was carried out until August, 1930. On Aug. 29 the brokers fixed the price for the deliveries outstanding, and on Sept. 4 the defendant accepted this price. The goods, however, were not accepted by the company or the defendant, and in respect of that failure to accept the plaintiffs brought an action against the liquidator personally, alleging that he had neglected and/or refused to take delivery of the bales due for delivery in August, 1930. The defendant pleaded (inter alia) that he had acted solely as liquidator and/or agent for the company as the plaintiffs at all material times well knew, and that he was under no liability to the plaintiffs. It was contended on behalf of the plaintiffs that the liquidator was personally liable—first, because he wrote the letter in June 20, 1930, and, secondly, because he had the right to disclaim the contract under s. 267 of the Companies Act, 1929, and had not exercised it.

By the Companies Act, 1929, s. 267 (1) a right of disclaimer of onerous property in the case of a company wound-up in England is given to a liquidator. By sub-s. (2):

> "The disclaimer shall operate to determine as from the date of disclaimer, the rights, interest, and liabilities of the company, and the property of the company, in or in respect of the property disclaimed, but shall not, except so far as is necessary for the purpose of releasing the company and the property of the company from liability, affect the rights or liabilities of any other person."

S. C. Vincent Addinsell for the plaintiff company.
J. Neville Laski, K.C., and *A. J. Hodgson* for the liquidator.

Cur. adv. vult.

Jan. 18. **LAWRENCE, J.**, read the following judgment.—This action is brought against the liquidator of Trent Mill (1920), Ltd., in his personal capacity. He was appointed liquidator by the court on May 6, 1930, at which date there was a contract outstanding under which the plaintiffs had agreed to deliver to the company certain bales of cotton in monthly instalments from November, 1929, to August, 1930, at prices to be fixed during the month of delivery at the buyers' option, cash before delivery. The defendant did not disclaim the contract, but on June 20, 1930, he wrote to the brokers who had negotiated the contract asking them to arrange that payment should be made after actual delivery instead of before delivery, and to this request the plaintiffs acceded. The liquidator and the plaintiffs carried out the contract accordingly until the month of August, 1930. On Aug. 29, 1930, the brokers fixed the price for the deliveries outstanding—namely one hundred bales—and on Sept. 4, 1930, the defendant accepted this price. The goods, however, were not accepted by the company or the defendant, and it is in respect of this failure to accept that this action is brought against the liquidator personally.

It is contended on behalf of the plaintiffs that the liquidator is personally liable, first, because he wrote the letter of June 20, 1930, by which it is said he undertook personal liability, and, secondly, because he had the right to disclaim the contract under s. 267 of the Companies Act, 1929, and is, therefore, personally liable on any contract which he has not disclaimed.

In my opinion, neither of these contentions is sound, and I hold that the defendant is not personally liable. Mr. Winstanley, a partner in the plaintiff firm, was the only witness called, but his evidence did not carry the case any further than the correspondence, since he never saw the defendant; and it is evident from the documents, and was admitted by Mr. Winstanley, that until March 14, 1932, no claim against the defendant personally was ever suggested, and that all the delivery notes, invoices, and receipts were sent to the company or to the defendant as liquidator. I see nothing in the letter of June 20, 1930, to suggest that the defendant intended to undertake a personal liability, and, even if that letter and its acceptance by the plaintiffs constituted a new contract, it was, in my judgment, a contract which purported to be a contract by the liquidator as agent for the company.

But it is contended that a liquidator appointed by the court is in exactly the same position as a receiver and manager appointed by the court, and that there is a presumption that when he performs a contract without disclaimer, or makes a new contract, he does so in his personal capacity, and that this presumption is not rebutted by his describing himself as liquidator. Reliance was principally placed upon *Burt, Boulton, & Hayward* v. *Bull* (1), where it was held on the facts that a receiver and manager appointed by the court who had given an order for goods in his own name, but describing himself as receiver and manager, was personally liable, because a receiver and manager of a company is not the agent of the company, and the words "receiver and manager" would, therefore, not suggest that the receiver was contracting as agent for the company. In my view, the position of a liquidator appointed by the court is not the same as that of a receiver and manager appointed by the court. A liquidator is the agent of the company: *Re Anglo-Moravian Hungarian Junction Rail. Co., Ex parte Watkin* (2) (1 Ch.D. at pp. 133–4); a receiver is not: *Burt, Boulton, & Hayward* v. *Bull* (1). It is true that both are appointed and can be dismissed by the court, and both control the assets of the company and may have to carry out the contracts of the company, but the liquidator acts for and in the interests of the company, whereas the receiver and manager acts for and in the interests of the debenture holders and not for the company.

I think, therefore, that the description "liquidator" has a different significance from that of "receiver and manager," and I find that the defendant did not purport to contract on his own behalf, nor did the plaintiffs give him credit on his own behalf. I am also of opinion that a liquidator's position is not altered in regard to his personal liability by s. 267 of the Companies Act, 1929, which gives him the right to disclaim any contract which he thinks onerous. If he was not personally liable before this statutory provision was introduced, it would require clear words to create such a personal liability, but there is none. On the contrary, the contrast between s. 54 of the Bankruptcy Act, 1914, which refers to the personal liability of the trustee in whom the assets of the bankrupt are by the statute vested, and

A s. 267 of the Companies Act, 1929, which does not refer to any personal liability of the liquidator in whom the assets of the company are not vested, goes to show that it was not intended, by conferring the right of disclaimer upon the liquidator, to affect his personal rights or liabilities. If such had been the intention, the statute could not have provided, as it does by s. 267 (2), that the disclaimer shall not affect the rights or liabilities of any other person than the company, since the B disclaimer would be affecting the personal liability of the liquidator by determining it. I, therefore, give judgment for the defendant, with costs.

Judgment for defendant.

Solicitors: *Layton & Co.*, Liverpool; *Hill, Dickinson & Co.*, for *J. Arnold Brierley & Robinson*, Oldham.

C [*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

D

Re SUTCLIFFE. ALISON *v.* ALISON

[CHANCERY DIVISION (Eve, J.), December 14, 19, 1933]

[Reported [1934] Ch. 219; 103 L.J.Ch. 154; 150 L.T. 391]

E *Will—Class gift—Contingency—Issue of children—Issue of some children dying before the period of distribution leaving further issue then living—Right of issue who had died before the period of distribution leaving no further issue to share.*

A testator gave his real and personal residuary estate to trustees on F trust to convert the latter, and, after making certain payments and annuities to his wife and a daughter, to receive the income of the estate during the lives of his four daughters and his son (all of whom survived him) and the survivors and survivor of them and divide the same until the decease of his last surviving child into five equal parts, one of such parts to go to each of his daughters and son respectively and during their lives, and after the G death of any of them until the death of such surviving child to divide the income equally between the survivors and the issue of any previously deceased child leaving issue per stirpes, and on the decease of the last surviving child to distribute the estate in the same manner, the share of any child dying and leaving no issue to go for the benefit of the issue of those then dead leaving issue. On the decease of the surviving child issue were living of all the other children, but H other issue of these children had in the meantime died, some leaving further issue, others without such issue.

Held: the personal representatives of the issue who had died leaving no further issue were entitled to share in the residuary estate.

Boulton v. *Beard* (1), applied.

Notes. As to gifts to a class on a contingency, see 34 HALSBURY'S LAWS (2nd I Edn.) 267, para. 317; as to the meaning of "issue," see ibid. 313, para. 362; and for cases on the subject see 34 DIGEST 851 et seq., *7051* et seq.

Cases referred to:

(1) *Boulton* v. *Beard* (1853), 3 De G.M. & G. 608; 43 E.R. 239, L.JJ.; 44 Digest 765, *6239*.

(2) *Sibley* v. *Perry* (1802), 7 Ves. 522; 33 E.R. 211, L.C.; 44 Digest 532, *3487*.

(3) *Selby* v. *Whittaker* (1877), 6 Ch.D. 239; 47 L.J.Ch. 121; 37 L.T. 514; 26 W.R. 117, C.A.; 44 Digest 558, *3743*.

(4) *Hickling* v. *Fair*, [1899] A.C. 15; 68 L.J.P.C. 12, H.L.; 44 Digest 538, *3559*.

(5) *Re Walker, Dunkerly* v. *Hewerdine*, [1917] 1 Ch. 38; 86 L.J.Ch. 196; 115 L.T. 708; 44 Digest 779, *6364*. A

(6) *Re Orlebar's Settlement Trusts* (1875), L.R. 20 Eq. 711; 44 L.J.Ch. 661; 40 Digest 573, *1088*.

Summons as to the construction of a will.

The testator, by his will made on April 1, 1871, devised and bequeathed all the residue of his realty and personalty to trustees on trust as to the personalty for sale and conversion and investment, and subject to the payment of certain debts and annuities to his wife and a daughter directed his trustees to receive the rents, interest, and profits of the estate during the lives of his four daughters and his son, and the survivors and survivor of them, and to divide the same until the death of his last surviving child into five equal parts, and pay one of such parts unto each of his daughters and his son respectively during their lives, and after the death of any of them, during the lives or life of the survivors or survivor to pay and divide the same equally amongst such of his five children as should from time to time be living, and the issue of such of them as should have previously died leaving issue per stirpes. And after the death of the last survivor of his said five children to sell and convert his real and leasehold estates and other property still unconverted and hold the net proceeds thereof on trust to pay one-fifth thereof and to divide the same amongst the issue of such of them, his daughters Harriet Alison, Elizabeth Lockwood, Sophia Cooke and Melena Sutcliffe, and his son Joseph Sutcliffe as should have died leaving lawful issue who might be then living, such issue of each of his last-mentioned children respectively to receive the share his or her respective parents would have been entitled to in case such fifth part had been divisible equally among such parents. And in case any of the testator's said five children should have left no issue the part or share to which the issue of such child or children would, if existing, have been entitled to was to fall into and follow the destination of the remainder of the five shares for the benefit of the issue of those then dead leaving issue. B C D E

The testator died on Nov. 7, 1878, the four daughters and son surviving him. This action was commenced in 1881, and judgment for administration given in 1882. F

The last survivor of the children, Melena Sutcliffe, died a spinster in 1932. There were issue then living of all the remaining four children. Harriet Alison died in 1884, having had four children, of whom three were living, and one had died a spinster. Elizabeth Lockwood died in 1911, having had five children, of whom two were living and two had died without leaving issue surviving them, and one was dead, leaving one child still living. Sophia Cooke died in 1912, leaving eight children, all of whom were living. Joseph Sutcliffe died in 1888, having had three children, one of whom, a daughter, died in 1915 leaving her husband and four children surviving, all of whom were still living; another daughter died a spinster in 1928; and the third was still living. The shares of income to which grandchildren who had died leaving no issue would have been entitled if living had been directed to be paid to their personal representatives, or into court. G H

In these circumstances this summons was taken out, and on July 19, 1933, his Lordship held (i) that the testator did not die intestate; and (ii) that the rule in *Sibley* v. *Perry* (2) did not apply, and that the word "issue" must be construed as including descendants of every degree, who would take per stirpes. The following question was then added, namely, whether in the events which had happened the personal representatives of Mary Janet Alison, John Allen Lockwood, James Herbert Lockwood and Gertrude Sutcliffe (being children of the testator's daughters Harriet Alison and Elizabeth Lockwood, and of his son, Joseph Sutcliffe), all of whom predeceased Melena Sutcliffe and left no issue living at her death, were entitled to share in the capital of the residuary estate. I

Alfred Adams for the trustees.

A. Guest Mathews for grandchildren living at the death of Melena Sutcliffe.—It is only the issue "who may be then living" who are to take shares, i.e., issue

A living at the time of distribution. There is a direction to "pay" each share to the persons entitled which assumes they are then living. The personal representatives of deceased grandchildren who died leaving issue which predeceased Melena Sutcliffe are not entitled to any share: *Selby* v. *Whittaker* (3), *Hickling* v. *Fair* (4).

Wilfrid Hunt, for great-grandchildren of the testator, supported this contention.

B. G. Burnett-Hall, for the legal personal representatives of grandchildren of the B testator who died before the period of distribution without leaving issue, submitted that the rule stated in JARMAN ON WILLS, 7th Edn. at p. 1363:

> "In the case of a gift to a class upon a contingency, the general rule is that the contingency is not imported into the description of the class so as to confine the gift to those members of the class who survive the contingency":

C *Boulton* v. *Beard* (1); *Hickling* v. *Fair* (4); and *Re Walker* (5), applied. *Selby* v. *Whittaker* (3) was distinguishable.

W. A. Peck for the trustees.

Cur. adv. vult.

Dec. 19. **EVE, J.,** read the following judgment.—I have already decided that the testator did not die intestate as to any part of his residuary estate, and that on the D death in February, 1932, of his daughter Melena, a spinster and the last survivor of his five children, the net residue was held on trust for payment and division amongst the issue of such of his other four children as should have died leaving issue who might be then living, that the word "issue' 'is to be construed as extending to all descendants, and that the division is to be a stirpital one.

At the death of Miss Melena Sutcliffe there were issue living of each of her three E sisters and of her brother. Two of the sisters, Mrs. Alison and Mrs. Lockwood, and the son, had also had children who died in the lifetime of Melena without leaving issue living at the date of her death, and I am now called on to decide whether the class is confined to issue living at the date of Miss Melena's death, or whether it is to be construed as including the children who were then dead and whose legal personal representatives are respondents to this summons.

F The point has been dealt with in several reported cases, and the weight of authority supports the contention that the children ought to be included and that the class ought not to be restricted to the issue living at the happening of the contingency. The rule to be applied, according to the authorities, is thus stated in the seventh edition of JARMAN ON WILLS, vol. 2 at p. 1363:

G
> "In the case of a gift to a class upon a contingency the general rule is that the contingency is not imported by implication into the description of the class so as to confine the gift to those members of the class who survive the contingency."

The first authority cited in support of that statement of the rule was *Boulton* v. *Beard* (1), a judgment of KNIGHT BRUCE and TURNER, L.JJ., which I do not pause H to read, as it is quoted in full in the next case I am about to refer to, *Re Orlebar's Settlement Trusts* (6), decided by HALL, V.-C. In that case, which arose under a settlement, the limitations which came into effect in the events which happened were (L.R. 20 Eq. at pp. 712, 713) life interests given to Elizabeth Hancock and Maria Orlebar

I
> "during their respective lives in equal shares for their separate use,
>
> 'and after the decease of either of them leaving a child or children, then as to one moiety of the whole of the trust premises, upon trust to assign, transfer, pay, and make over' "

and so on

> " 'among such one or more of the children of the said Elizabeth Hancock and Maria Orlebar, who should first happen to depart this life, or the issue of such children as might be then dead leaving issue living at his or their death, or born in due time afterwards,' "

and then,

> " 'at such age' and in such manner as the said Mary Caroline Orlebar should by deed or will appoint, and in default of appointment [this is what happened] then upon further trust to transfer, pay, and make over the said moiety whereof there should be no such appointment
>
>> 'unto all and every the child or children of the said Elizabeth Hancock or Maria Orlebar, who should first happen to depart this life, and the issue of such of their said children as might then be dead (such issue to take the share of his or her parent), equally between and among them (if more than one), share and share alike, and if there should happen to be but one such child, then the whole to such only child.' "

Then there is a provision that they were only to attain a vested interest on reaching twenty-one. HALL, V.-C., after stating the facts, says (L.R. 20 Eq. at p. 716):

> "I think that I must construe this instrument according to what I take to be the actual meaning of the words used in the trust for children, that is to say, a trust in favour of
>
>> 'all and every the child or children of the said Elizabeth Hancock and the issue of such of their said children as might be dead'
>
> and the words are 'unto all and every the child or children of Elizabeth Hancock,' with a substitution of issue for such as might be dead; and the words 'all and every the child or children,' as I construe them, include all the children and not merely those who survive the tenant for life; and the fact of any children or issue taking being made dependent on the fact of some one child surviving, is not, in my judgment, according to the language of the instrument, or according to authority, sufficient to cut down the objects to take to those alone who are mentioned as being only to take provided one object survives; in other words, that the contingency upon which the gift is to take effect is not to be imported into the constitution of the class who are to take under the trust itself."

Then he refers to *Boulton* v. *Beard* (1), and quotes at length the judgments of KNIGHT BRUCE and TURNER, L.JJ. He says:

> "The trusts in *Boulton* v. *Beard* (1) were trusts of one-tenth to or for the use of R.H., and another one-tenth to or for the use of C.R., for their respective lives; and in case either of them should die in the lifetime of the tenant for life, or afterwards, leaving lawful issue, then the testatrix directed that the part of him or her so dying leaving lawful issue should go and be equally divided among his or her children as they should attain twenty-one. And it was held that a child of C.R., who survived the tenant for life and attained twenty-one, but died in the lifetime of C.R., took a vested interest."

KNIGHT BRUCE, L.J., said (3 De G.M. & G. at p. 611):

> "The question is whether a child of Catherine Rayner, who, after the testatrix's death, died in the lifetime of Catherine Rayner, having attained twenty-one, took a vested interest in the part of the share of the residuary estate of which Catherine Rayner was tenant for life. Upon this question no doubt could have arisen if the case had simply been one of a gift to Catherine Rayner for life, and after her death in the language of the will, omitting the condition of Catherine Rayner leaving lawful issue. Would the case be varied if by a separate clause the testatrix had declared that if Catherine Rayner should die without leaving issue her share should fall into the residue, or go as in case of intestacy? No one will argue that this would have caused a difference. We should be making a will and guessing away what is plain, if we acceded to the argument addressed to us on behalf of the defendant."

Then TURNER, L.J., says (3 De G.M. & G. at p. 612):

> "I concur entirely with the construction which the Master of the Rolls has put on this will. The first argument in support of a different construction is that

> the bequest to the children of Catherine Rayner being only given in the contingent event of her leaving issue, therefore only the children who were living when the contingency happened would take. That argument would go to a great extent, and affect many decisions, affirming, as it must, the principle that where there is a gift to a class upon a contingent event the time of the happening of the contingency determines the individuals composing the class. That is not the rule."

The matter does not stop there: it was further considered in the House of Lords in *Hickling* v. *Fair* (4). I do not think I need read the headnote, but LORD DAVEY, in the course of his speech, after expressing surprise that anybody should have found it possible to arrive at an opinion different from that which he was about to express, says this ([1899] A.C. at p. 35):

> "It is an elementary principle in the construction of wills that a gift to a class after a life interest or life-rent includes all persons within the description of the class who were alive at the testator's death, or have come into being during the lifetime of the life tenant or life-renter. That principle is common to Scotland and England, and is applicable, I should suppose, wherever the English language is used. I think it is equally clear that when the gift is made to depend on the happening of a contingency that contingency is not imported by implication into the description of the class so as to confine the gift to those members of the class who survive the contingency."

Then he reads the judgment of TURNER, L.J., in *Boulton* v. *Beard* (1), and after dealing with *Selby* v. *Whittaker* (3), which has been relied on here and which was also relied on in that case as leading to a different conclusion, he points out that in *Selby* v. *Whittaker* (3) SIR GEORGE JESSEL, M.R., who gave the leading judgment, recognised the existence of the rule but did not think it was applicable in that particular case; he relied there on the "reason of the thing"; he thought it was so unreasonable that he determined that the rule ought not to be applied; which shows, as appears from the observations of LORD DAVEY in his speech, that *Selby* v. *Whittaker* (3) was decided on the particular will there, and the Court of Appeal did not contemplate thereby setting at nought the rule which had been so well established.

The matter was finally dealt with by YOUNGER, J., in *Re Walker, Dunkerly* v. *Hewerdine* (5), where, after dealing with the authorities to which I have referred, he came to the conclusion that the rule in *Boulton* v. *Beard* (1) must be applied, and that the contingency did not affect injuriously the interests of those who did not live to survive.

In those circumstances I must answer this question by holding that the legal personal representatives of those children who were dead at the date of Melena's death are entitled to share.

Solicitors: *Jaques & Co.*, for *Hall, Walker, & Norton*, Huddersfield; *Stephens & Sons.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

HARMER *v.* ARMSTRONG AND OTHERS
SAME *v.* SAME (CROSS-APPEAL)

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), March 29, 30, 31, April 7, July 21, 24, 25]

[Reported [1934] Ch. 65; 103 L.J.Ch. 1; 149 L.T. 579]

Agent—Contract under seal made by agent in own name—Right of principal to sue other contracting party for specific performance.

Contract—Enforcement—Contract under seal made by agent and trustee in own name—Right of principal and beneficiary to sue other party to contract.

Specific Performance—Contract under seal—Contract by agent and trustee made in own name—Action by principal and beneficiary.

Practice—Parties—Contract under seal—Specific performance—Contract made with X. by A. as agent and trustee for B.—Rescission of contract by A. and X.—Jurisdiction to decree specific performance of intent in action by B. against A. and X.—Rules of Supreme Court, Order XVI, r. 11.

In November, 1932, A., an employee of the V. Press who worked on five periodicals owned by them, learnt that the V. Press were prepared to sell these periodicals. A., who wished to buy the periodicals, but did not have the £2,000 he estimated would be necessary to buy and run the periodicals, agreed with H. to put up £400 and that H. and K. should each put up £800. H. then authorised A. to offer the V. Press £1,500 for the periodicals. A. made this offer, which was accepted. A. paid a deposit and the periodicals were sold to him by an agreement under seal made on Dec. 15, 1932. H. and K. were not mentioned in this agreement. A. then asserted that he alone took an interest under the agreement and, without the concurrence of H. or K., wrote to the V. Press on Dec. 22, 1932, requesting them to rescind the sale and to return the deposit. The V. Press knew of the existence and interest of H. and K., but agreed to this request, and on Jan. 5, 1933, an agreement was made between A. and the V. Press purporting to rescind the sale. On Jan. 6, 1933, the V. Press purported to sell the periodicals to S. Negotiations for a contract for the formation of a company to run the periodicals, and for a service agreement between A. and the proposed company, took place between A. and H. (who acted on behalf of himself and K.) during November and December, 1932, but were never concluded. In an action by H. and K. against A., the V. Press, and S.,

Held: H. and K. were entitled to a declaration that A. entered into and took the benefit of the contract of Dec. 15, 1932, as agent and trustee for the plaintiffs and himself, and to an order for specific performance of that contract, because

(i) after entering into the contract of Dec. 15, 1932, A. could have compelled H. and K. to contribute their agreed shares of the purchase money, and, therefore, H. and K. were therefore entitled to treat the contract as having been entered into by A. for their benefit as well as his own, although H., K., and A. had not then agreed, and never did agree, how the periodicals should eventually be run; A. therefore obtained the contract of Dec. 15, 1932, as trustee for himself and the plaintiffs

(ii) where a party to a contract was trustee for a third party and the trustee refused to sue on the contract, the beneficiary could sue on the contract and enforce the right of the trustee thereunder, joining the trustee as a party, no matter whether the contract is under seal or not: rule stated by LORD HALDANE in *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co., Ltd.* (1), [1915] A.C. at p. 853, and by LORD WRIGHT in *Vandepitte* v. *Preferred Accident Insurance Corpn. of New York* (2), [1933] A.C. at p. 79, applied to contracts under seal; R.S.C., Ord. XVI, r. 11, considered.

(iii) in the circumstances of this case there was no doubt that enforcement of the contract of Dec. 15, 1932, was for the benefit of the trust and that A. had therefore committed a breach of trust in refusing to enforce it.

Semble: in cases where there is a genuine dispute whether enforcement of the contract is for the benefit of the trust, the court may refuse to decide this question in an action to which the other contracting parties are party, and may instead insist on an application being made in the matter of the trust for leave to use the name of the trustee in an action to enforce the contract.

Notes. As to enforcement by a principal of a deed executed in the name of his agent, see 1 Halsbury's Laws (3rd Edn.) 217–218, para. 494; as to the enforcement by action by the beneficiaries under a trust of a right of the trustee where the trustee refuses to sue, see 14 ibid. 557, para. 1038; and as to such enforcement of such a right under a contract, see 26 Halsbury's Laws (2nd Edn.) 13, para. 4.

Cases referred to:

(1) *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co., Ltd.*, [1915] A.C. 847; 84 L.J.K.B. 1680; 113 L.T. 386; 31 T.L.R. 399; 59 Sol. Jo. 439, H.L.; 12 Digest (Repl.) 234, *1754*.

(2) *Vandepitte* v. *Preferred Accident Insurance Corpn. of New York*, [1933] A.C. 70; 102 L.J.P.C. 21; 148 L.T. 169; 49 T.L.R. 90; 76 Sol. Jo. 798, P.C.; Digest Supp.

(3) *Chesterfield & Midland Silkstone Colliery Co., Ltd.* v. *Hawkins* (1865), 3 H. & C. 677; 34 L.J.Ex. 121; 12 L.T. 427; 11 Jur.N.S. 468; 13 W.R. 841; 159 E.R. 698; 12 Digest (Repl.) 45, *232*.

(4) *Performing Right Society, Ltd.* v. *London Theatre of Varieties, Ltd.*, [1924] A.C. 1; 93 L.J.K.B. 33; 130 L.T. 450; 40 T.L.R. 52; 68 Sol. Jo. 99, H.L.; 28 Digest 392, *208*.

(5) *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A.C. 454; 74 L.J.K.B. 898; 93 L.T. 495; 21 T.L.R. 710; 11 Com. Cas. 1, H.L.; 8 Digest (Repl.) 573, *230*.

(6) *Gandy* v. *Gandy* (1885), 30 Ch.D. 57; 54 L.J.Ch. 1154; 53 L.T. 306; 1 T.L.R. 520; 33 W.R. 803, C.A.; 12 Digest (Repl.) 49, *274*.

(7) *Tweddle* v. *Atkinson* (1861), 1 B. & S. 393; 30 L.J.Q.B. 265; 4 L.T. 468; 25 J.P. 517; 8 Jur.N.S. 332; 9 W.R. 781; 121 E.R. 762; 12 Digest (Repl.) 234, *1752*.

(8) *E. M. Bowden's Patents Syndicate, Ltd.* v. *Herbert Smith & Co.*, [1904] 2 Ch. 122; 73 L.J.Ch. 776, C.A.; 16 Digest 185, *913*.

(9) *Yeatman* v. *Yeatman* (1877), 7 Ch.D. 210; 47 L.J.Ch. 6; 37 L.T. 374; 24 Digest (Repl.) 793, *7826*.

Appeal and cross-appeal against a decision of Maugham, J.

The facts, which are summarised in the headnote, are set out in full in the judgment of Lord Hanworth, M.R. The arguments appear from the judgments.

C. E. E. Jenkins, K.C., and *A. J. Belsham* for the plaintiffs.

Cleveland-Stevens, K.C., and *E. E. H. Brydges* for the defendant Armstrong.

Sir Herbert Cunliffe, K.C., and *Walter Banks* for the defendant company and the defendant Sumner.

Cur. adv. vult.

April 7. **MAUGHAM, J.**, read the following judgment.—The first question that arises is whether the defendant Armstrong, in entering into the agreement of Dec. 15, 1932, was acting as agent for the plaintiffs or either of them or was in a fiduciary position towards them. It is argued on his behalf that, having regard to the circumstances that the terms of the agreement of service between him and the proposed company were never agreed, and that he never approved the form of the memorandum and articles of association, he is not bound to the plaintiffs in any way, and that the case is one where the contract which was in negotiation between him and the plaintiffs is incomplete and therefore not enforceable. In my opinion, this is not the correct view. The test as to whether the defendant Armstrong must be taken to have been acting for and on behalf of the plaintiffs is not whether something remained to be done after the contract for purchase had been entered into, but whether the said defendant was entitled, after entering into the contract, to compel the plaintiffs to subscribe their shares of the purchase money; and, having regard to the facts which I have stated, I find it impossible to come to any conclusion other than that he was so entitled. The consequence is that he must, in my view, be treated as having entered into the contract as agent for and in a fiduciary position towards the plaintiffs, with the result that, as between him and them, he was bound to complete the contract in due course with their financial assistance and was committing a breach of his duty and his trust towards them in purporting or attempting to rescind the agreement.

The next question that arises is whether in the circumstances the plaintiffs are entitled to enforce specific performance of the agreement in a proceeding in which they are the plaintiffs and the defendant Armstrong and the Vallancey Press, Ltd., are defendants. On behalf of the defendant company the technical point is taken that the agreement, being under the seal of the defendant Armstrong and of the other parties to it, among whom the plaintiffs are not included, cannot be enforced either by or against the plaintiffs. [His Lordship considered this defence, and the authorities on the point, and held that it succeeded. He continued:] My conclusions must be, first, that the defendant Armstrong committed a breach of trust in writing his letter of Dec. 28, 1932, and requesting the defendant company to release him from his agreement and return his deposit. The consequence of this action on his part was the rescission of the contract of Jan. 5, 1933, and a fresh contract entered into on the following day with the defendant Sumner.

The plaintiffs, in my opinion, are entitled, if they press for it, to have an inquiry to ascertain the amount of damage they have suffered by this breach of trust or agency committed by the defendant Armstrong. On the other hand, the plaintiffs are not, in my opinion, entitled to a judgment for specific performance, and the action against the defendants, other than the defendant Armstrong, must be dismissed.

The plaintiffs appealed against the refusal of MAUGHAM, J., to grant them a decree of specific performance and his dismissal of their action against the defendant company and the defendant Sumner. The defendant Armstrong cross-appealed against the declaration and the inquiry as to damages granted by MAUGHAM, J.

C. E. E. Jenkins, K.C., and *A. J. Belsham* for the plaintiffs.

Cleveland-Stevens, K.C., and *E. E. H. Brydges* for the defendant Armstrong.

Sir Herbert Cunliffe, K.C., and *Walter Banks* for the defendant company and for the defendant Sumner, supported the judgment of MAUGHAM, J.

LORD HANWORTH, M.R.—This appeal must be allowed. It has raised an important point which has been well presented by counsel on both sides. The point at issue can be shortly stated.

The plaintiffs in the action sought a declaration that the defendant Armstrong entered into and took the benefit of the agreement of Dec. 15, 1932, as agent and trustee for the plaintiffs and himself. They also asked for specific performance of the agreement. The reason why the action was brought is stated by the plaintiffs in their statement of claim.

Shortly, the facts are these: The defendant company, the Vallancey Press, Ltd., were the owners of certain papers—papers which dealt specially with philately—that is the business of collecting and understanding stamps and stamp collecting. The defendant Armstrong was, either as assistant editor or as manager or assistant manager, concerned in helping with the production of those papers. He learned some time in November, 1932, that the defendant company, which was then the owner, was prepared to sell those papers, and it was an opportunity for someone who could put energy and some money into them possibly to develop them with consequent profit to themselves. But Armstrong was unable of his own resources to purchase, and the consequence was that he turned about to try to find someone who would assist in the purchase. At first he went to the City. He was unable to obtain assistance there. Ultimately he came to the plaintiff Harmer. Armstrong did not know, and did not see, the plaintiff King, but his negotiations were carried on with Harmer alone. Harmer entertained the project, and ultimately (to make a long story short) Harmer gave authority to Armstrong to offer a sum of £1,500 as the purchase price for these papers. The money that needed to be found, we are told in the evidence, was more than this. It would be necessary to find a little more than the actual purchase price, and £2,000 was the figure which was contemplated would be necessary to carry the enterprise to success. That sum was to be obtained by Harmer and King putting up £800 apiece, and Armstrong putting up £400—that is to say, taking £2,000 as a total, Harmer and King were to provide two-fifths and Armstrong one-fifth. The learned judge, who has gone through the facts more carefully than I have, tells us this—and I understand that there is no objection on the part of the counsel for Armstrong to this statement—

> "that Harmer was quite ready and willing to authorise Armstrong to make a definite offer for the papers in question, and he did so authorise him."

Counsel were right to accept that because the evidence of Armstrong himself fully justifies that finding by the learned judge. There was a letter written in which Harmer says that they told a sad story that £1,500 was the only sum which could be offered, and Armstrong tells us this. The evidence abundantly shows that Armstrong was unable of his own resources to make an offer which would involve him in a liability of £1,500 direct to the vendor, and he had to rely on the assistance which was to be given by the two plaintiffs, through Harmer, with whom he was dealing; the upshot of it all was that the money was available in the proportions I have already mentioned, and Armstrong was, with that assurance, able to make the offer which he did, and which was accepted. The result was that there was an agreement in writing and under seal, made on Dec. 15, between the defendant company and the others, to sell to the defendant Armstrong, who agreed to purchase the copyright and interest and all the goodwill of the company in the five periodicals mentioned, and so on. When that had been done Armstrong asserted that he alone was interested in this purchase, and he purported shortly afterwards to come to an arrangement with the defendant company under which he put an end to the purchase agreement.

The action is brought, as I have said, for a definite declaration that Armstrong was not acting on his own in the negotiations, and in the conclusion of the agreement, but that the plaintiffs were also interested with him; and then for specific performance. MAUGHAM, J., has found that Armstrong was acting in the capacity of an agent and in a fiduciary capacity and a fiduciary position towards the plaintiffs. The order that was made is this:

> "The court doth declare that the defendant Armstrong entered into and holds the benefit of the agreement of Dec. 15 as agent and trustee for the plaintiffs and himself in the following shares."

From that finding there was a cross-appeal by Armstrong which raised the question whether or not Armstrong was acting in a fiduciary capacity in relation to that agreement. We have heard counsel for the defendant Armstrong on the point and we have come without hesitation to the same conclusion that the learned judge reached. I have referred to some of the evidence and it appears to me that the conduct of Armstrong, the fact that he was equipped to make an offer only through the assistance of the plaintiffs, abundantly justifies and confirms the conclusion reached by the learned judge that Armstrong in the whole of this matter was acting as agent and in a fiduciary position for the plaintiffs.

That being so, we dismiss the cross-appeal. Then comes the question of what ought to be done in the action. The learned judge, finding matters so far in favour of the plaintiffs, says this:

> "My conclusions must be, first, that the defendant Armstrong committed a breach of trust in writing this letter of Dec. 28, 1932, and requesting the Vallancey Co. to release him from his agreement and to return his deposit. The consequence of this action on his part was the rescission of the contract on Jan. 5, 1933, and a fresh contract entered into on the following day with the defendant Sumner." A

I need not refer to that. All the facts are fully stated in MAUGHAM, J.'s judgment. He then holds: B

> "The plaintiffs, in my opinion, are entitled, if they press for it, to have an inquiry to ascertain the amount of damage they have suffered by this breach of trust or agency committed by the defendant Armstrong. On the other hand, the plaintiffs are not, in my opinion, entitled to judgment for specific performance." C

Why not? The answer to that is this, that the learned judge found himself pressed by a rule of law which is this, that where a contract under seal is entered into by an agent, even where the agent is described as acting on behalf of the named principal, in such a case the principal can neither sue nor be sued upon it—the rule being that the parties are determined exclusively by the form of the instrument. D Counsel for the defendant company, in his argument, called our attention to the statement of the rule made in *Chesterfield and Midland Silkstone Co.* v. *Hawkins* (3), where BARON MARTIN quotes a passage from LORD TENTERDEN's book ABBOTT ON MERCHANT SHIPPING, where the rule is perhaps as happily stated as it could be in terms of authority. The rule, therefore, is this, that the plaintiffs, not being named and, more, not being indicated—I have put that in especially because E of counsel's argument—are not entitled to bring any proceedings themselves on this agreement. It is said that this is an agreement made between A. and B. and on that agreement C. and D. cannot sue; there is the rule of law, and that is the end of it. But is it? There has been a definite finding that Armstrong was a trustee of this agreement for the plaintiffs. He is before the court. He has, as the learned judge has found, committed a breach of trust in acting so as to put F an end to the agreement—the company entering into a new agreement with Sumner—and the plaintiffs are cestuis que trust as beneficiaries upon that contract made by their trustee for them, a contract in which Armstrong himself is beneficially interested.

What ought to be done? I will read from the judgment of LORD WRIGHT in *Vandepitte* v. *Preferred Accident Insurance Corpn. of New York* (2). I need not G read the whole of the paragraph, but I read these words ([1933] A.C. at p. 79):

> "The trustee then can take steps to enforce performance to the beneficiary by the other contracting party as in the case of other equitable rights. The action should be in the name of the trustee; if, however, he refuses to sue, the beneficiary can sue, joining the trustee as a defendant."

H That undoubtedly is right. The trustee must be before the court. It was on that ground that the action by the *Performing Right Society* v. *London Theatre of Varieties* (4) failed. In the course of giving his judgment LORD CAVE said ([1924] A.C. at p. 14):

> "An equitable owner may commence proceedings alone and may obtain interim protection . . . but it was always the rule in the Court of Chancery, and is, I I think, the rule of the Supreme Court, that, in general, when a plaintiff has only an equitable right in the thing demanded, the person having the legal right to demand it must in due course be made a party to the action: (DANIELL'S CHANCERY PRACTICE, 7th Edn., vol. 1, p. 172). If this were not so, a defendant, after defeating the claim of an equitable claimant, might have to resist like proceedings by the legal owner, or by persons claiming under him as assignees for value without notice of any prior equity, and proceedings might be indefinitely and oppressively multiplied. No doubt the rule does not

> apply to a mortgagor, at least since the passing of s. 25 (5) of the Judicature Act, 1873; and there may be special cases where it will not be enforced, as in *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (5), where the defendant disclaimed any wish to have the legal owners made parties. Further, under Order XVI, r. 11, no action can now be defeated by reason of the misjoinder or non-joinder of any party; but this does not mean that judgment can be obtained in the absence of a necessary party to the action, and the rule is satisfied by allowing parties to be added at any stage of a case."

So far we get this: beneficiaries are entitled to have their rights enforced; if the trustee will not enforce them for them, the beneficiaries can come before the court, but they must bring before the court the trustee also. In *Gandy* v. *Gandy* (6) to which I have referred in the course of the argument, the difficulty that arose was overcome by allowing ultimately one of the beneficiaries to sue, but making the trustee, who declined to take action, one of the defendants. It will be observed in the course of the argument there that the court, fully appreciating the difficulties that were placed before it, raised the question of what should be done in the case and adjourned the proceedings in order that the action might be properly constituted. I am quite aware of the criticism—I think it is a fair criticism to make—which counsel for the defendant company advances that in that case there was an indication of the interests of certain beneficiaries, named or not named, as the case may be, but quite clearly indicated, that in the present case there is no indication of any trust at all, and no indication that there were any beneficiaries, and therefore he says that the rule of law, which I have already accepted, must be applied in its strictness.

However, when one accepts that argument one asks the question: Is the court in such a position that it cannot provide any remedy to the beneficiaries? and the answer that may be made is this: separate proceedings might be taken by the beneficiaries to have it declared that Armstrong was a trustee for them and for himself, and when that had been declared they might obtain leave to sue in his name if he was reluctant to sue. It has already been determined in the present proceedings that Armstrong was a trustee. When that leave to sue in Armstrong's name had been obtained, these two plaintiffs in the name of Armstrong would then bring their action against the present defendants, the company, the vendors, for specific performance. At the present time that involves circuity of action. Is that what the court at the present time ought to do? Counsel for the defendant company answers "Yes, because you have the rule of law, and the rule of law is only modified or relaxed in special circumstances." What the special circumstances may be must depend in each case on its own facts, and if special circumstances are required I am quite prepared to find that they exist in the present case because I should be sorry to think that we put the parties to the expense of separate proceedings to get leave to sue in Armstrong's name when Armstrong himself is now before the court and has admitted by his counsel that if it is declared that he was a trustee and his cross-appeal fails, then, if he is a trustee, he wishes to join in the fruits which he, as one of the beneficiaries, is entitled to receive.

I turn to Order XVI, r. 11, and that provides:

> "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined"

be added, and so on. We have actually before us Armstrong, declared to be a trustee for himself and the two plaintiffs. There are no absences in the matter of parties. We have the two plaintiffs, who are undoubtedly entitled to take some A proceedings as beneficiaries, and ultimately, if necessary, to sue in Armstrong's name. We have Armstrong found to be a trustee and himself ready to take his share in the trust. It would seem almost absurd to send these parties away and to force them to incur greater costs, more circuity of action. Surely, the right course is to deal with the case in the words of Order XVI, r. 11.

For these reasons I have come to the conclusion that, accepting the judgment B of the learned judge up to the point at which he found himself compelled to yield to the obstacle of the rule of law, we ought to accept his view of the case and to say that we do find, if necessary, special circumstances, and that in all the circumstances of the case we are prepared, as all the parties are before the court, to give the remedy which they would ultimately become entitled to after greater expenditure and greater delay, namely, to say that the plaintiffs are entitled to have C specific performance of the contract—the contract in which the defendant, Armstrong, will share together with the plaintiffs.

In those circumstances we shall allow the appeal, discharge the order made as to an inquiry for damages, and declare the rights of the plaintiffs and make an order for specific performance.

D

LAWRENCE, L.J.—In my judgment, MAUGHAM, J., was plainly right in holding that the defendant Armstrong entered into the contract of Dec. 15, 1932, as a trustee for the plaintiffs and himself. It was strenuously contended on the part of the defendant Armstrong that because the plaintiffs and that defendant had not finally agreed inter se as to the terms on which the property comprised in the agreement should be held and dealt with after it had been acquired, and because E the terms on which the company was going to take over the property and the terms on which the defendant Armstrong was to be appointed managing director had not been finally agreed on, the defendant Armstrong was at liberty to treat the agreement to purchase that property as having been made for his own use and benefit. In my judgment, that contention is not well founded.

The facts have been fully stated by the learned judge, and I do not intend to F repeat them. I agree with the test applied by the learned judge that, the plaintiffs having agreed to join with the defendant Armstrong in acquiring the property and to find their proportion of the purchase money, and having instructed the defendant Armstrong to accept an offer for the property at a given price and to enter into a contract for the purchase of the property, and the defendant Armstrong, in accordance with those instructions and with the arrangement so come to, having entered G into the contract, he could have compelled the plaintiffs to contribute their agreed proportions of the purchase money. It is equally plain, in my judgment, that in those circumstances the plaintiffs were entitled to treat the contract as having been entered into by the defendant Armstrong for their benefit as well as his own.

The learned judge has, however, held that although the contract was entered into by the defendant as a trustee for himself and the plaintiffs, yet because it happens H that the contract was a contract under seal the plaintiffs cannot enforce it in this action as they were no parties to it. In my judgment, the view so taken by the learned judge is erroneous. It is well settled and not disputed by the plaintiffs that at common law no one can sue on a contract under seal except those who are contracting parties. If the contract be not under seal, besides the actual contracting parties those from whom and between whom consideration proceeds can also I sue. The rule is stated plainly by LORD HALDANE in *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co., Ltd.* (1) as follows ([1915] A.C. at p. 853):

> "My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quæsitum tertio by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam."

LORD WRIGHT, in *Vandepitte* v. *Preferred Accident Insurance Corpn. of New York* (2), after quoting the above extract from LORD HALDANE'S speech, proceeds to state ([1933] A.C. at p. 79):

> "In that case, as in *Tweddle* v. *Atkinson* (7), only questions of direct contractual rights in law were in issue, but LORD HALDANE states the equitable principle which qualifies the legal rule, and which has received effect in many cases [then he cites certain cases as examples] that a party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party. The trustee then can take steps to enforce performance to the beneficiary by the other contracting party as in the case of other equitable rights. The action should be in the name of the trustee; if, however, he refuses to sue, the beneficiary can sue, joining the trustee as a defendant."

The rule that where a party to a contract is trustee for a third party and the trustee refuses to sue the beneficiary can sue, joining the trustee as a party in no way depends on whether the contract which the trustee has entered into is under seal or not. Supposing a trustee under a will or settlement were to enter into a contract under seal to purchase a property for the benefit of the trust without disclosing that fact in the contract, and that then he were to execute a declaration of trust for the benefit of the beneficiaries under the trust instrument, could it be said for a moment, that, if the trustee were to refuse to sue on the contract, the beneficiaries were not entitled to sue, themselves joining the trustee as a defendant? It was strenuously contended that in such a case, as the contract was under seal, the beneficiaries' only course was to apply in the matter of the trust and obtain leave to sue in the name of the trustee. I can see no foundation for such a suggestion. It was admitted that if the contract had been a contract in writing not under seal an action to enforce it could have been brought by the beneficiaries joining the trustee as a defendant. There is no distinction between a contract under seal and a contract not under seal in connection with the equitable rule in question. The contention that there is such a distinction confuses two entirely distinct rules, both of which are well established, and as to both of which there can be no possible dispute at the present time, namely, the rule that the law does not recognise a jus quæsitum tertio arising by way of contract, and the rule that such a right may be conferred by way of property under a trust. Whenever a party under a contract, at the date when he enters into it, is (or thereafter constitutes himself) a trustee for a third party that party has a right conferred upon him by way of property to sue on the contract whether the contract be under seal or not, and can, according to well-settled principles, enforce that right in equity, joining the trustee as a defendant to the action. The right of a beneficiary in such a case as the present, however, is to enforce the agreement according to its tenor, that is to say in favour of the defendant Armstrong, and not in favour of the plaintiff beneficiaries.

It was suggested by counsel for the defendant company that the rule which I have stated only applies in the case of contracts under seal where the trust is disclosed on the face of the contract. I know of no such limitation to the rule and such a limitation cannot be justified in principle. I can conceive that there may be cases in which the court would hesitate to enforce, at the instance of a beneficiary or beneficiaries, the performance of a contract made by the defendant trustee by reason of the complications which might arise if there was a genuine dispute as to whether it was for the benefit of the trust to enforce the contract at all. In such a case the court has the power and might very well put the parties to the expense and delay of fighting out the question whether the contract ought to be enforced in an application in the matter of the trust for leave to use the name of the trustee in an action to enforce the contract. In the present case, however, there is no such complication. The learned judge, having heard the whole case, has come to the clear conclusion that there was a trust, and that it was a case in which the trustee had committed a breach of trust in not enforcing the contract. Moreover, counsel for the defendant Armstrong has plainly stated to this court, quite frankly and properly, that if his client is in fact a trustee he desires to retain the benefit of the trust. In those circumstances it is plainly, in my judgment, a case in which the court ought to act on the equitable rule and decree specific performance of the contract.

The appeal, in my opinion, ought to be allowed and an order made in the form suggested by the Master of the Rolls.

ROMER, L.J.—I agree. Dealing with the cross-appeal, which logically comes first, I am of opinion that the learned judge was plainly right. The facts are these, that the defendant Armstrong, having discovered that the defendant company were contemplating the sale of papers in which they were interested, approached the plaintiff Harmer with a view to seeing whether Harmer would not join with him in a scheme for acquiring those papers and subsequently carrying them on. Harmer, as we know, subsequently associated his co-plaintiff, King, with him, although the negotiations with Armstrong were carried on by Harmer's son. The learned judge finds that, in the course of those negotiations, while they were going on, Harmer authorised Armstrong to make a definite offer for the papers. Armstrong—the matter still being negotiated between him and Harmer and no definite agreement having then been arrived at, and I think never having been arrived at, as to how the papers should be carried on after they had been bought from the defendant company—interviewed the defendant company and obtained an offer of £2,000. There was a letter written by Harmer to King, which was put in evidence by the defendant Armstrong, which says:

> "Things have been moving re V. [that means 're the defendant company']. Mr. Armstrong came along, as you know, with a definite offer of £2,000 on certain conditions [which he refers to]. We sent it back with a heartrending tale that £1,500 cash down was the utmost possible and to our surprise it came back a couple of hours later with the acceptance."

How in the world it can be suggested that, having obtained a contract from the defendant company in that way, Armstrong can say that he is entitled to retain the benefit of it for himself really passes my comprehension. Plainly he obtained the contract as trustee for himself and the plaintiffs, and none the less because the parties had not at that time agreed, and never did agree, as to how precisely the papers were to be carried on after they had been acquired. The contract having been obtained, as MAUGHAM, J., has declared, by Armstrong as trustee for himself and the plaintiffs in certain shares, it has not been suggested that when the defendant company and Armstrong purported to put an end to that contract the contract was or could have been determined as against the plaintiffs, of whose existence and interest the defendant company were aware.

Therefore the only question remaining is this: Should the plaintiffs issue a writ against Armstrong claiming a declaration that he was trustee and then asking for an order from the court that he should as trustee institute proceedings or that they should use his name for the purpose of instituting proceedings for specific performance against the defendant company; or are they entitled, in order to save circuity of action and multiplicity of proceedings, to issue a writ against Armstrong and the defendant company seeking to establish the trust, and then for specific performance of the contract that the defendant company had entered into with Armstrong? There are two principles which have to be borne in mind, principles which belong to two distinct systems of law, or, rather, two systems of law that were distinct at the time that the principles were laid down. The first principle is this, that where a right is held by a trustee for the benefit of certain cestuis que trust the cestuis que trust may, where justice demands it, themselves enforce the right in an action to which the trustee is made a party, and may do so whether it is an express trust or a constructive trust or whether the right to be enforced is a right arising under an instrument under hand or an instrument under seal. To a large extent all that has been admitted by the defendants in this action, although at one time counsel for the defendant company was not willing to admit that the right could be enforced by a cestui que trust in any case when the right arose under an instrument under seal; but he was compelled to abandon that position when he was confronted with *Gandy* v. *Gandy* (6) in which certain cestuis que trust were held entitled to enforce a right arising under an instrument under seal, making the trustee defendant. In the end he confined himself to saying that in the case of an instrument under seal a cestui que trust could only enforce the right in the way I have mentioned where the cestui que trust was himself named in the instrument as a party to the instrument, or where at any rate, the trust appeared on the face of the instrument.

The principle that I have referred to has been enunciated many times. It was enunciated by LORD CAVE in *Performing Right Society* v. *London Theatre of Varieties* (4). It was enunciated recently by LORD WRIGHT in *Vandepitte* v. *Preferred Accident Insurance Corpn. of New York* (2). It is also enunciated in DANIELL'S CHANCERY PRACTICE, and I want to refer to the statement of the principle there for a purpose that will appear presently. In that book it is said, at p. 173 of the first volume of the seventh edition:

> "The principle that requires a trustee, or other owner of the legal estate, to be brought before the court in actions relating to trust property, applies equally to all cases where the legal right to sue for the thing demanded is outstanding in a different person from him who claims the beneficial interest. Thus, where an action is brought for the specific performance of a covenant under seal with one for the benefit of another, the covenantee must be a party to an action by the person for whose benefit the covenant was intended against the covenantor. And, so, in an action for the specific performance of a covenant for the surrender of a copyhold estate to A., in trust for others, A. is a necessary party because the effect of a surrender would be to give him the legal estate, and another action might become necessary against him. Where a covenant is entered into with one person for the benefit of another, so as to place such other person in the position of cestui que trust under the contract, then if the covenantee will not sue, the person beneficially interested must sue in equity."

There no such exception from the doctrine is referred to as has been contended for by the defendants in this case.

It was said by counsel for the defendant company that no case can be found in the books in which a cestui que trust has been held entitled to enforce a right arising under a document under seal unless his interest or the trust appears on the face of the document itself. Even so he is not right because, as I think I intimated to him in the course of the argument, it has been laid down that the cestui que trust of the rights under a patent is entitled to enforce those rights, making his trustee a defendant. That was decided by WARRINGTON, J., in *E. M. Bowden's Patents Syndicate* v. *Herbert Smith & Co.* (8) ([1904] 2 Ch. at p. 91), which was referred to without disapproval—I think I may say with approval—by LORD CAVE in *Performing Right Society* v. *London Theatre of Varieties* (4) ([1924] A.C. at p. 14). In that case the equitable owner of a patent sought to restrain an infringement of the patent not merely by way of interlocutory injunction but at the trial without making the legal owner of the patent a party. WARRINGTON, J., said he was not entitled to do so, but gave him leave to amend by adding the legal owner. What WARRINGTON, J., said was this:

> "Now what is the general rule of the court with regard to an action brought by an equitable owner of property? The common case with which we are most familiar is an action relating to some debt in respect of which the provisions of the Judicature Act, which allow an assignee to bring an action in his own name without joining the assignor, have not been complied with. In that case, unless I am much mistaken, the well-accepted practice of this court is that the legal owner of the property in question must be a party to the action, either as

> plaintiff or defendant. He is the proper person to bring the action. If he does not bring the action, then the course which the plaintiff adopts is that of proving that fact and making him a defendant. But the practice of the court, as I understand it, is that the legal owner of the property must be before the court somehow, in order that he may be bound. Applying that to the present case and holding, as I do, that that agreement of December, 1897, is not a legal but an equitable assignment of the patent, the conclusion I come to is that it is necessary in order to enable these parties to maintain this action to have the legal owner of the patent before the court."

It is unnecessary to add that a patent is a document under seal. I should add this, so that there may be no misconception, that in such a case the cestui que trust, supposing that the right he is seeking to enforce is a contract, does not enforce the performance of the contract to himself but he enforces the performance of the contract to the trustee. One may also refer, I think, usefully to the cases, to some of which our attention was called, in which the question has been considered as to the circumstances in which a residuary legatee may bring an action himself to enforce a right belonging to the testator, making the executor a party; and if that right be not confined to rights arising under a document not under seal, that is to say, if the right exists so as to enable a cestui que trust in such circumstances to enforce a right under seal, it is perfectly plain that the residuary legatee will not be a party to the document, nor will the trust under which he is claiming be expressed in the document. The trust under which he is claiming arises from the will of, say, the covenantee.

Before going on to consider the other principle I wish to make one other observation. I entirely agree with what LAWRENCE, L.J., has said, that in certain cases it may be extremely inconvenient and, indeed, inequitable, to allow a cestui que trust to enforce his right in this way. The cases to which LAWRENCE, L.J., referred were cases in which there was a dispute between the cestuis que trust as to whether the right should be enforced or as to the method in which the right should be enforced. Take the case of residuary legatees of an estate, one of the assets of which consists of a contract by the testator to sell a portion of his real estate, entered into in the course of his life. It may be a question of dispute between the residuary legatees as to whether that contract shall be enforced against the purchaser or whether it would not be wiser to return the deposit and seek damages. That is the sort of question that will arise, and, where the residuary legatees are not at one or where a portion of the residuary legatees are not at one with the executor as to the course that ought to be pursued, it would be wholly wrong for some of the residuary legatees, who are in favour of specific performance, to bring an action claiming that relief, making the executor and the dissenting residuary legatees parties. Of course, the very first question that would have to be determined in the action as between the residuary legatees themselves would be as to whether in the circumstances it was wiser to ask for specific performance or to forfeit the deposit. In order to form an opinion on that question the court might have to consider the opinion of counsel. Of course, all that could not be discussed in the presence of the other party to the contract. I only say that by way of caution to show that I realise that the principle is not to be extended to every case.

I refer to the other principle because I cannot help thinking that the argument of the defendants here is based upon a mixing up of those two principles, which are essentially distinct. The other principle is a principle of the common law, and it is this: Where in a document not under seal A. contracts with B., A. being the agent for C., C. can enforce the contract himself, and B., on the other hand, can enforce the contract against C. But be it observed in that case that when C. enforces the contract he does not enforce it in the name of A., his agent; he enforces it as against B. in his own interest and the contract is performed by B. to C. If the document be under seal that rule does not apply at all, and if it be under seal C. cannot sue B., nor can B. sue C. But that has nothing to do with this principle in equity, which is not dealing with the circumstances in which a third party, a person who is not a party to the contract, can enforce it for his own benefit. As I pointed out just now, under the principle of equity the contract is always enforced in the name and for the benefit of the trust. In the present case no one is suggesting that the contract should be performed in the name of anyone other than the trustee Armstrong. I refer again to that statement of the equitable principle that is to be found in DANIELL'S CHANCERY PRACTICE, because, after stating the principle in the terms in which I have just now read it out, the statement goes on as follows:

> "The preceding cases arose upon covenants formally entered into under seal; the same rule does not, however, apply to less formal instruments, such as ordinary agreements not under seal, where one party contracts as agent for the benefit of another. In such cases, it is not necessary to bring the agent before the court, because the principal is entitled to interpose and supersede the right of his agent, by claiming to have the contract performed to himself, although made in the name of his agent."

In other words, so far from the principle not applying to a contract under seal, it does not apply in some cases to a contract not under seal, for this reason, that in such cases it is not always necessary to bring the trustee or the agent before the court. In my opinion, the two statements that I have read from DANIELL'S CHANCERY PRACTICE are proper and correct statements of the law. In the present case, as has been pointed out, Armstrong, although one of the cestuis que trust under this contract, which has been declared to exist, is willing that if there is to be specific performance of that contract it shall be as much for his benefit as for his other cestui que trust. There is therefore no difficulty in the present case in allowing the two cestuis que trust, the plaintiffs Harmer and King, an order for specific performance in proceedings constituted as these proceedings have been constituted.

I will only add this. In one of the cases relating to residuary legatees (*Yeatman* v. *Yeatman* (9)), VICE-CHANCELLOR HALL said (7 Ch.D. at p. 216):

> "My impression rather is that it would be a correct holding to say that if the circumstances of any given case are such that upon an inquiry directed as to whether any and what proceedings should be taken, the court upon the materials before it would come to the conclusion that it was a proper case for proceedings to be taken, although not necessarily and absolutely certain that they would be successful, there it would be a proper case to allow a party to sue in his own name."

It seems to me that in an inquiry—here no inquiry is necessary because, as I say, Armstrong wishes specific performance of the contract in the circumstances—it would be perfectly obvious that directions would be given to the trustee to enforce this contract and, that being so, it can be done in these proceedings.

For these reasons I agree with the order which has been proposed by the Master of the Rolls.

Appeal allowed and specific performance ordered.
Cross-appeal dismissed and order for an inquiry as to damages discharged.

Solicitors: *H. Leonard Hunter*; *Osborn-Jenkyn & Son.*

[*Reported by* MISS B. A. BICKNELL *and* GEOFFREY P. LANGWORTHY, ESQ., *Barristers-at-Law.*]

HORNIMAN *v.* HORNIMAN

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P.), February 14, 1933]

[Reported [1933] P. 95; 102 L.J.P. 33; 148 L.T. 572;
49 T.L.R. 245; 77 Sol. Jo. 158]

Divorce—Maintenance—Assessment—Arithmetical rule—Principles to be applied—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 190.

Although the considerations which applied in the ecclesiastical courts to awards of alimony must have due weight in determining the proper award of maintenance to a wife after a decree of divorce, the assumption of a fixed arithmetical rule [i.e., the one-third rule] and an indispensable process of applying that rule is erroneous, and disregards the duty imposed [on the court] by statute under which the ability of the husband and the conduct of the parties are to be considered to find out what is the reasonable amount.

Dictum of LORD HANWORTH, M.R., in *Stibbe* v. *Stibbe* (1), [1931] P. at p. 110, adopted.

Notes. Section 190 (1) and (2) of the Judicature Act, 1925, has been repealed: its provisions are now reproduced s. 19 (2) and (3) of the Matrimonial Causes Act, 1950.

As to assessment of the amount of maintenance, see 12 HALSBURY'S LAWS (3rd Edn.) 436, para. 982, and as to dum sola et casta clauses, see ibid. 438, para. 983. For cases as to the amount of maintenance, see 27 DIGEST (Repl.) 616–620, *5765–5790*. For the Matrimonial Causes Act, 1950, s. 19 (2), (3), see 29 HALSBURY'S STATUTES (2nd Edn.) 407.

Cases referred to:

(1) *Stibbe* v. *Stibbe*, [1931] P. 105; 100 L.J.P. 82; 144 L.T. 742, C.A.; Digest Supp.

(2) *Dean* v. *Dean*, [1923] P. 172; 92 L.J.P. 109; 129 L.T. 704; 39 T.L.R. 602; 67 Sol. Jo. 704; 27 Digest (Repl.) 603, *5639*.

(3) *Cooke* v. *Cooke* (1812), 2 Phillim. 40; 161 E.R. 1072; 27 Digest (Repl.) 606, *5682*.

(4) *Otway* v. *Otway* (1813), 2 Phillim. 109; 161 E.R. 1092; 27 Digest (Repl.) 604, *5648*.

(5) *Fisher* v. *Fisher* (1861), 2 Sw. & Tr. 410; 31 L.J.P.M. & A. 1; 5 L.T. 364; 8 Jur.N.S. 103; 10 W.R. 122; 164 E.R. 1055; 27 Digest (Repl.) 613, *5740*.

(6) *Sidney* v. *Sidney* (1865), 4 Sw. & Tr. 178; 34 L.J.P.M. & A. 122; 12 L.T. 826; 11 Jur.N.S. 815; 164 E.R. 1485; on appeal (1866), L.R. 1 P. & D. 78; 36 L.J.P. & M. 73; 17 L.T. 9, H.L.; 27 Digest (Repl.) 618, *5773*.

(7) *Cope* v. *Cope* (1864), unreported.

(8) *Wood* v. *Wood*, [1891] P. 272; 60 L.J.P. 66; 64 L.T. 586; 7 T.L.R. 463, C.A.; 27 Digest (Repl.) 625, *5846*.

(9) *Restall* v. *Restall*, [1930] P. 189; 99 L.J.P. 123; 143 L.T. 225; 46 T.L.R. 398; 74 Sol. Jo. 319, C.A.; 27 Digest (Repl.) 616, *5762*.

Cross-motions on a registrar's report as to permanent maintenance.

On May 6, 1931, the wife petitioner obtained a decree nisi for the dissolution of her marriage, which was made absolute on Nov. 16, 1931. There were four children of the marriage. She re-married on Nov. 21, 1931. Each of the parties had a considerable income. She had petitioned for variation of settlements in her favour, and for maintenance, asking for periodical payments and security. Under a marriage settlement into which both parties brought funds the wife had a certain income, and by the deed of separation the husband covenanted to pay the wife dum sola et casta £600 a year for herself and £300 a year, subject to certain contingencies, for each of three of the children. The elder son under the deed remained with the husband. On the wife's re-marriage the payments under the deed ceased.

On the wife's application for variation of the marriage settlement and for maintenance the registrar reported that he estimated the net income of the husband, subject to tax, at £5,385, and that a third of the joint incomes, less the wife's own income of £1,057, would be £1,090. He thought that the wife should not suffer any diminution of maintenance on the score of her re-marriage. Having regard to all the circumstances, including the conduct of the parties, he submitted that the husband should pay the wife £750 a year, less tax, for joint lives, but that no sum should be secured. The husband's father died during the proceedings, and in a supplementary report the registrar estimated the net increase in the husband's annual income under the father's will at £597, and submitted that though it might be that the amount payable during joint lives should be revised when the husband's reversionary interest in the residue of his father's estate fell into possession, the report already made should stand. It was submitted for the wife that the husband should pay £1,289 a year during joint lives instead of the £750 submitted, and for the husband that he should pay £473.

T. J. O'Connor, K.C., and the *Hon. Victor Russell* for the wife, the petitioner.
Willis, K.C., and *H. W. Barnard* for the respondent husband.
T. Bucknill for the trustees of the settlement.

LORD MERRIVALE, P.—Some exceptional proceedings in this case have necessitated closer examination than usual of the material facts and of the statutory provisions under which the application before the court purports to be made. The petitioner, wife of the respondent, who had been living apart from him under a separation deed, obtained on May 6, 1931, a decree nisi of dissolution of marriage, which was made absolute on Nov. 16, 1931. On Nov. 21, 1931, she re-married. Each of the parties had a considerable income. There had been a marriage settlement of funds to which each had contributed. On the grant of decree absolute the wife proceeded with a petition for variation of the settlement, which had been filed unopposed. She also proceeded with a petition for maintenance under the relevant statutory enactments, and she claims, in effect, to be entitled thereunder to have secured to her such part of her husband's fortune as will make her own income henceforward equivalent to one-third of their combined incomes. The claim last mentioned was keenly contested in the usual proceedings in the registry, and in July last, when the matter seemed ripe for decision, it was re-opened on the death of the husband's father, a wealthy man, who, shortly before his death, had made testamentary dispositions with reference to the husband. The matter comes up now on the original report, an agreed statement of facts, and a supplemental report.

The claims presented here on behalf of the wife raise questions of gravity in respect of the relative rights and obligations of the parties whenever a decree of dissolution is granted on a wife's petition so as to permit of a claim for secured maintenance under the Judicature (Consolidation) Act, 1925, s. 190 (1), or for periodical payments under sub-s. (2) of the same section.

A few additional facts must be stated. The parties married in 1910, and there is issue of the marriage a daughter born in 1914, a daughter born in 1916, a son born in 1919, and a son born in 1926. Under the marriage settlement already referred to the husband assigned to the trustees preferred shares in an important business concern producing £550 a year and the wife brought in property worth £10,000. Upon the separation of the parties in 1930 this deed, already mentioned, was executed, whereby it was provided that

> "during the joint lives of the husband and the wife for which the wife shall remain chaste and shall not be re-married the husband shall pay to the wife the yearly sum of £150 payable in advance in addition to all benefits taken by her under the marriage settlement."

The deed also dealt in detail with matters relating to maintenance and education A and custody of the children of the marriage, and it charged the wife's quarterly allowance on the husband's fund under the settlement, made some provisions as to the husband's property over which the wife is given rights or interests, and extinguished any successional interest the husband might otherwise have had in case he should survive her.

The husband's interests in the wife's settled property will be extinguished by an B order in common form to be made now on her petition for variation of the settlement, and, by virtue of the terms of the deed and of various orders of the court, maintenance will be provided for the three younger children at the rate of £300 a year for each.

In the course of these proceedings the "fortune" of the wife, and the "ability of the husband"—to quote the relevant words of the statute in question—have been C investigated as though the matter in question had been one of settlement or of re-settlement or both. The husband's total income in the three years 1929–1931 averaged £6,125 after payment of expenses. He has spent large amounts on various properties of disputable value and accepted corresponding financial commitments; he has limited interests under the dispositions of his father's will, which must be further mentioned. Apart from the provision for three children made out of the D husband's resources, the wife is found to have a gross yearly income of £1,057 from settled moneys, and the income of her present husband is stated at £1,000 a year.

On the figures which were ascertained at the first inquiry in the registry, counsel for the wife arrived at a figure of £1,257 as the annual amount which, according to their contention, ought to be contributed by the husband by way of addition to the wife's personal income of £1,057 a year so as to bring her total income to E one-third of a joint income of the spouses calculated at £6,942, and they contended that the court ought to order the husband to secure to her for her life the annual sum of £1,257. Counsel for the husband, on the other hand, contended that the sum could be no more than £473, and that in view of the relative position of the parties an order for payment at that rate for joint lives under s. 190 (2) of the Act of 1925 was the largest that should be made. F

I am sorry to have to do again what has been done constantly in recent years, that is, to emphasise once more certain considerations with regard to the jurisdiction which is here invoked. This is not a case of judicial separation with a decree which, under the statute, is to have

> "the same force and effect as a decree for divorce a mensa et thoro had immediately before the commencement of the Matrimonial Causes Act, 1857." G

Such a decree no doubt carries with it a primâ facie claim for alimony on the footing on which alimony was fixed in the ecclesiastical courts, though, as was explained here in *Dean* v. *Dean* (2), there is judicial control on proper grounds even in such cases.

The power here in question is statutory. The relevant words of the Judicature H (Consolidation) Act, 1925, s. 190 (1) and (2), are clear. What may be ordered is that the

> "husband shall . . . secure to the wife such gross sum of money or annual sum of money for any term not exceeding her life, as having regard to her fortune, if any, to the ability of the husband, and to the conduct of the parties, the court may deem to be reasonable"; I

or that in addition to or instead of such an order the husband shall

> "pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance or support as the court may think reasonable."

In applying the decided cases under the statutes now consolidated in the Act of 1925 it must not be overlooked that in some material respects certain elements of marital life have been transformed. In 1857 and for a good many years afterwards the common law operated to vest in the husband the personal property of the wife at the date of the marriage and such property as might accrue to her thereafter. Reference to cases like *Cooke* v. *Cooke* (3) and *Otway* v. *Otway* (4) show the powerful operation in the earlier time of the fact that sometimes the guilty husband stood possessed of the wife's fortune by virtue of a marriage which was still of legal effect, although the ecclesiastical court might decree that he should pay alimony and use its powers of attachment to enforce its decree. Sir John Nicholl sometimes said that, apart from special circumstances, half the income would not be an unreasonable proportion for the wronged party from whom the income had come. Since those days the situation of married women in respect of property has been transformed by a long series of Married Women's Property Acts enacted in successive Parliaments from 1870 onward. The discretionary power brought into being by s. 32 and 1 of the Matrimonial Causes Acts, 1857 and 1866, respectively, now expressed in s. 190 of the Judicature (Consolidation) Act, 1925, has its full scope, but the cases which illustrate its operation must be considered on their material facts with regard to the matters which the statute specifies.

The outstanding decisions in the early days of the exercise of the jurisdiction are *Fisher* v. *Fisher* (5), heard before Sir Cresswell Cresswell, and *Sidney* v. *Sidney* (6), heard before Sir James Wilde. Each case arose under s. 32 of the Act of 1857. The Act of 1866 probably came to be passed by reason of some difficulties which were discussed in Sir J. Wilde's judgment in *Sidney* v. *Sidney* (6). The material passage in the judgment in *Fisher* v. *Fisher* (5) (2 Sw. & Tr. at p. 413) is as follows:

> "In the present case the wife elects to have the marriage dissolved and, although she had strong grounds for complaint, I cannot consider her as in a position at all resembling that of a wife divorced a mensa et thoro. She might have been relieved from the necessity of living with her husband and have remained his wife, but her election was not to be so. Still, although she did so elect, having good grounds for complaint, the respondent may be considered as in some sort depriving her of her position, and the legislature no doubt intended that she should not seek a remedy at the expense of being left destitute. Not being able to derive any assistance from the practice of Parliament or the ecclesiastical court, I must take upon myself the arduous duty of deciding what is reasonable in this case. I consider then, that the wife ought not to be left destitute; on the other hand, I think it would not be politic to give to wives any great pecuniary interest in obtaining a dissolution of the marriage tie. The petitioner had no fortune of her own; the husband has some fortune and trading profits, but they are neither large nor certain. Under such circumstances I think I ought not to award more than a maintenance."

This was done in the exercise of judicial discretion. The judgment in *Sidney* v. *Sidney* (6) emphasises very vigorously the claims of a wife who has been driven by her husband's misconduct to seek dissolution of their marriage. Each of the parties had some secured income. The matter was investigated as it would have been in a suit for judicial separation and a figure was ascertained which, the learned judge said, was

> "as nearly as I have been able to calculate the sum she would have received in the ecclesiastical court as permanent alimony."

He said (4 Sw. & Tr. at p. 179):

> "I am at a loss to discover any reason why the court in construing and applying this section [i.e., s. 32] should deal with the subject in any more niggard spirit than that in which the ecclesiastical court regarded the question of permanent alimony . . . the needs of the wife and the wrongs of the husband are the same in both cases. . . . Why should not the husband's purse be called upon to meet both cases alike? It has been said that in one case she remains a wife and in the other she does not. This remark would carry great weight if the provision were intended to continue in the event of her second marriage;

> but it can hardly affect the rate of allowance made and continued so long only as the wife remains chaste and unmarried." A

The material passage in the decree in *Sidney* v. *Sidney* (6), as recorded in the registry at Somerset House, is in these terms: The judge ordinary pronounced and declared the said marriage to be dissolved, and ordered that

> "The respondent do . . . secure to the petitioner the sum of £245 per annum to be paid to the petitioner by equal quarterly payments so long as she shall remain chaste and unmarried." B

SIR JAMES WILDE had made in 1864 an order on somewhat similar lines (*Cope* v. *Cope* (7)) to those on which he proceeded in *Sidney* v. *Sidney* (6), but whereas alimony pendente lite in that suit had been ordered at the usual rate of a fifth of the husband's income, which was small, the learned judge in the exercise of his C discretion fixed the payment for maintenance at a much reduced rate, but attached the condition: "So long as she leads a chaste life and remains unmarried," as he did later in *Sidney* v. *Sidney* (6) These were both discretionary orders.

In 1867 the terms of the order in *Sidney* v. *Sidney* (6) were discussed on appeal in the House of Lords. The appeal failed hopelessly because the order was discretionary. "Entirely a matter for the discretion of the judge," and "an order D pronounced upon an application to the discretionary power of the court," are phrases from the opinions of the noble and learned lords who heard the appeal.

A time arrived when the limitation dum casta et sola vixerit was regarded as a matter of form so as to be no longer a matter of discretion, but in 1891 the Court of Appeal in *Wood* v. *Wood* (8) found this to be an unwarrantable fetter upon the discretion. Again, what was thought to be settled practice on some of the elements E of these cases was invoked in *Restall* v. *Restall* (9), and the Court of Appeal once more insisted on the necessity of giving attention to all the considerations presented by the statute. A year later in *Stibbe* v. *Stibbe* (1) ([1931] P. at p. 110) the Court of Appeal placed the supposed arithmetical rule in what, as I respectfully suppose, is its proper place. LORD HANWORTH, M.R., summed the matter up in these words:

> "Although the considerations which applied in the Ecclesiastical Courts to F awards of alimony must have due weight in determining the proper award of maintenance to a wife after a decree of divorce, the assumption of a fixed arithmetical rule and an indispensable process of applying that rule is erroneous, and disregards the duty imposed by the section under which the ability of the husband and the conduct of the parties are to be considered to find out what is the reasonable amount." G

Having regard to the state of the authorities I am perplexed at the assumption still confidently made in cases like the present that—irrespective of the facts—there is a primâ facie rule that a divorced husband should share his fortune with his former wife on the footing of the permanent alimony which would be secured to a wife who had become judicially separated—in short that the case is one not H of discretion but of arithmetic. Before the registrar in the protracted discussions which are summarised in his report an arithmetical computation on the one-third rule was being insisted on.

The material passage in the report runs thus:

> "Having regard to all the circumstances of the case, the conduct of the parties, the income of the petitioner, the allowance of £300 a year in respect of each of I three children, and the probable diminution of the income of the respondent, I am of opinion that the respondent should pay to the petitioner £750 a year less tax during joint lives and that no sum should be secured for her life."

The report having been made on July 4, 1932, on July 12 notice of motion was given on the wife's behalf for "an order confirming the registrar's report and such further and other order as may be just." For the husband notice of motion was given on July 19 adversely to the wife's submission. Both motions came on for hearing on July 25. By that time, however, the death of the husband's father was known to the wife's advisers, and at their instance the hearing of the motions was adjourned, and the petition for maintenance was referred back to the registrar in order that consideration might be given to the testamentary dispositions of the father. On an agreed statement of facts the registrar reconsidered the case and made his further report submitting to the same effect as in the first instance, with a proviso relating to certain exceptional dispositions of the father's will. By the will in question it is provided that in case of "any action of [the wife] whereby any part of [the husband's] income may become payable to [the wife] in augmentation of any annual sum now or at any time hereafter directed by the court to be paid by him to her for her maintenance," the trusts of the will in the husband's favour "shall fail and determine." The trusts relate to the income of a sum of £10,000 presently payable to trustees and reversionary interests in the residue of the testator's estate, said to be of the value of about £40,000. The will also relieves the husband from liability for £19,000 lent him at interest by his father in 1929, but it makes the release subject to payment by the husband of the legacy and estate duties attributable to the sum of £19,000.

The paragraph of the further report which deals with the father's dispositions concludes with the finding that the net increase in the husband's income through his father's death "may be taken to be £597." Grounds for this view are sufficiently stated. The submission in the further report is in these terms:

> "Taking all the circumstances into consideration, though it may be that the amount payable during joint lives should be revised when the respondent's reversionary interest in the residue of his father's estate falls into possession, it is submitted as in the previous report."

I take the meaning of the provisional reservations attached to the submission to be this: Inasmuch as the order proposed would be an order under the Judicature (Consolidation) Act, 1925, s. 190 (2), such order would by virtue of the provisions in s. 190 (2) (b) be subject to increase in case the court is satisfied that the means of the husband have increased, and this power of increase should remain in being.

Some discussion took place here as to the effect on the husband's position of his father's death and testamentary dispositions, and some slight efforts were made to work out this problem arithmetically. In the view I take of the case I need not pursue this subject.

The husband was, and is, a man of varied resources, set off in some measure by various large commitments. He could, if the case required it, be ordered to secure in some way the additional income for the wife which is demanded. What is to be determined, though, is whether in the exercise of a judicial discretion he should be ordered to do so.

If the case had arisen under a judicial separation some difficult topics must have been further investigated, and among them these: what addition there really was to the husband's resources by reason of his father's will, and to what extent, and how, this part of his means could at present be resorted to. The registrar thought, on the whole, that the best course would be to make an order in the wife's favour not under s. 190 (1), where the order is final, but under sub-s. (2), where it is capable of enlargement. This commends itself to my judgment.

The question whether the husband should be ordered to secure to the wife some gross or annual sum of money under s. 190 (1) of the statute, and not merely ordered to make periodical payments under s. 190 (2) is not a simple one, apart from the situation under the father's will. There are practical difficulties by reason of his actual position, the character of the possible security, and the extent to which security, which could be ordered, would be of real advantage to the wife. The registrar had these things in mind, as I suppose, when he framed his contingent recommendation as to periodical payments. He, no doubt, would not have made this suggestion if he had thought the case one for security. I accept his view. As to the amount of the periodical payments proposed to be ordered, £750 per annum payable monthly, I contrast this provision with £1,257 postulated on the one hand and the £473 provisionally mentioned on the other. I have been impressed, too, by the fact that under the separation deed executed by the parties in January, 1930, the husband was to pay to the wife during their joint lives while she should remain chaste and unmarried, the yearly sum of £750, in addition to the benefits taken by her under the marriage settlement. From the point of view of security, £750 a year was not negligible. I note, too, that when the registrar's report was issued to the parties in July, 1932, notice of motion to confirm the report was given on the wife's behalf. Bearing in mind the various facts on which I have laid stress, it is, I think, manifestly proper that an order should be made in the terms proposed in the report, and I so decide.

His Lordship granted the wife and trustees orders for their costs.

Report confirmed.

Solicitors: *Withers & Co.*; *Halsey, Lightly, & Hemsley*; *A. F. & R. W. Tweedie.*

[*Reported by* William Latey, Esq., *Barrister-at-Law.*]

Re PENROSE. PENROSE *v.* PENROSE

[Chancery Division (Luxmoore, J.), January 26, 27, 31, February 3, 6, 17, 1933]

[Reported [1933] Ch. 793; 102 L.J.Ch. 321; 149 L.T. 325; 49 T.L.R. 285]

Power of Appointment—Exercise—Power to appoint residue by deed or will among issue of donee's father—Appointment by donee to himself.

Estate Duty—Tenant for life of residue with power to appoint by deed or will among his father's issue—"Competent to dispose"—"Power . . . enabling the donee . . . to appoint or dispose of . . . property as he thinks fit"—Finance Act, 1894 (57 *& 58 Vict., c.* 30), *s.* 5 (2), *s.* 22 (2) (*a*).

A testatrix by her will gave her residuary estate to trustees upon trust to pay the income thereof to her husband for life and "from and after" her husband's death to hold for such of the following persons as he should by deed or will appoint, namely (inter alios), any issue, immediate or remote, of her husband's father, subject to the rule against perpetuities, and in default for her four named sons in equal shares. By deed poll the husband appointed certain sums to himself.

On the questions whether the appointment was valid, whether the husband was "a person [who had] . . . a power . . . enabling the donee . . . to appoint or dispose of such property [viz., the residue] as he thinks fit" within s. 22 (2) (a) of the Finance Act, 1894, and so was "competent to dispose" of the residue within s. 5 (2), and whether estate duty on the residue became payable on his death,

Held: the appointment by the husband to himself was valid, and estate duty on such part of the residuary estate as then remained subject to the trusts of the will became payable on the husband's death because

(i) there was nothing illegal per se in an appointment by a donee of a power in favour of a limited class of persons appointing to himself if the donee was himself a member of the class and not excluded from it. *Taylor* v. *Allhusen* (1), [1905] 1 Ch. 529, followed; dictum in *Re Sinclaire's Estate* (2) (1867), L.R. 2 Eq. 45, dissented from.

(ii) neither the fact that the husband was tenant for life of the residue under the will, nor the words "by deed or will," nor any other of the circumstances of the case operated to exclude the husband from the class; and he could, therefore, appoint the whole or any part of the residue to himself.

(iii) the word "power" in the phrase in s. 22 (2) (a) "a power . . . to appoint or dispose of property as he thinks fit" meant "capacity," and was not confined to the strict legal sense of "power of appointment," and, therefore, a donee of a power who could freely appoint the whole of the fund had "a power to appoint or dispose of [that fund] as he thinks fit" within the meaning of s. 22 (2) (a), and so was "competent to dispose" of that fund within the meaning of s. 5 (2).

Notes. As to the power of a son with power to appoint among his father's issue to appoint to himself, see 34 Halsbury's Laws (2nd Edn.) 185, para. 235, note (s); as to frauds on a power of appointment, see 25 Halsbury's Laws (2nd Edn.) 581, para. 1033; as to property rendered assets by the exercise of a general power, see ibid. 563, para. 1005; and as to the classification of powers to appoint as general or special, see ibid. 511, para. 926. As to the meaning of "competent to dispose," see 15 Halsbury's Laws (3rd Edn.) 12, para. 19; and as to the meaning of "competent to dispose . . . during the continuance of the settlement," see ibid. 49, para. 97, note (d). For the Finance Act, 1894, s. 5 (2), s. 22 (2) (a), see 9 Halsbury's Statutes (2nd Edn.) 356 and 383.

Cases referred to:

(1) *Taylor* v. *Allhusen*, [1905] 1 Ch. 529; 74 L.J.Ch. 350; 92 L.T. 382; 53 W.R. 523; 37 Digest 508, *1004*.

(2) *Re Sinclaire's Estate* (1867), I.R. 2 Eq. 45, 47.

(3) *Tharp* v. *Tharp*, [1916] 1 Ch. 142; 85 L.J.Ch. 162; 114 L.T. 495; 60 Sol. Jo. 176; on appeal, [1916] 2 Ch. 205; 85 L.J.Ch. 622; 115 L.T. 325, C.A.; 37 Digest 508, *1005*.

Originating Summons as to the construction of a will giving (inter alia) a life interest in, and power of appointment among the issue of his father of, the residue of the testatrix's estate to her husband; and as to the estate duty payable on the death of the husband.

By her will dated March 5, 1930, the testatrix, after appointing executors and trustees and giving legacies and specific devises and bequests, directed her trustees to hold her residuary estate upon the trusts following, namely:

> "(a) Upon trust to pay the income thereof to my said husband during his life. (b) From and after the death of my said husband upon trust for such of the following persons or purposes and in such shares if any and upon such trusts if any and with such powers and provisions as my said husband shall by any deed or deeds with or without power of revocation and new appointment or by will or codicil appoint that is to say: (i) Any issue (immediate or remote) of my said late father Lord Peckover subject only to the rule against the creation of perpetuities. (ii) Any issue (immediate or remote) of his my said husband's late father James Doyle Penrose subject to the same rule. (iii) Any charitable purposes falling within the legal conception of charity. But in default of the exercise of this power and subject to any partial exercise thereof my residuary estate shall be held in trust in equal shares for such of my four sons Alexander Peckover Doyle Penrose Lionel Sharples Penrose Roland Algernon Penrose and Bernard Edmund Penrose as shall survive me and the legal personal representatives of such of them as shall die before me leaving lawful issue surviving me as part of the estate of such deceased son and to be disposed of and dealt with accordingly."

She died on July 30, 1930.

By deed poll of May 16, 1931, James Doyle Penrose, the husband, in purported exercise of the power of appointment in the will, irrevocably appointed that the trustees should raise out of the residuary estate and pay to himself and each of his A four sons certain sums.

By another deed poll of even date he, in further exercise of the power, appointed that immediately after his death and in the meantime subject and without prejudice to his own life interest therein and to a power of revocation therein (which he never exercised) the trustees should hold the residue then remaining unappointed of the residuary estate or of the investments for the time being representing the same and B the income thereof in trust for his four sons in equal shares. He died on Jan. 2, 1932.

The Commissioners of Inland Revenue, having claimed that in these circumstances estate duty was payable at a certain rate on the testatrix's residuary personal estate which passed on her death and at a slightly lower rate on her real estate, and that also estate duty was payable on the same property as passing on C the death of the said James Doyle Penrose on the ground that under the power of appointment conferred upon him by the will of the testatrix he was "competent to dispose" of the said residuary estate within the meaning of the Finance Act, 1894, s. 5 (2), and the definition of "competent to dispose of property" contained in s. 22 (2) (a) of the same Act, an originating summons was taken out by the executors of the will of the testatrix for the determination (inter alia) of the ques- D tions whether James Doyle Penrose was an object of the power of appointment thereby created in his favour, and whether he was at the date of his death, or had been during the continuance of the settlement created by the will of the testatrix, a person competent to dispose within the meaning of the Finance Act, 1894, s. 5 (2) of the whole or any and if so what part or parts of the residuary estate of the testatrix; and whether, therefore, estate duty became payable on his death in E respect of the whole or any and if so what part or parts of the residuary estate of the testatrix and the sum or sums appointed or purporting to have been appointed by the deed polls. By agreement between the parties the Commissioners of Inland Revenue were added as defendants to the summons.

The Finance Act, 1894, provides:

> "Section 5 (2): If estate duty has already been paid in respect of any settled F property since the date of the settlement, the estate duty shall not, nor shall any of the duties mentioned in the fifth paragraph of the First Schedule to this Act, be payable in respect thereof, until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of such property."
>
> "Section 22 (2): For the purposes of this Part of this Act—(a) A person shall G be competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were sui juris, enable him to dispose of the property, including a tenant in tail whether in possession or not; and the expression 'general power' includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument or by will, or both, but exclusive of any H power exercisable in a fiduciary capacity under a disposition not made by himself, or exercisable as tenant for life under the Settled Land Act, 1882, or as mortgagee."

Sir A. Underhill for the summons.

Gavin Simonds, K.C., and *Harman* for the defendants, Roland A. Penrose and I Bernard E. Penrose.—The husband, the donee of the power, was not an object of it or at least not a person "competent to dispose of the residue within the meaning of the Finance Act, 1894, s. 5. The power was a special power: (see FARWELL ON POWERS, 3rd Edn., Chap. X, pp. 457, 555, 556). The testatrix has not declared that he should be both donee and object. Here there was no general power. He had not a limited power until something had happened.

Vaisey, K.C., and *Winterbotham* for the defendant, Alfred Ernest Penrose, the legal personal representative of the husband, supported this argument.

J. H. Stamp for the Commissioners of Inland Revenue.—As to the husband being "competent to dispose," he came within s. 22 (2) (a) of the Finance Act, 1894, by reason of the power; he could have disposed of the property without any question of fiduciary capacity. The principal authority is *Taylor* v. *Allhusen* (1). During his lifetime he controlled the income, and had power to take a part out of the corpus and appoint to anyone. It cannot be said that he is not one of the issue of his father. It has never been held, unless expressly declared, that "issue" means "all the children of X. except A." There is no ambiguity here. [LUXMOORE, J.: The ambiguity seems to arise from the form of the gift.] There is a clear intention to exercise a power among a class. In some cases on failure of the persons interested there is a gift to next-of-kin. Being capable of appointing to himself, he is "competent to dispose" of the property.

Cur. adv. vult.

Feb. 17. **LUXMOORE, J.**, read the following judgment.—The object of this summons is to determine whether estate duty became payable in respect of any and what part or parts of the residuary estate of the late Mrs. Elizabeth Josephine Penrose on the death of her husband, Mr. James Doyle Penrose. It was issued at the request of the Commissioners of Inland Revenue, who are joined as defendants. The substantial question is whether James Doyle Penrose was, either at the date of his death or during the continuance of the settlement created by the will of the testatrix, a person "competent to dispose," within the meaning of the Finance Act, 1894, s. 5 (2), of the whole or any part or parts of her residuary estate.

By her will, to which I will refer with more particularity later, the testatrix conferred a power of appointment on her husband, James Doyle Penrose. Among the objects of the power was a class of persons described as the issue immediate or remote of the father of the said James Doyle Penrose. Obviously, apart from any question of construction of the particular will, the husband falls within the description "issue immediate or remote of his father."

Three questions arise. The first, as I understand the argument, is purely one of law. Could the husband, as donee of the power and being within the class of objects, exercise it in his own favour to the exclusion of all other objects? If the answer is in the negative, the other questions are immaterial. If, on the other hand, it is in the affirmative, the second question arises, namely: Is the husband, on the true construction of the will, an object of the power? If the answer is in the negative, again no further question arises, but if it is in the affirmative a further question has to be answered: Was the husband, on the true construction of the relevant sections of the Finance Acts, competent to dispose of the testatrix's residuary estate or any part of it? [His Lordship set out the terms of the will, and continued:] The first question is one of law. It is said that, although this question has been raised in earlier cases, it has never been decided. The earliest case raising the question came before the Chancery Court in Ireland in *Re Sinclaire's Estate* (2). The testator in that case gave all his real and personal estate to his wife, her heirs, executors and administrators in trust for his wife and the children of their marriage in such shares and proportions and in such manner and form as the wife should by deed in her lifetime or by will or codicil appoint. The wife appointed to herself. In support of that appointment it was argued that the will contained a gift to the wife and children as joint tenants with a superadded power to the wife to determine the quantity of the estate to go to herself and them by an appointment to be made by her. The court in the result held that on the true construction of the will the wife took a life interest in the estate with remainder to her children as she should appoint; in other words, the court decided as a matter of construction that the wife was not an object of the power, but LYNCH, J., said in the course of his judgment:

> "Whether assuming a parent to be at once the donee, and one of the objects of such a power as this, that power could be well executed by the donee giving to himself the whole fund with a nominal exception, raises a question on which

> I do not express an opinion, but which I should hesitate to decide in the affirmative."

The point was next raised in the English Courts in *Taylor* v. *Allhusen* (1). It was there held that a lady having a power of appointment among grandchildren, of whom she herself was one, might appoint to herself. The learned judge dealt with the question purely as a matter of construction, but he was referred to *Sinclaire's Case* (2), and he quoted in his judgment and relied on Sir George Farwell's opinion as expressed in his work on Powers. The passage to which reference was made is to be found on p. 492 of the 2nd Edn.. After commenting on *Sinclaire's Case* (2), and the dictum which I have quoted, the learned author says this:

> "But it is submitted that the real question in each case is: Has the testator expressed his intention that the same person shall be donee and object? If the intention is clearly expressed, there is no real reason why the donee should not appoint the whole to himself, if the power authorised an exclusive appointment, or fell within Lord Selborne's Act; or with a nominal exception, if it did not fall within the Act."

It is to be observed that the dictum in *Sinclaire's Case* is general and covers the case where the donee is expressed to be the object of the power. In my judgment the decision in *Taylor* v. *Allhusen* (1) in effect rejects this dictum and, accepting Sir George Farwell's criticism of it, decides against it, holding that the question is in reality one of construction, and not of invalidity arising out of any fiduciary capacity with which the donee of the power has been invested. The point was again raised in *Tharp* v. *Tharp* (3) but was not decided.

I respectfully agree with the opinion expressed by Sir George Farwell to which I have already referred. Quite apart from the decision in *Taylor* v. *Allhusen* (1), I should have come to the conclusion that there is nothing illegal per se in an appointment by a donee of a power in favour of a limited class of persons appointing to himself if, on the true construction of the instrument creating the power, the donee is himself a member of the class and not excluded from it.

The question therefore arises: Is there anything in the will, construed in the light of all the material circumstances which can properly be taken into consideration, to exclude the testatrix's husband from the primâ facie meaning of the words "the issue immediate or remote" of his father. It is argued that I must, on the true construction of this will, come to the conclusion that the husband is excluded from among the objects of the power, first, because he is constituted the tenant for life of the whole of the fund subject to the power, and the trusts after this life interest are limited to take effect through the medium of the trustees "from and after the husband's death." It is certainly not an unusual thing to find gifts limited after a life interest through the medium of a trust under which the life tenant may in certain events take the whole or a part of the capital, and I think that but little weight can be attached to this argument. It is next said that the form of the power itself suggests that the donee must be excluded from among the objects, first, because the form is that usually employed when conferring what lawyers generally call a special or a limited power, and such a power is in its nature fiduciary. This argument really begs the question, because the power can only be fiduciary if the donee is not an object. It is next said that, as the power is to appoint by deed or will, it must be predicated of each object of the power that an appointment may be made to him or her, either by deed or by will, and it is pointed out that the donee never could appoint by will to himself. Again, I do not think this contention has much force. A power to appoint by deed is different to a power to appoint by will. Each is a separate power. The donee is given both powers in order that he may be able to exercise whichever may be appropriate to the occasion.

I have dealt with each of these points separately, but if they are taken altogether, and I think this is the proper method of considering them, I am quite unable to find from them such a clear expression of the testatrix's intention as to leave no reasonable doubt but that she intended to exclude her husband from among the objects of the power she was conferring on him. The words "issue immediate or remote of my husband's father James Doyle Penrose" are clear and unambiguous words. In order to construe these words in any sense other than their primâ facie meaning, I must find sufficient context in the will and the admissible evidence of what are called the surrounding circumstances to leave no reasonable doubt in my mind that the testatrix was using the words in some other sense and what that other sense is. I am quite unable to satisfy these conditions. I am therefore bound to hold that on the true construction of the testatrix's will her husband was himself an object of the power. The power is in terms an exclusive power, and I therefore also hold that on the true construction of the will the husband was entitled at any time after the death of the testatrix to appoint by deed the whole of the fund to himself. So far as he did so by what I have called the first deed of May 16, 1931, he made the fund thereby appointed to himself his own, and no further question arises as to this.

So far as the rest of the fund is concerned, the third question is material: What is the meaning of the words "competent to dispose" in the Finance Act, 1894, s. 5 (2)? The subsection is in these words:

> "If estate duty has already been paid in respect of any settled property since the date of the settlement, the estate duty shall not, nor shall any of the duties mentioned in the fifth paragraph of the First Schedule to this Act, be payable in respect thereof, until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of such property."

Section 22 (2) (a) contains a definition of the words "competent to dispose." It is in these words:

> "(2) For the purposes of this Part of this Act—(a) A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were sui juris, enable him to dispose of the property, including a tenant in tail whether in possession or not; and the expression 'general power' includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument inter vivos or by will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself, or exercisable as tenant for life under the Settled Land Act, 1882, or as mortgagee."

It is argued that the power in the present case is a limited power and does not authorise the donee to appoint or dispose of the property subject to it as he thinks fit. It is said that if he appoints to himself he only acquires the property but does not dispose of it, and that his power to dispose of it as he thinks fit does not arise under the power, but after he has exercised it in his own favour. In my judgment this is too narrow a construction to place on the words of the definition. A donee of a power who can freely appoint the whole of the fund to himself and so acquire the right to dispose of the fund in accordance with his own volition is, in my judgment, competent to dispose of that fund as he thinks fit, and it can make no difference that this can only be done by two steps instead of by one, namely, by an appointment to himself, followed by a subsequent gift or disposition, instead of by a direct appointment to the object or objects of his bounty. If under a power the donee can make the whole of the property subject to it his own, he can by exercising the power in his own favour place himself in the position to dispose of it as he thinks fit. The power to dispose is a necessary incident of the power to acquire the property in question. In my judgment, the word "power" in the phrase "a power to appoint or dispose of as he thinks fit" is not used in the definition section in the strict legal sense attaching to it when used with reference to a power of appointment, but in the sense of capacity; and I think this is made clear by the use of the words "or dispose of" in addition to the words "to appoint," A because otherwise the words "or dispose of" would be mere surplusage.

In the result I hold that, on the true construction of the relevant sections of the Finance Act, 1894, the testatrix's husband was after her death competent to dispose of the residuary estate, and consequently on his death estate duty became payable in respect of such part of the residuary estate as then remained subject to the trusts of the testatrix's will. B

[An appeal was entered from this judgment, but was not proceeded with, terms of settlement having been agreed upon.]

Solicitors: *Waterhouse & Co.*; *Inland Revenue Solicitor*.

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law*.]

C

D

BURR AND OTHERS *v.* ANGLO-FRENCH BANKING CORPN., LTD.

[King's Bench Division (Swift, J.), April 3, 1933]

[Reported 149 L.T. 282; 49 T.L.R. 405; 77 Sol. Jo. 448] E

Practice—Setting aside judgment against non-existent corporation—Jurisdiction to set aside.

Declaratory judgment—Declaration that judgment against non-existent person null and void—Jurisdiction to make.

By two Chilean decrees respectively dated March 20 and April 22, 1931, a Chilean company was formed. Subsequently an English company issued a writ against the Chilean company in England, and on Jan. 19, 1933, obtained judgment on that writ. Meanwhile, by a Chilean decree dated Jan. 2, 1933, the decrees forming the Chilean company had been repealed and left without effect. In an action by the persons in whom the assets of the Chilean company had vested against the English company for a declaration that the judgment of Jan. 19, 1933, was null and void and of no effect and an injunction to restrain the English company from enforcing it, F G

Held: the plaintiffs were entitled to the relief claimed because (i) the court has jurisdiction to set aside a judgment on the ground that the person against whom it was given was a non-existent person at the time when the judgment was given; and an action for this purpose is therefore maintainable.

(ii) the effect of the decree dated Jan. 2, 1933, was to make the Chilean company one which had never come into or had any legal existence, even though it had had a de facto existence. H

(iii) the Chilean company was therefore "at all material times, at the date of writ and subsequently, non existent," and so the "judgment must be set aside and declared a nullity by the court": dictum of Lord Wright in *Lazard Bros. & Co., Ltd.* v. *Midland Bank, Ltd.* (1), [1933] A.C. 289, applied. I

Notes. As to setting aside judgments against non-existent defendants, see 22 Halsbury's Laws (3rd Edn.) 785, para. 1665; and as to the maintainability of actions for declaratory judgments, see ibid. 748, para. 1610.

Cases referred to:

(1) *Lazard Bros. & Co., Ltd.* v. *Midland Bank, Ltd.*, [1933] A.C. 289; 102 L.J.K.B. 191; 148 L.T. 242; 49 T.L.R. 94; 76 Sol. Jo. 888, H.L.; 10 Digest (Repl.) 1299, *9161*.

A (2) *Charles Bright & Co., Ltd.* v. *Sellar* (*No. 1*), [1904] 1 K.B. 6; 72 L.J.K.B. 921; 89 L.T. 431; 52 W.R. 148; 20 T.L.R. 12, C.A.; Digest, Practice 53, *425*.

(3) *Birch* v. *Birch*, [1902] P. 130; 71 L.J.P. 58; 86 L.T. 364; 50 W.R. 437; 18 T.L.R. 485; 46 Sol. Jo. 393, C.A.; 23 Digest (Repl.) 254, *3102*.

(4) *Boswell* v. *Coaks* (1887), 57 L.J.Ch. 101; 57 L.T. 742; 36 W.R. 65, C.A.; B 30 Digest (Repl.) 208, *499*.

Action in which the plaintiffs claimed a declaration that a judgment obtained by the defendants against the Compania de Salitre de Chile was null and void, and an injunction to restrain the defendants from taking any steps to enforce such judgment.

C The plaintiffs were members of a Liquidation Commission appointed by the Chilean Court to wind-up the affairs and take over the assets of the Compania de Salitre de Chile. That company had been brought into existence by two decrees of the Chilean Legislature, No. 2100 of March 20, 1931, and No. 2827 of April 22, 1931; and an Act of the Chilean Parliament, Law 4863 of July, 1930, had authorised the Government to hold shares in the company.

D By a Presidential decree of Jan. 2, 1933, it was ordered that the two decrees, Nos. 2100 and 2827 be repealed and left without effect.

On Jan. 19, 1933, the defendants obtained judgment against the Compania de Salitre de Chile in an action tried in the King's Bench Division by LAWRENCE, J. The plaintiffs now sought a declaration that that judgment was null and void and of no effect, and an injunction to restrain the defendants from enforcing it, on E the ground that it had been obtained against a non-existent entity. The defendants denied that the Compania de Salitre de Chile had no existence and they further contended that the present action did not lie.

Stuart Bevan, K.C., and *Wilfrid Lewis* for the plaintiffs.
Harold Murphy for the defendants.

SWIFT, J.—This case raises important and difficult questions of law. Two F questions arise; the first is, will the action as it is brought before me lie at all? On Jan. 19, 1933, a judgment was given by LAWRENCE, J., in an action in which the present defendants, the Anglo-French Banking Corpn., Ltd., sued the Compania de Salitre de Chile. When it was sought to enforce that judgment objection was taken by the present plaintiffs, three gentlemen who have been appointed to take over the assets lately belonging to that company, and they say that the company G never in law existed and could not be sued now. They bring the present action claiming that the judgment which was given in these courts on Jan. 19, 1933, shall be declared to be null and void and of no effect, and asking for an injunction restraining the defendants or their agents or servants from enforcing or taking any steps to enforce the said judgment in any way whatsoever.

The first point which has to be decided is, will such an action lie? I think it H will. It is clear on the authorities that where there is an allegation that a judgment has been obtained by fraud the courts will stay any further proceedings under that judgment. I do not think that such an action, to have a judgment declared to be null and void, is limited to cases of fraud. In *Charles Bright & Co., Ltd.* v. *Sellar* (2) COZENS-HARDY, L.J., said (89 L.T. at p. 433):

> "Doubtless there is ample jurisdiction now to deal by fresh action with some I matters which were formerly the subject of a bill of review, or of a supplemental bill in the nature of a bill of review. For instance, where a judgment has been obtained by fraud—*Birch* v. *Birch* (3)—or where fresh material evidence has been obtained since the judgment which could not have been previously procured—*Boswell* v. *Coaks* (4)—an action may be maintained. Actions of this nature do not invite the High Court to re-hear upon the old materials. Fresh facts are brought forward, and the litigation may be well regarded as new and not appellate in its nature, because not involving any decision contrary to the previous decision of the High Court."

In *Lazard Bros. & Co., Ltd.* v. *Midland Bank, Ltd.* (1) LORD WRIGHT, dealing with the question whether an order nisi should not be set aside on the ground that the judgment was a nullity, having been signed against a non-existent defendant, said:

> "It is clear law, scarcely needing any express authority, that a judgment must be set aside and declared a nullity by the court in the exercise of its inherent jurisdiction if and as soon as it appears to the court that the person named as the judgment debtor was at all material times, at the date of the writ and subsequently, non-existent."

It seems to me that in addition to fraud as being a ground for such an action as the present, and in addition to material evidence, which could not have been obtained before the judgment, coming to light, being a ground, the fact that those bringing the action are able to satisfy the court that the person who was sued was indeed a non-existent person at the time when the judgment was given, is also a ground for bringing such an action as this, and therefore I do not assent to the argument of counsel for the defendants that this action is not maintainable. In my view it is maintainable, and I go on to consider whether it should succeed.

The action arose out of the affairs of a Chilean company, the Compania de Salitre de Chile. It was an action which arose in this way. The company was formed under Chilean law by the making of two decrees, which are documents describing the formation of the company. One was dated March 20, 1931, and the other April 22, 1931. In order that the Government might take a share in the promotion of that company it was necessary to pass something in the nature of a special Act of Parliament, that is Law 4863 of July, 1930. I take the view of that law put forward by one of the witnesses on behalf of the plaintiffs in this action, that it was merely to enable the Government to take a share in the company which was subsequently to be formed in the ordinary way by decrees. Had there been no such enabling piece of legislation the Government could not have taken any share either in the promotion or in the capital of the company. In order that they might do that the enactment of Law 4863 was necessary; but, apart from authorising the Government to take part in the promotion and to take shares in the company, that law was of no effect in forming the company. The company did not owe its existence to Law 4863, but to the two decrees. It was from them that it derived its entire juridical existence; without those two documents it could never have come into existence at all.

On Jan. 2, 1933, seventeen days before the judgment was given by LAWRENCE, J., there was a Presidential decree issued which is an effective and binding decree, by which it was decreed that decrees numbers 2100 and 2827 of March and April, 1931, which respectively approved the articles of the company and declared it to be legally formed, are repealed and left without effect. It is argued for the plaintiffs that, as soon as that decree came into force and repealed the two decrees to which this company owed its very existence and without which it could not go on, the company came to an end, and came to an end because it had never been born. Counsel for the plaintiff argued, and I think rightly, that the effect of repealing these two decrees was to make the company, which at one time had been a de facto entity, one which had never had any de jure existence. It had during its de facto existence acquired properties and incurred debts for the purpose of dealing with certain matters. The three plaintiffs were appointed the liquidators. They took their rights under powers which were conferred on them by the ordinary law or by some subsequent decree, not as being the liquidators of the company as we understand it over here, where a company goes on although it is in liquidation, but they took them as the property which had been acquired by an entity which never had had any legal existence, and that property was handed over to them for the purposes of liquidation. I think that this company never did come, owing to the effect of that Presidential decree, into legal existence; that throughout the time of its activities it was what has been called a de facto but not a de jure entity. And I think, therefore, that it comes within the words of LORD WRIGHT in *Lazard's Case* (1); it was "at all material times, at the date of writ and subsequently, non-existent." In my view the plaintiffs are entitled to have the declaration and injunction for which they ask, and the costs of the action.

Solicitors: *Slaughter & May*; *Stephenson, Harwood, & Tatham.*

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

Re THOMPSON. PUBLIC TRUSTEE *v.* LLOYD

[CHANCERY DIVISION (Clauson, J.), May 11, 1933]

[Reported [1934] Ch. 342; 103 L.J.Ch. 162; 150 L.T. 451]

Will—Legacy to be applied towards the promotion and furtherance of fox-hunting—Need for undertaking by legatee to apply legacy in furtherance of fox-hunting—Appropriate order.

A. bequeathed £1,000 to B. to be applied by him in such manner as in his discretion he might think fit towards the promotion and furtherance of fox-hunting.

Held: (i) the gift was not a gift to B. personally, nor was it a charitable gift, yet the object of the gift was sufficiently definite to enable the gift to be enforced by the court; (ii) the proper way to deal with the matter was not to make a general declaration, but to make an order that, on B. giving an undertaking to apply the money towards the promotion and furtherance of fox-hunting, the legacy should be paid to B., but that the residuary legatees should have liberty to apply to the court in case the legacy was not so applied.

Pettingall v. *Pettingall* (1) (1842), 11 L.J.Ch. 176, applied.

Notes. Considered: *Re Astor's Settlement Trusts, Astor* v. *Scholfield*, [1952] 1 All E.R. 1067.

As to lawful objects of trusts, see 33 HALSBURY'S LAWS (2nd Edn.) 411, para. 192; and as to gifts for the maintenance of particular animals, see 4 HALSBURY'S LAWS (3rd Edn.) 234, para. 515.

Cases referred to:

(1) *Pettingall* v. *Pettingall* (1842), 11 L.J.Ch. 176; 8 Digest (Repl.) 357, *361*.

(2) *Re Dean, Cooper-Dean* v. *Stevens* (1889), 41 Ch.D. 552; 58 L.J.Ch. 693; 60 L.T. 813; 5 T.L.R. 404; 8 Digest (Repl.) 358, *362*.

(3) *Re Nottage, Jones* v. *Palmer*, [1895] 2 Ch. 649; 64 L.J.Ch. 695; 73 L.T. 269; 44 W.R. 22; 11 T.L.R. 519; 39 Sol. Jo. 655; 12 R. 571, C.A.; 8 Digest (Repl.) 358, *370*.

(4) *Morice* v. *Durham (Bp.)* (1805), 10 Ves. 522; 32 E.R. 947, L.C.; 8 Digest (Repl.) 390, *836*.

Adjourned Summons for a declaration as to the validity of a gift by will.

The testator, who died in August, 1932, bequeathed a legacy of £1,000 to his friend George William Lloyd, to be applied by him in such manner as in his discretion he might think fit towards the promotion and furtherance of fox-hunting, and he devised and bequeathed his residuary estate to Trinity Hall, Cambridge University, to be applied in such manner as the master and fellows thought fit. An originating summons was taken out by the executors, which asked whether the legacy was a valid legacy, or whether it failed for want of an object, or for uncertainty, or on other grounds.

Henry Johnston for the executors.

J. V. Nesbitt for the legatee, George William Lloyd. The fact that there is no cestui que trust who can enforce application of the legacy does not prevent it from being a valid bequest: *Re Dean, Cooper-Dean* v. *Stevens* (2). [He also referred to *Re Nottage, Jones* v. *Palmer* (3).]

J. M. Paterson for the residuary legatee, Trinity Hall, Cambridge.—There is no cestui que trust nor any person in whose favour the court can order the performance of the trust, therefore the bequest is invalid: *Morice* v. *Durham* (4).

CLAUSON, J., stated the facts, and continued.—In the first place, it is clear that the legatee is not entitled to the legacy for his own benefit, nor indeed does he so claim it, but he is anxious to carry out the testator's expressed wishes, if and so far as he lawfully may do so. No argument has been put forward which could justify the court in holding this gift to be a gift in favour of charity, although it may well be that a gift for the benefit of animals generally is a charitable gift; but it seems to me plain that I cannot construe the object for which this legacy was given as being for the benefit of animals generally. In my judgment, the object of the gift has been defined with sufficient clearness, and is of a nature to which effect can be given. The proper way for me to deal with the matter will be, not to make the general declaration for which the summons asks, but, following the example of KNIGHT-BRUCE, V.-C., in *Pettingall* v. *Pettingall* (1), to order that, on the defendant, the legatee, giving an undertaking—which I understand he is willing to give—to apply the legacy when received by him towards the object expressed in the testator's will, the executors are to pay to the defendant legatee the legacy of £1,000; and that, in case the legacy should be applied by him otherwise than towards the promotion and furthering of fox-hunting, the residuary legatees are to be at liberty to apply.

Solicitors: *Guscotte, Wadham, Tickell & Co.*; *Gray & Dodsworth*; *Saville & Mannooch.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

STEVENS & SONS *v.* TIMBER AND GENERAL MUTUAL ACCIDENT INSURANCE ASSOCIATION, LTD.

[COURT OF APPEAL (Slesser and Romer, L.JJ.), January 17, February 1, 1933]

[Reported 102 L.J.K.B. 337; 148 L.T. 515; 49 T.L.R. 224; 77 Sol. Jo. 116]

Arbitration—Stay of legal proceedings—Insurance policy containing arbitration clause—Repudiation by insurer—Action by insured to enforce policy—Right of insurer to a stay—Arbitration Act, 1889 (52 *&* 53 *Vict.*, c. 49), *s.* 4.

The recital in an insurance policy, made on July 14, 1926, for indemnity against claims by workmen provided that the statements made in the proposal form "shall be the basis of this contract and be considered as incorporated herein," and that "the due observance and fulfilment of the conditions of this policy shall be a condition precedent to any liability of the" insurers. By the proposal form the insured had stated on June 9, 1926, that none of their employees had lost the sight of one or both eyes. Clause 10 of the policy provided for the reference of disputes to arbitration, and further provided that, where the insurers did not claim to avoid liability on the ground of fraud, the insured "shall not be entitled to commence or maintain any action at law . . . on this policy till the amount due to the insured shall have been awarded as hereinbefore provided, . . . and the obtaining of such award shall be a condition precedent to the commencement of any action . . . upon this policy." On March 7, 1928, one of the insured's workmen suffered an accident, in respect of which he later made a claim against the insured. While considering this claim the insurers discovered that the workman had both lost his eye and been in the employment of the insured since before June 9, 1926. Thereupon, on Oct. 24, 1932, the insurers' solicitors wrote to the insured, referring to the statement in the proposal form and their discovery, that the statement "was not a true one and constitutes a breach of warranty, and in consequence we hereby declare the insurance void from inception. We will render to you in due course a statement of the premiums and claims since 1928 in total." The insurers further refused to indemnify the insured against the claims of the workman in question, and of another workman who was also claiming at that time. On Oct. 27, 1932, the insured replied that they wished "to continue our insurance with you," asked for an interview, and stated they had never known that the workman was sightless in one eye. At the interview the insurers declined to consider the withdrawal of the repudiation. On Nov. 24, 1932, the insured issued a writ claiming that the policy was a valid and subsisting one, that the insurers were liable to indemnify the insured thereunder against the claims of the two workmen, and repayment of the sums paid to the two workmen by the insured, but did not claim damages for breach of contract. On Dec. 2, 1932, the insurers' solicitors entered an appearance under protest and wrote that "in our opinion the proper way of dealing with the case is to refer it to arbitration under the terms of the policy. We, therefore, beg to give you notice that on behalf of our clients we withdraw the repudiation of the policy without prejudice to any claims thereunder." On Dec. 15, 1932, the insurers took out a summons to stay the action under s. 4 of the Arbitration Act, 1889, and by their affidavit in support of the summons deposed that they "at the time when the action was commenced . . . were and still remain ready and willing to do and concur in all things necessary for causing the said matters to be decided by arbitration." The insurers at no time alleged fraud against the insured.

Held: the action should be stayed because

(i) the facts stated above showed that the insurers never intended to repudiate the whole contract as such, but only to repudiate their liability under the contract, for in repudiating they relied solely on an alleged untrue statement in the proposal form, which the parties agreed to treat as part of the contract between them, as an exoneration of their liability on the policy;

(ii) as the insurers had not repudiated the policy they were entitled thereunder to a stay: *Woodall* v. *Pearl Assurance Co.* (1), [1919] 1 K.B. 593, followed;

(iii) even if the letter of Oct. 24 had amounted to a repudiation of the policy by the insurers, the insured, by their letter of Oct. 27 and by their claim under the policy in this action, had refused to accept such repudiation, and so had rendered the repudiation ineffective, and entitled the insurers to claim the stay under the policy.

Golding v. *London and Edinburgh Insurance Co.* (2) (1923), 43 Lloyd, L.R. 487, and *Freshwater* v. *Western Australian Insurance Co., Ltd.* (3), [1933] 1 K.B. 515, applied. *Jureidini* v. *National British and Irish Millers' Insurance Co.* (4), [1915] A.C. 499, explained by ROMER, L.J.

Notes. The Arbitration Act, 1889, has been repealed: provisions essentially similar to those contained in s. 4 of the 1889 Act are now contained in s. 4 of the Arbitration Act, 1950.

Considered: *Toller* v. *Law Accident Insurance Society, Ltd.*, [1936] 2 All E.R.

952; *Heyman* v. *Darwins, Ltd.*, [1942] 1 All E.R. 337. Referred to: *Jones* v. *Birch Bros., Ltd.*, ante, p. 251.

As to clauses making the arbitrator's award a condition precedent to any action on a policy of non-marine insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 464, 465, para. 690; and for cases on the subject see 2 DIGEST 355, *290* et seq. As to the repudiation of such clauses, see 2 HALSBURY'S LAWS (3rd Edn.) 20, para. 48; and for cases on the subject see 2 DIGEST 332–333, *145–147*. For the Arbitration Act, 1950, s. 4, see 29 HALSBURY'S STATUTES (2nd Edn.) 93.

Cases referred to:

(1) *Woodall* v. *Pearl Assurance Co.*, [1919] 1 K.B. 593; 88 L.J.K.B. 706; 120 L.T. 556; 83 J.P. 125; 63 Sol. Jo. 352; 24 Com. Cas. 537, C.A.; Digest Supp.

(2) *Golding* v. *London and Edinburgh Insurance Co.* (1923), 43 Lloyd, L.R. 484.

(3) *Freshwater* v. *Western Australian Insurance Co., Ltd.*, [1933] 1 K.B. 515; 102 L.J.K.B. 75; 148 L.T. 275; 49 T.L.R. 131; 76 Sol. Jo. 888, C.A.; Digest Supp.

(4) *Jureidini* v. *National British and Irish Millers' Insurance Co., Ltd.*, [1915] A.C. 499; 84 L.J.K.B. 640; 112 L.T. 531; 31 T.L.R. 132; 59 Sol. Jo. 205, H.L.; 2 Digest 333, *146*.

(5) *Stebbing* v. *Liverpool and London and Globe Insurance Co.*, [1917] 2 K.B. 433; 86 L.J.K.B. 1155; 117 L.T. 247; 33 T.L.R. 395, D.C.; 29 Digest 415, *3249*.

(6) *Hirji Mulji* v. *Cheong Yue Steamship Co.*, [1926] A.C. 497; 95 L.J.P.C. 121; 134 L.T. 737; 42 T.L.R. 359; 31 Com. Cas. 199; 17 Asp.M.L.C. 8, P.C.; Digest Supp.

(7) *Johannesburg Municipal Council* v. *D. Stewart & Co.* 1909, 46 Sc.L.R. 657; 1909 S.C. 53; 2 Digest 332 *e*.

Interlocutory Appeal from an order dated Dec. 20, 1932, made by ACTON, J., in Chambers, staying further proceedings in the action under s. 4 of the Arbitration Act, 1889.

The plaintiffs, the insured, claimed (i) A declaration that the policy of insurance made by the defendants, the insurers, on June 14, 1926, issued by them to the insured, and renewed thereafter annually and on June 16, 1932, was a valid and subsisting policy; (ii) a declaration that under the policy the insurers were liable to indemnify the insured in respect of the claims of two of their workmen, Harness and Charles Lawrence, for compensation under the Workmen's Compensation Acts; (iii) repayment of the sum of £11 12s. paid by the insured to the said Harness by way of workmen's compensation; (iv) repayment of all sums paid by the insured to the said Charles Lawrence by way of workmen's compensation.

The following affidavits were sworn in support of and against the application to stay all further proceedings in the action.

> "I Gertrude Bessie Goodman of Bond Court House, Walbrook, in the City of London, spinster, secretary to the [insurers], make oath and say as follows: (i) This action is brought for a declaration that the policy of insurance made by the [insurers] and issued to the [insured] is a valid and subsisting policy and for repayment of certain sums paid by the [insured] by way of workmen's compensation. (ii) By the policy made on or about the 14th day of June, 1926, between the [insured] and [insurers] it was agreed inter alis by condition 10 thereof that if any dispute question or difference should arise between the [insurers] and the [insured] the same should be referred to two arbitrators in accordance with the conditions of the Arbitration Act, 1889. (iii) The matters in dispute and difference in this action between the parties hereto are relative to the policy within the meaning of the said condition, and are fit and proper to be referred to and decided by arbitration pursuant to the terms thereof. (iv) There is no sufficient reason why the said matters should not

> be so referred and decided. (v) the [insurers] have taken no further step in this action beyond causing an appearance to be entered thereto which was entered on Dec. 2 last. (vi) At the time when the action was commenced the [insurers] were and still remain ready and willing to do and concur in all things necessary for causing the said matters to be decided by arbitration under the said agreement and for the proper conduct of such arbitration."
>
> "We, Stanley Stevens, of 14, Muswell Hill Road, Highgate, in the county of Middlesex, builder and contractor, and Louis Hance Falck, of 58, Margaret Street, W., in the county of London, solicitor, severally make oath and say as follows: First, I, Stanley Stevens, for myself, say: (i) I am a partner in the [insured] firm and am duly authorised by them to make this affidavit. (ii) As appears from the correspondence by letter dated Oct. 24, 1932, the [insurers] declared the insurance in question void from its inception, claiming a refund in respect of claims paid by them, and declined to withdraw their said repudiation of the policy up to the date of the writ herein. (iii) I had the conduct of this matter on behalf of the [insured], and I was present at the interview which took place between the [insured] and the [insurers] with regard thereto on Wednesday, Nov. 2, 1932. The [insurers] have not on any occasion within my knowledge offered arbitration in this matter prior to the date of the issue of the writ herein."
>
> "And next I, Louis Hance Falck, for myself say: (iv) I am a partner in the firm of Roberts, Seyd, Jackman, & Falck, the solicitors for the [insured] herein, and I am duly authorised by my said firm to make this affidavit. (v) I wrote the letter of Nov. 24, 1932, and I was present at the interview referred to therein. The [insurers] have not on any occasion within my knowledge offered arbitration in this matter prior to the date of the issue of the writ herein or until the [insurers'] solicitors wrote the letter of Dec. 2, 1932."

The Master directed that all further proceedings in the action be stayed. The insured appealed to ACTON, J., who dismissed their appeal. The insured appealed.

The relevant provisions of the proposal form and policy, the relevant parts of the correspondence and the facts (which are summarised in the headnote) are set out in full in the judgment of SLESSER. L.J.

G. M. Hilbery, K.C., and *Paul Springman* for the insured.
F. Van den Berg, K.C., and *H. D. Samuels* for the insurers.

The arguments appear from the judgments.

Cur. adv. vult.

Feb. 1. The following judgments were read:

SLESSER, L.J.—This is an appeal from an order of ACTON, J., that all further proceedings in the action be stayed under s. 4 of the Arbitration Act, 1889.

The events which led up to this application for a stay are as follows: Messrs. Stevens & Sons, the insured, carry on the business of builders and the like on a large scale, and employ a large number of workmen. On June 9, 1926, they made a proposal of insurance for indemnity under the Workmen's Compensation Act, 1925, the Employers' Liability Act, 1880, the Fatal Accidents Act, 1846, and common law in respect of their staff. They declared that their total wages for the year 1925 were about £14,000. One of the questions on the proposal form—5a—was as follows: "Have any of your employees lost the sight of one or both eyes?" To which the answer was: "No."

In accordance with this proposal on June 14, 1926, the insurers granted the insured an indemnity policy. In that policy it was recited that:

> "Whereas [the insured] carrying on the business of builders and the like have made to the [insurers] a written proposal and declaration containing certain particulars and statements which it is hereby agreed shall be the basis of this contract and be considered as incorporated therein . . ."

and there was a provision that:

> "The due observance and fulfilment of the conditions of this policy shall be a condition precedent to any liability of the [insurers] under this policy."

By cl. 10 of the conditions it was provided as follows:

> "If any dispute, question, or difference shall arise between the [insurers] and the [insured], his executors, administrators, or assigns, relative to this policy, or the construction thereof, or the amount to be paid thereunder, or the rights, duties, or liabilities of either party hereto, the same shall, subject as hereinafter mentioned, be referred to two arbitrators, in accordance with the provisions of the Arbitration Act, 1889, or any statutory modification thereunder for the time being in force. And in case either party refuse or neglect to appoint an arbitrator within fourteen days after notice being given, the arbitrator chosen by the other party shall proceed to make his award as if he had been sanctioned or chosen by both parties, and the same shall be binding on both parties. And in case of disagreement of the arbitrators, then of an umpire, who shall have been chosen by the arbitrators before entering on the said reference. And it is hereby expressly dclared to be a condition of the making of this policy, and part of the contract between the [insurers] and the [insured], that where the [insurers do] not claim to avoid liability under the policy on the ground of fraud, the party insured or claimant shall not be entitled to commence or maintain any action at law or suit in equity on this policy till the amount due to the assured shall have been awarded as hereinbefore provided, and then only for the sum so awarded, and the obtaining of such award shall be a condition precedent to the commencement of any action or suit upon this policy."

The other material condition is cl. 9, which was in the following terms:

> "If the [insured] during the continuance of this policy or any renewal thereof, shall take into his employment any person who has lost the sight of one or both eyes, the use of one or both hands or feet, or who is maimed or crippled, the [insured] shall forthwith notify the [insurers] thereof, giving full particulars in writing, and unless and until the [insurers] notify the [insured] in writing that the [insurers] elect that this policy, or the renewal thereof, shall apply in respect of such employee, this policy and any renewal thereof shall as to any such injured, maimed, or crippled employee, apply in all respects as if such employee were not and had not been employed by the [insured]."

The policy was expressed to be renewable annually, and was in fact renewed so that the times here in question were within the periods covered by the policy.

On March 7, 1928, a certain workman in the employment of the insured—Charles Lawrence—met with an accident arising out of and in the course of his employment. The injury was a septic hand, and in respect of such accident he was paid compensation until June 18, 1932, at the rate of 30s. per week, since reduced to 23s. 6d. per week. On Aug. 3, 1932, he started arbitration proceedings under the Workmen's Compensation Act, 1925, claiming full compensation at 30s. per week from June 25, 1932, less the partial compensation paid at 23s. 6d. per week; his case being one which would normally fall within the indemnity policy. A number of medical examinations followed, and, on Oct. 24, 1932, the solicitor to the insurers wrote to the insured to say that:

> "We are surprised to learn on receipt of the report that this workman lost the sight of his left eye some thirty or thirty-five years ago."

They pointed out that, in answer to the question whether an employee had lost the sight of one or both eyes, the answer in the proposal form of June 9, 1926, was "No," and that the workman had then been in the employ of the insured about six years. They then continued as follows:

> "In these circumstances the answer was not a true one and constitutes a breach of warranty, and in consequence we hereby declare the insurance void from inception. We will render to you in due course a statement of the

> A premiums and claims since 1928 in total. We believe that there will be a balance payable to us. In the meantime both this claim and that of Harness will fall to be dealt with by yourselves. We hand you the arbitration papers in this case for attention. The hearing has been adjourned, which will allow you ample time to deal with them."

B The arbitration papers so handed over were those of the workman Charles Lawrence, under the Workmen's Compensation Act, to which I have already referred, and of another workman claimant, Mr. Harness.

On Oct. 27 in reply to this letter, the insured pointed out that "Lawrence has never disclosed to us that one of his eyes was sightless." They note

> "that your letter of the 24th gives notice that you treat the whole insurance C void from its commencement in consequence of the alleged misstatement in the original application,"

and they ask for an interview to discuss the matter and to continue the insurance.

On Nov. 24, 1932, the solicitors for the insured wrote that:

> "With reference to our interview at your office when your assessor definitely declined to consider the withdrawal of the repudiation of our client's policy, D counsel has advised us to issue a writ."

This statement that the assessor had declined to consider the withdrawal of the repudiation was never contradicted by the insurers, and I assume it to be true.

The writ, which was enclosed, claims that the policy is a valid and subsisting one, that the insurers are liable to indemnify the insured in respect of the claims E of Lawrance and Harness (one other workman) for compensation and repayment of all sums paid to the two men by way of workmen's compensation.

On Dec. 2 the solicitors for the insurers again wrote as follows:

> "We have gone into the matter, and in our opinion the proper way of dealing with this case is to refer it to arbitration under the terms of the policy. We, therefore, beg to give you notice that on behalf of our clients we withdraw the F repudiation of the policy without prejudice to any claims thereunder."

They further state that they have entered an appearance under protest, and add,

> "Let us hear from you that no further step in the action will be taken having regard to this withdrawal of repudiation, otherwise of course we shall have to take out an application to stay the action."

G A summons for stay was duly taken out on Dec. 15; the order to stay was made by the master in chambers; and on appeal the master's order was upheld by the learned judge, from whom appeal is now brought.

On a careful consideration of all the facts of this case I have come to the conclusion that the insurers never intended to repudiate the whole contract as such, but only to repudiate their liability under the contract, for in repudiating they H rely solely on an alleged untrue statement in the proposal form, which the parties agreed to treat as part of the contract between them, as an exoneration of their liability on the policy.

The case thus resembles *Woodall* v. *Pearl Assurance Co.* (1), where the insurance company similarly had denied liability on the policy in part on the ground that the assured had made a mis-statement (in that case of occupation) in the proposal. It I was held that the company, by relying on the terms of the policy which rendered it void in certain events, did not thereby repudiate the policy as a binding contract between the parties, but insisted on the obtaining of an award as a condition precedent to a right of action. In the present case there is attached to the proposal a statement to be signed by the proposer that the proposer has not suppressed, misrepresented or mis-stated any material fact. Though it is not in terms said that such a suppression, misrepresentation, or mis-statement shall, ipso facto, render the policy null and void as was the fact in *Woodall's Case* (1), it is agreed that the declaration shall be the basis of the contract between the proposer and the insurers. I have no doubt whatever language was used that, in reality, the A case of the insurers is based on the proposal and policy itself, and that their case is and always was that by reason of an untrue statement in the proposal form they were free from liability. If this be so, the principle to be applied is clear. Their application for arbitration is not only consistent with *Woodall's Case* (1), but with all other authority.

As was said by LORD READING, C.J., in *Stebbing* v. *Liverpool and London and* B *Globe Insurance Co.* (5) ([1917] 2 K.B. at p. 437):

> "In the present case the company are claiming the benefit of a clause in the contract when they say that the parties have agreed that the statements in question are material and that they induced the contract. If they succeed in escaping liability that is by reason of one of the clauses in the policy. In resisting the claim they are not avoiding the policy but are relying on its terms. C In my opinion, therefore, the question whether or not the statement is true is a question arising out of the policy."

Were the matter to rest here the present case would produce little or no difficulty, but, unfortunately, the insurers, in repudiating liability on the policy, in the letters which I have read and in their interviews, have used language which might be D taken to amount to such a total repudiation of the whole contract as to bring the case within that class of liability referred to by the learned judges in *Woodall's Case* (1) as a repudiation of the contract, in the sense that they are "disputing the existence of any binding contract at all": per BANKES, L.J. ([1919] 1 K.B. at p. 604). And the real issue to be decided here is whether the insurers have so conducted themselves that it is no longer possible for them to say that they have E not so repudiated the whole contract.

However, as I have said, I have come to the conclusion that they never intended so to repudiate the whole contract, and, further, I think they were not understood by the insured so to have repudiated it. It is true that on Oct. 24 the insurers declare the policy "void from inception," but the reason why they purport to do so is alleged to be because of a mis-statement in the proposal form, and they describe F the statement as not a true one, and declare that it constitutes a breach of warranty. Though the word "warranty" is sometimes treated as a breach of condition going to the root of the contract, I see no reason here for taking the view that the insurers had any such intention. I think that, if their letter be read as a whole, they meant that the breach freed them from liability within the contract, but not that it had had the effect of destroying the contract altogether.

Moreover, the insured never accepted repudiation in the wider sense. On G Oct. 27, 1932, in answer to the alleged total repudiation, they say they wish "to continue our insurance with you," and when they come to issue their writ, they founded their action, in so far as it was a claim for money, on repayment of all sums paid by the insured to the workmen Lawrence and Harness by way of workmen's compensation, that is, under the policy. They added a consequential claim for declaration that the policy was valid and subsisting, but did not claim damages H for breach of contract: an appropriate remedy if they thought that the whole contract had been repudiated: see GREER, L.J., in *Golding* v. *London and Edinburgh Insurance Co.* (2) (43 Lloyd, L.R. at p. 489).

In the same case SCRUTTON, L.J., said (43 Lloyd, L.R. at p. 488) that

> "the plaintiff is claiming under the policy, and, if the case is not stayed to go I to arbitration, the only result will be that as soon as he opens his case, he will be asked: 'Where is your award on this policy?' and again, 'The position is this; the plaintiff sues on the policy which has a clause in it that there is no liability unless there is an award.' In spite of that he brings an action without having got an award":

(see also *Freshwater* v. *Western Australian Insurance Co., Ltd.* (3)).

I share the difficulty expressed by SCRUTTON, L.J., in *Golding's Case* (2) (43 Lloyd, L.R. at p. 488), where he says:

> "I have never been able to understand what effect the repudiation of one party has unless the other accepts the repudiation."

The difficulties in this case have been largely produced by the behaviour of the parties, for, in truth, if certain expressions in the correspondence and proceedings alone be regarded without their context each side seems at pains to put themselves in the wrong. Thus, the insurers use language for a considerable time consistent with repudiation, when, in fact, they seek to rely on the insured's proposal under the policy as containing untrue statements, while the insured, who wish to say that the policy is repudiated when they oppose the stay, in fact sue, not for damages for breach of contract, but for moneys under the policy.

In such a tangle of inconsistencies, this much emerges: that the insured, who approbate the policy in their writ, seek to reprobate it in their resistance to arbitration. But the realities are clear. In my view the insured are claiming under the policy and therefore are bound by the tenth condition which requires an award as a condition precedent to the commencement of any action upon that policy.

This appeal, therefore, fails and must be dismissed with costs.

ROMER, L.J.—The provisions in the policy of insurance material to the decision of this appeal are as follows: (i) It is recited that the insured have made a written proposal and declaration containing certain particulars and statements which it is thereby agreed shall be the basis of the contract and be considered as incorporated therein. (ii) It is provided that the due observance and fulfilment of the conditions of the policy which are to be read as part of it shall be a condition precedent to any liability of the insurers under the policy. (iii) The ninth condition of the policy is as follows:

> "If the insured during the continuance of this policy or of any renewal thereof, shall take into his employment any person who has lost the sight of one or of both eyes, the use of one or both hands and feet, or who is maimed or crippled, the insured shall forthwith notify the insurers, giving full particulars in writing, and unless and until the insurers notify the insured in writing that the insurers elect that this policy, or the renewal thereof, shall apply in respect of such employee, this policy and any renewal thereof shall as to any such injured, maimed, or crippled employee, apply in all respects as if such employee were not and had not been employed by the insured."

(iv) The tenth condition of the policy introduces an arbitration clause, which has already been read by SLESSER, L.J.

It is, however, to be particularly observed that this condition as to arbitration covers any dispute, question, or difference that may arise between the parties relative to the policy or the construction thereof.

In the month of October, 1932, claims appear to have been made against the insured by two of their employees, named Lawrence and Harness respectively, and in respect of these claims the insurers were according to the terms of the policy bound to indemnify the insured. When investigating Lawrence's claim, however, the insurers allege that they became aware of the fact that one of the statements in the proposal form was untrue. They thereupon wrote to the insured a letter dated Oct. 24, 1932, stating that the untrue answer constituted a "breach of warranty," and added these words, "and in consequence we hereby declare the insurance void from inception."

Pausing there, it is to be observed that the insurers do not accuse the insured of fraud. If that were the issue between the parties, arbitration would not, according to the terms of the arbitration clause, be a condition precedent to an action by the insured on the policy, and no court would in the exercise of its discretion compel the insured to have it decided by arbitration. But no such issue is raised by the insurers. They merely assert a breach of warranty and declare the policy void from its inception as a consequence of such breach. This, in my opinion, amounts to no more than a reliance on the stipulation in the policy that the statements in the written proposal are to form the basis of the contract of insurance. If they were not relying upon this stipulation, an allegation of a breach of warranty would more naturally have been followed by a claim for damages. In point of fact it is followed in the letter by what is, in effect, a claim to have an account taken of the payments made under the contract by each party since its inception. Following upon that letter there appears to have been an interview between Mr. Stevens, a partner in the insured firm, and the assessor acting on behalf of the insurers. We are not told exactly what happened at that interview, but by letter dated Nov. 24, 1932, the insured, referring to it, say this:

> "With reference to our recent interview at your office when your assessor definitely declined to consider a withdrawal of the repudiation of our clients' policy."

What is here called a repudiation of the policy is merely the declaration contained in the letter of Oct. 24, and, for the reasons I have already given, that declaration did not amount to a repudiation. But that is the name given to it by the insured, and that unfortunately is the name by which the declaration was subsequently referred to by the insurers' solicitors in their letter of Dec. 2, 1932. However, that letter does not, I think, really carry the matter any further. It is true that in it the insurers' solicitors express the view that the proper way of dealing with the action that the insured had by then commenced was to refer it to arbitration, and add:

> "We therefore give you notice that on behalf of our clients we withdraw the repudiation of the policy without prejudice to any claims thereunder."

I suspect that the insurers' solicitors had by now become alarmed at the effect that the word "repudiation" might have on their application for a reference to arbitration in view of *Jureidini* v. *National British and Irish Millers' Insurance Co.* (4), to which I must presently refer in detail. This, however, was the first occasion, so far as I know, on which the word had been used by or on behalf of the insurers, and I cannot think that, by withdrawing a repudiation that had never in fact been made, or by labelling as a repudiation something that in truth was not one at all, the insurers must now be treated as having repudiated the contract of insurance, as distinct from having asserted that they are free from all liability to the insured by reason of the terms of that contract. If, as I think, they have done no more than rely on the terms of the policy as freeing them from liability, then it is admitted by the insured that the order appealed from was rightly made. They can in such circumstances find nothing in *Jureidini's Case* (4) to help them.

But what is the position, assuming that the letter of Oct. 24 must be taken to have been a repudiation of the contract altogether, quite irrespective of its terms? Apart from *Jureidini's Case* (4) I should have thought the position was as follows: The insured could, on that assumption, have elected to accept the repudiation, and thereupon have sued the insurers for damages. Had they done so, the arbitration clause would obviously have no operation. The insured might, however, have refused to accept the repudiation and have sued the insurers on the contract. This is what they in fact did. If the insurers, without having withdrawn their repudiation, had applied to stay the action and refer the matters in dispute to arbitration, the court, in the exercise of its discretion, would at that stage have refused to do so, because, as the insurers were asserting that there was no contract, they must also have been asserting that there was no submission to arbitration. If, however, the action proceeded to trial and that issue was decided against the insurers, the claim of the insured to payment would be defeated by the terms of the tenth condition, which makes the obtaining an award a condition precedent to the commencement of any action on the policy. Having established the validity of the policy, the insured would, therefore, have had then to proceed by way of arbitration in order to enforce their claims thereunder. In the present case, however, the repudiation was withdrawn by the letter of Dec. 2. There is not, therefore, any issue to be

A decided that falls outside the scope of the arbitration clause. The issues now are whether or not the insurers are absolved from all liability by virtue of the terms of the policy, and, if they are not, what is the extent of their present liability to the insured under it. All these are disputes, questions, or differences between the parties relative to the policy or the construction thereof. It was, indeed, said on behalf of the insured that, in view of the letter of Oct. 24 and the refusal of the B insurers to withdraw their repudiation until after the issue of the writ in this action, they did not fulfil the condition imposed by s. 4 of the Arbitration Act, 1889, of being ready and willing at that time to arbitrate. It may be conceded on the assumption I have made as to the "repudiation" that they were not willing to arbitrate on that point. However, I have no reason to suppose that they were not willing to arbitrate at that time on all the issues raised in the action other than C the issue as to repudiation, and when that issue disappeared the condition of the arbitration clause is complied with. The insurers were at the date of the writ ready and willing to go to arbitration upon all the matters that they are now seeking to have referred.

For these reasons, and apart from *Jureidini's Case* (4), I should be prepared to hold that the order of ACTON, J., was right whichever view be taken of the true D effect of the letter of Oct. 24. That case must, however, be now considered, with a view to ascertaining what it really decided. It has been frequently referred to in the courts in cases where there was no repudiation of the contract containing an arbitration, but merely a denial of liability by virtue of some clause in the contract itself. To such cases it has always been held that *Jureidini's Case* (4) has no application: see *Woodall* v. *Pearl Assurance Co., Ltd.* (1); *Golding* v. *London and* E *Edinburgh Insurance Co.* (2); and *Freshwater* v. *Western Australian Insurance Co.* (3).

The present appears to be the first occasion on which it has to be considered in relation to a case where the contract itself is to be taken as having been repudiated; and I have to consider it for the purpose of seeing whether it in any way precludes me from coming to the conclusion at which, apart from it, I should have arrived.

F The policy with which the House of Lords was concerned in that case was a fire policy that contained (condition 17) a very limited arbitration clause. It only extended to any difference as to the amount of any loss or damage, and made the obtaining of an award as to the amount of loss or damage a condition precedent to any action upon the policy. There was also a condition in the policy in the following terms:

G

> "(12) If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or anyone acting on his behalf to obtain any benefit under this policy; or if the loss or damage be occasioned by the wilful act, or with the connivance of the insured; . . . or if the claim be made and rejected and an H action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of condition 17 of this policy) within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this policy shall be forfeited."

A fire having occurred upon the premises of the insured, a claim was lodged with the insurance company, who rejected it and denied liability. The insured there- I upon commenced an action against the company to enforce their claim. By their defence the company alleged that the claim was fraudulent in that the amount claimed was grossly in excess of the value of the goods; that the insured themselves set fire to their premises or connived at their being set on fire; and that the insured had not complied with condition 17; and that it was a condition precedent to any right of action on the policy that an award of the amount of loss or damage, if disputed, should first be obtained. The insurers, however, made no attempt to have the action stayed, and it proceeded to trial before a judge and jury. The jury found that the insured had not set fire to their premises or connived at their being set on fire, and that they did not make a fraudulent claim within condition 17, and assessed the value of the goods destroyed by the fire. The learned judge accordingly entered judgment for the insured for £543 odd. The insurers thereupon applied for judgment on the ground that the action was not maintainable having regard to condition 17. The Court of Appeal having acceded to the insurers' contention as to this, the insured appealed to the House of Lords. The appeal was heard before Lord Haldane, Lord Dunedin, Lord Atkinson, Lord Parker, and Lord Parmoor, and was allowed. The reasons given by Lord Atkinson and Lord Parmoor for concurring in the decision cause no difficulty. The former said this ([1915] A.C. at pp. 507, 508):

> "My Lords, I concur on this short ground. I think that art. 17 refers to existing disputes and differences about the amount of loss sustained, and in a contract such as this I do not think that article has any application whatever when the persons to indemnify say 'you yourself brought about the destruction of the goods which were insured for the loss of which you claim to be indemnified, and we rely upon our article, which provides that in that state of circumstances all benefit under the policy is forfeited.' "

Two things emerge quite clearly from this speech. First, that in the view of Lord Atkinson the insurers were not repudiating the policy altogether, but were relying on cl. 12 as relieving them of all liability; and secondly, that in his view, the arbitration clause had no application to the dispute that had in fact arisen between the parties. He regarded that clause as only applying to the simple case where the only dispute was as to the amount of loss sustained, and did not regard it as imposing a condition precedent to all actions upon the policy. Lord Parmoor seems to have taken the same view. He said ([1915] A.C. at p. 508):

> "That no difference had arisen as regards matters which would come for decision under cl. 17, and that consequently the clause had no application."

Lord Parker merely concurred without giving any reasons. Lord Dunedin, as I read his speech, took the same view as to the effect of condition 17. He said ([1915] A.C. at p. 507):

> "Personally I should rather like to reserve my opinion as to what would have been the effect if the respondents, instead of pleading as they did, had pleaded in this way: 'We will allow this question to be disposed of at law by a jury as to whether there was fraud and arson or not'; and had gone on to say, 'but in the event of that being negatived we wish this ascertainment of actual damage to be ascertained by arbitration.' I should like to reserve my opinion on whether they might have said so with effect."

This statement is of importance if Lord Dunedin regarded the insurers as having repudiated the contract altogether and not as having merely repudiated liability by virtue of cl. 12. For he assuredly did not decide that by reason of the repudiation the insurers had for ever precluded themselves from relying on the arbitration clause after that repudiation had been held by the court to be wrongful. He expressed no opinion on that point. The remainder of his speech appears to me to be based on a consideration of the terms of the arbitration clause, which he held was to be confined to an actually existing difference as to the amount of loss and did not extend to all forms of action. So far I can find nothing in *Jureidini's Case* (4) to support the proposition that if the insurers here in fact repudiated the contract on some ground not founded on the terms of the contract itself, they have for ever debarred themselves from relying on the arbitration clause notwithstanding their withdrawal of that repudiation.

I must, however, now turn to the reasons given by Lord Haldane, reasons that were regarded by Lord Sumner as affirming the doctrine that a man may not approbate and reprobate at the same time: see *Hirji Mulji* v. *Cheong Yue Steamship Co.* (6) ([1926] A.C. at p. 512). His reasons were really summed up in one sentence ([1915] A.C. at p. 505). It is as follows:

> "Now, my Lords, speaking for myself, when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract being still enforced."

I do not doubt that with this passage every other member of the House would have agreed. A person who repudiates the contract in toto obviously cannot be allowed at the same time that he is repudiating it to avail himself of a clause contained in it. Where, therefore, a defendant who has so repudiated his contract applies to the court to refer to arbitration the question of the legality of such repudiation, his application must necessarily fail. For if the repudiation was justified the arbitration clause has gone. An arbitrator, therefore, who purported to award in favour of the defendant's repudiation would at the same time be making an award against the existence of his own jurisdiction. But in *Jureidini's Case* (4) the defendants had failed to justify their repudiation, and yet Lord Haldane was of opinion that the plaintiff's judgment against the defendants should stand notwithstanding the condition contained in cl. 17, not on the ground of the limited terms of that clause, but apparently on the ground of the repudiation. It is, however, impossible to suppose that Lord Haldane intended to decide that an ineffectual repudiation of a contract by one party precluded him thereafter from relying on the conditions contained in it. Suppose that in the present case the insurers had purported to repudiate the contract altogether, it is inconceivable that in an action on the policy by the insured in respect of a person taken into their employment in breach of condition 9, the insurers, when defeated as to their right to repudiate, would be precluded from relying upon that ninth condition. If, however, the plaintiffs in *Jureidini's Case* (4) had accepted the repudiation of the defendants and had sued them for damages, then the arbitration clause would have been no answer to the plaintiffs' claim. If the defendants had attempted to rely on it, they would indeed have been attempting to approbate and reprobate. That this was what the plaintiffs there had in fact done was the explanation of that case that was suggested by Greer, L.J., in *Golding's Case* (2), and it must, I think, be assumed that that was also Lord Haldane's view of what the plaintiffs had done. I cannot think that otherwise he could have used the language that he did. Some confirmation of this, if confirmation be wanted, is to be found in Lord Haldane's reference during the argument to *Municipal Council of Johannesburg* v. *Stewart & Co.* (7). In that case the plaintiffs alleged that the defendants had repudiated their contract, and they were suing for damages occasioned by such repudiation. For the purposes of the case before the court the plaintiffs' allegation had to be taken as true, and in those circumstances the defendants were held not to be entitled to rely on an arbitration clause in the contract as affording an answer to the action. It was in reference to such an action that Lord Shaw used the words cited by Lord Haldane.

For these reasons I cannot regard *Jureidini's Case* (4) as in any way precluding me from coming to the conclusion that in view of the insurers' withdrawal of the repudiation, even if it had to be regarded as a repudiation on a ground outside the contract itself, the insurers are now precluded from relying on the condition precedent contained in the arbitration clause. That being so, the order of Acton, J., was, in my opinion, a proper one to make, and this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Roberts, Seyd, Jackson, & Falck*; *White & Co.*

[*Reported by* Geoffrey P. Langworthy, Esq., *Barrister-at-Law.*]

Re CAUS. LINDEBOOM *v.* CAMILLE

[CHANCERY DIVISION (Luxmoore, J.), November 1, 6, 1933]

[Reported [1934] Ch. 162; 103 L.J.Ch. 49; 150 L.T. 131; 50 T.L.R. 80; 77 Sol. Jo. 816]

Charity—Religion—Gift for masses for the dead.

A gift for the saying of masses for the dead is a gift for the advancement of religion and a valid charitable gift because it

(i) enables a ritual act to be performed which is recognised by a large proportion of Christian people to be a central act of their religion, and

(ii) assists in the endowment of priests whose duty it is to perform that ritual act.

A.-G. v. *Delaney* (1) (1876), 10 I.R.C.L. 104, followed. *West* v. *Shuttleworth* (2) (1835), 2 My. & K. 684, and *Heath* v. *Chapman* (3) (1854), 2 Drew. 417, not followed.

Notes. In *Gilmour* v. *Coats*, [1949] 1 All E.R. 848, the House of Lords expressly reserved its opinion as to the correctness of this decision. See ibid. at pp. 855, 859.

As to gifts for masses for the dead, see 4 HALSBURY'S LAWS (3rd Edn.) 240, para. 520; and for the preamble to the Charitable Uses Act, 1601 (43 Eliz. 1, c. 4), see 2 HALSBURY'S STATUTES (2nd Edn.) 916.

Cases referred to:

(1) *A.-G.* v. *Delaney* (1876), 10 I.R.C.L. 104.
(2) *West* v. *Shuttleworth* (1835), 2 My. & K. 684; 4 L.J.Ch. 115; 39 E.R. 1106; 8 Digest (Repl.) 336, *182*.
(3) *Heath* v. *Chapman* (1854), 2 Drew 417; 2 Eq. Rep. 1264; 23 L.J.Ch. 947; 24 L.T.O.S. 31; 18 J.P. 693; 2 W.R. 649; 61 E.R. 781; 8 Digest (Repl.) 336, *184*.
(4) *Neo* v. *Neo* (1875), L.R. 6 P.C. 381, P.C.; 8 Digest (Repl.) 382, *758*.
(5) *O'Hanlon* v. *Logue*, [1906] 1 I.R. 247; 8 Digest (Repl.) 337, **87*.
(6) *Bourne* v. *Keane*, [1919] A.C. 815; 89 L.J.Ch. 17; 121 L.T. 426; 35 T.L.R. 560; 63 Sol. Jo. 606, H.L.; 8 Digest (Repl.) 336, *172*.
(7) *Re Charlesworth, Robinson* v. *Cleveland* (1910), 101 L.T. 908; 26 T.L.R. 214; 54 Sol. Jo. 196; 8 Digest (Repl.) 341, *230*.
(8) *Powers-Court* v. *Powers-Court* (1824), 1 Mol. 616; 8 Digest (Repl.) 382, **235*.
(9) *Re Lea, Lea* v. *Cooke* (1887), 34 Ch.D. 528; 56 L.J.Ch. 671; 56 L.T. 482; 35 W.R. 572; 3 T.L.R. 360; 8 Digest (Repl.) 455, *1534*.
(10) *Re Blundell's Trusts* (1861), 30 Beav. 360; 31 L.J.Ch. 52; 5 L.T. 337; 25 J.P. 820; 8 Jur.N.S. 5; 10 W.R. 34; 54 E.R. 928; 8 Digest (Repl.) 337, *186*.
(11) *Re Fleetwood, Sidgreaves* v. *Brewer* (1880), 15 Ch.D. 594; 49 L.J.Ch. 514; 29 W.R. 45; 8 Digest (Repl.) 337, *187*.
(12) *Re Elliott, Elliott* v. *Johnson* (1891), 39 W.R. 297; 8 Digest (Repl.) 337, *188*.

Summons as to whether certain gifts made by a will were valid charitable gifts, and so did not fail for perpetuity.

The testator, a Belgian Roman Catholic priest, domiciled in England, bequeathed £1,000 "for masses foundation and others," and devised four houses

> "for one foundation mass a month to be said for my soul, the souls of my parents and relatives during the space of twenty-five years."

The property was to revert to the parish of St. Peter's Roman Catholic Church "for extension purposes," with a residuary gift in favour of the testator's sisters and their children. This summons asked whether these were valid charitable gifts.

G. D. Johnston for the trustees, the plaintiffs.

Stafford Crossman for the Attorney-General.—The House of Lords has held such gifts legal, but not that they were charitable.

Braund for the next-of-kin.—The gifts are not charitable, because they do not benefit the public, or any particular class: *West* v. *Shuttleworth* (2); *Heath* v. *Chapman* (3); *Neo* v. *Neo* (4); *O'Hanlon* v. *Logue* (5); *Bourne* v. *Keane* (6).

Norris for other next-of-kin.

Stafford Crossman in reply.—This case is within the third class of Lord Macnaghten's definition "trusts for the advancement of religion"; first, because it enables a ritual act to be performed which is accepted by a large number of people as the most important ritual act of their religion, and, secondly, because the saying of masses results in benefit to religion. It is also an endowment of the priests who say the mass.

Luxmoore, J., referred to *Re Charlesworth* (7).

Cur. adv. vult.

Nov. 6. **LUXMOORE, J.**, read the following judgment.—A number of questions arise on this will. I have decided all except that relating to the gifts for masses above referred to. Are such gifts charitable or not? If the answer is in the negative, the gifts fail for perpetuity, because, according to the evidence before me, a foundation mass is said in perpetuity and is paid for out of the income of an invested fund, and not out of capital. The question whether a gift for masses is charitable or not has not been decided in any case in the English courts since *Heath* v. *Chapman* (3), which followed a decision in *West* v. *Shuttleworth* (2). In the last-mentioned case, Lord Cottenham held that a gift for masses was void, on the ground that it constituted a superstitious use, but he also held that such a gift was not charitable, both on the ground that the gift was illegal, and therefore could not be charitable, because there could not be a charitable gift for an illegal purpose; and also because—I quote his words from the report—

> "the intention was not to benefit the priests or to support the chapels, but to secure a supposed benefit to the testatrix herself."

In *Heath* v. *Chapman* (3) Sir Robert Kindersley, V.-C., followed *West* v. *Shuttleworth* (2), and held that gifts for masses were void, as constituting superstitious uses, and were also not charitable; but no argument appears to have been addressed to the question whether the gift was charitable. The Vice-Chancellor referred to the words of the gift, which were "to the church of St. Mark for masses for the soul of the testator and for the poor dead," and said (2 Drew. at p. 425):

> "The question on this is whether the gift for saying masses for the souls of the poor dead makes the gift charitable. The usual test to try questions of this kind has been the statute of 43 Eliz. I, c. 4. [The Charitable Uses Act, 1601, the preamble to which was expressly preserved, when the rest of the Act was repealed, by the Mortmain and Charitable Uses Act, 1888, s. 13 (2).] In that statute are enumerated a variety of uses which are charitable. Charitable uses are not exactly confined to those which are specifically expressed in the Act; but to be charitable uses they must be such as are there enumerated, or uses of an analogous character. Now saying masses for the souls of the poor dead would have, I think, no analogy to any of those enumerated in the statute. Even if I were to take the construction of the words 'poor dead' to mean those who in life were poor, too indigent to provide for masses, even then that would not be a charity within the meaning of the statute; but if, as I am told, the words are used to refer to the condition of the souls after death in purgatory, it is impossible to say that that bears the slightest analogy to any charity described in the statute."

It does not appear that there was any evidence as to the precise nature of the masses, or as to the destination of the testamentary gift before the court, either in *West* v. *Shuttleworth* (2) or in *Heath* v. *Chapman* (3). In each case the decision on the question whether the gift was charitable or not was really a subsidiary one. The main decision was that the particular gifts were void, as constituting superstitious uses.

In the present case there is no evidence before me as to the precise nature of the mass, or as to the actual destination of the gift for the saying of masses. Counsel agreed to accept the summary of the evidence of Dr. Delaney given in Ireland in *A.-G.* v. *Delaney* (1), as set out by the Lord Chancellor of Ireland (SIR SAMUEL WALKER) in his judgment in *O'Hanlon* v. *Logue* (5), which is as follows:

> "According to the doctrine of the Roman Catholic Church the mass is a true and real sacrifice offered to God by the priest, not in his own person only, but in the name of the church whose minister he is. Every mass on whatever occasion used is offered to God in the name of the church, to propitiate His anger, to return thanks for His benefits, and to bring down His blessings upon the whole world. Some portions of the mass are invariable and some are variable. Amongst those invariable are an offering of the Host for his own sins and for all present, and also for all faithful Christians both living and dead; and the sacrifice is offered for the church and the granting to it of peace and its preservation and union. It includes commemoration of the living and of the dead";

and he states it is impossible, according to the doctrine of the church, that a mass can be offered for the benefit of one or more individuals, living or dead, to the exclusion of the general objects included by the church.

> "When an honorarium is given for the purpose of saying a mass for a departed soul the priest is bound to say it with that intention; but that obligation may be discharged by a mental act of the priest, but it cannot be discharged by the ordinary parochial mass which he says on Sundays and holy days. Such honoraria for masses form a portion of the ordinary income and means of livelihood of priests, and are generally in Ireland distributed, by those to whom the distribution is entrusted, amongst priests whose circumstances are such that they stand in need of the assistance offered."

On that description, apart from the decisions in *West* v. *Shuttleworth* (2) and *Heath* v. *Chapman* (3), could there be any real doubt but that a gift for masses was charitable, in the sense which is derived from the statute 43 Eliz. I, c. 4? because the object must necessarily be one which is not only for the public benefit but for the advancement of religion; when one bears in mind, as one is bound to do, that the court in such cases refuses to entertain an inquiry as to the truth or soundness of any religious doctrine, provided it is not contrary to morals, or contains nothing contrary to law. As the Lord Chancellor of Ireland pointed out in *O'Hanlon* v. *Logue* (5) ([1906] 1 I.R. at p. 260):

> "All religions are equal in the eye of the law. . . . Whether the subject of the gift be religious, or for an educational purpose, the court does not set up its own opinion. It is enough that it is not illegal, or contrary to public policy, or opposed to settled principles of morality."

In *O'Hanlon* v. *Logue* (5) the Lord Chancellor, after summarising Dr. Delaney's evidence in *A.-G.* v. *Delaney* (1), in the words I have already quoted, continued:

> "Such is the evidence as to the exact nature of the mass both generally and where a commemoration of named dead is included. It is settled by authority which binds us that where there is a direction to celebrate the mass in public the gift is a valid charitable one; but what makes it charitable is the performance of an act of the church of the most solemn kind, which results in benefit to the whole body of the faithful, and the results of that benefit cannot depend upon the presence or absence of a congregation. Furthermore, adopting the evidence of Dr. Delaney, it seems to me that the bequest of a sum of money for the saying of masses which cannot be satisfied by the ordinary parochial mass, and the conferring of honoraria upon the priests who celebrate the masses are an endowment of the priest who celebrates this solemn sacrifice, and therefore an advancement of religion, just as much in principle as the erection of a church in which they might be said, or the endowment of an

A additional priest to celebrate them. Authority is not needed for the proposition that a gift for such a purpose would be a good charitable one."

Then he mentions the two cases of *Powers-Court* v. *Powers-Court* (8) and *Lea* v. *Cooke* (9).

In my judgment, once the true nature of the mass is explained, and the destination and object of the payment for it made clear, there can be no room for any B other opinion but that a gift for masses is charitable, and that the contrary view expressed in *West* v. *Shuttleworth* (2) and followed in *Heath* v. *Chapman* (3) is based on insufficient and incorrect information with regard to the character of the rite and the nature and purpose of the payment. In my view, the decision in *West* v. *Shuttleworth* (2) that a gift for the saying of masses is not a charitable gift is not correct, and is contrary to the whole current of authority with regard to gifts C for the advancement of religion. The decision in *West* v. *Shuttleworth* (2) that such a gift was void, as constituting a superstitious use, was overruled by the House of Lords in *Bourne* v. *Keane* (6), and with it the decisions which followed it, including *Heath* v. *Chapman* (3), *Re Blundell's Trusts* (10), *Re Fleetwood* (11), *Re Elliott* (12). Although there was no decision in *Bourne* v. *Keane* (6) on the question whether a gift for saying masses was charitable or not, there are many D passages in the speeches of LORD BIRKENHEAD, LORD ATKINSON, and LORD PARMOOR that recognise and support the view that such a gift is charitable. I have no hesitation in holding that a gift for the saying of masses constitutes a valid charitable gift, on the ground, first, that it enables a ritual act to be performed which is recognised by a large proportion of Christian people to be a central act of their religion, and, secondly, because it assists in the endowment of priests whose E duty it is to perform that ritual act. On each of these grounds religion is advanced, and it is no objection in law that the particular religion advanced is a particular form of Christian religion. In my judgment *West* v. *Shuttleworth* (2) and *Heath* v. *Chapman* (3) ought not to be followed. Indeed, I cannot help thinking that, if the substance of Dr. Delaney's evidence had been before the court in both of those cases, the decision in each, so far as the point before me is concerned, would have F been different. In the result I hold that each of the gifts for the saying of masses is a valid charitable gift. The gift in remainder to the parish of St. Peter's Roman Catholic Church is obviously valid.

Solicitors: *J. B. Borer*, for *J. Hincks*, Leicester; *H. Linley*; *Treasury Solicitor.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

Re BENEFICES OF BOLTON LE MOORS, ST. PAUL, CHRIST CHURCH, AND EMMANUEL

[PRIVY COUNCIL (Lord Blanesburgh, Sir Lancelot Sanderson and Sir George Lowndes), May 5, 30, 1933]

[Reported [1933] A.C. 556; 102 L.J.P.C. 165; 149 L.T. 370; 77 Sol. Jo. 446]

Ecclesiastical Law—Union of benefices—Scheme—Diversion of surplus income—Report of Commissioners of Inquiry—Report in favour of scheme only because of proposed diversion—Jurisdiction to affirm scheme—Union of Benefices Measure, 1923 (14 *&* 15 *Geo.* 5, *No.* 2), *s.* 2 (6), *s.* 15.

A scheme framed by the Ecclesiastical Commissioners under the Union of Benefices Measure, 1923, for the division of a parish between two adjoining parishes included a recommendation by the Ecclesiastical Commissioners under s. 15 of the Measure that the surplus income should be diverted towards the endowment of a new benefice in the same diocese. The Commissioners of Inquiry had stated in their report to the bishop that, apart from the diversion of surplus revenue, which they had recommended, they would have found it difficult to justify any interference with the parish in question. On appeal against the scheme the objectors contended that by virtue of s. 15 of the Measure the disposal of surplus income was a matter to be considered by the Ecclesiastical Commissioners after a conclusion in favour of union had been reached, and so could not be regarded by the Commissioners of Inquiry in deciding whether to report for or against the scheme.

Held: the scheme should be affirmed because

(i) as the report to the bishop was personal to the bishop and neither he nor the Ecclesiastical Commissioners were obliged to disclose it, the Privy Council was concerned only with the pronouncement of the Commissioners of Inquiry for the scheme as a whole, and not with their reasoning;

(ii) in any event the Commissioners of Inquiry could properly recommend and take into account the disposal of surplus income as part of their duty (imposed by s. 2 (6) of the Measure) to consider the matters under inquiry "in their relation . . . to the interests of religion in England generally."

Dictum of LORD TOMLIN in *Re Union of Benefices of Great Massingham and Little Massingham, Norfolk* (1), [1931] A.C. 328, applied.

Notes. Section 2 (6) of the Union of Benefices Measure, 1923, has been repealed by the Union of Benefices (Amendment) Measure, 1936 (No. 2), s. 2 (2), and replaced by s. 2 (1) of that Measure.

As to commissions of inquiry into union of benefices, see 13 HALSBURY'S LAWS (3rd Edn.) 299, para. 672, and for the Union of Benefices Measure, 1923, s. 15, see 7 HALSBURY'S STATUTES (2nd Edn.) 512; and for the Union of Benefices (Amendment) Measure, 1936 (No. 2), s. 2 (1) and (2), see ibid. p. 554.

Case referred to:

(1) *Re Union of Benefices of Great Massingham and Little Massingham, Norfolk*, [1931] A.C. 328; 100 L.J.P.C. 93; 144 L.T. 654; 47 T.L.R. 294, P.C.; Digest Supp.

Appeal under the Union of Benefices Measure, 1923, referred to the Judicial Committee under s. 10 (5) of the Measure.

The appeal was against a scheme for the union of certain benefices situate in or near the centre of Bolton, in the county of Lancaster and diocese of Manchester. The facts are fully set out in the judgment of the Judicial Committee.

J. W. Stansfield for the appellants, the objectors.

F. H. L. Errington for the respondents, the Ecclesiastical Commissioners.

A Their Lordships took time for consideration.

May 30. The judgment of their Lordships was delivered by

LORD BLANESBURGH.—This is an appeal to His Majesty in Council against a scheme framed by the Ecclesiastical Commissioners under the powers of the Union of Benefices Measure, 1923.

B Under its formal description the scheme is one for the union of (i) the benefice of Bolton le Moors, Saint Paul, with part of the benefice of Bolton le Moors, Christ Church, and (ii) the benefice of Bolton le Moors, Emmanuel, with the remaining part of the said benefice of Bolton le Moors, Christ Church, in the county of Lancaster and diocese of Manchester. More aptly it may with sufficient accuracy for present purposes be described as a scheme for the division of the parish of C Christ Church in Bolton between the two adjoining parishes of St. Paul and Emmanuel and for the supersession of Christ Church as a separate parish.

The appellants are three members of the parochial church council of Christ Church. They represent the whole council in their opposition to the scheme.

The three parishes adjoin and they are situate in or near the centre of the town of Bolton. Christ Church was formed in 1844, partly out of Emmanuel. In 1866 D St. Paul was constituted as a separate district and to the new parish there was transferred a considerable portion of the original Christ Church area. Since that year the three parishes have in the matter of boundaries remained unaltered. They are none of them very large. Christ Church in area is particularly small. Of the three, Emmanuel, with its 500 acres and a population of about 7,400, is the E most extensive. Only a very small addition to it is proposed by the scheme. St. Paul has an area of 220 acres with a population of over 3,000. Christ Church comprises forty-five acres only, with no more than half of the area residential. It has a population of just over 2,800, of whom many are Roman Catholics.

The re-arrangements of 1844 and 1866 were doubtless meant to provide for the needs of an expanding population then in prospect. It is, however, now charac- F teristic of all three parishes that the population has for many years been stationary with a tendency, especially strong in the cases of St. Paul and Emmanuel, to decline. In Bolton, as in other large towns, there is stated to be a steady drift from the centre towards the outskirts and the urban area is continually declining. As a result the existing church accommodation of the three parishes has become much more than adequate: it may almost be described as redundant. While the G church of St. Paul has seating accommodation for 1,175 persons and Emmanuel for 640, the normal Sunday congregation at St. Paul is said to number about 250, and that at Emmanuel from 250 to 300. At Christ Church, with seating accommodation for 500, the normal attendance at Matins on Sundays is fifty; at Evensong, seventy to eighty; at early Communion, twenty. The church of Christ Church stands midway between the churches of St. Paul and Emmanuel at a H distance of about 700 yards from each other. Both Emmanuel and St. Paul churches are thus within easy reach of every part of the parish of Christ Church. There is apparently no extreme of difference between the services at any of the three churches, but those at St. Paul are said to be definitely Protestant in character. There are other churches at no great distance. On the other hand, the spiritual needs of large populations in new districts outside Bolton are practically unprovided I for.

Emmanuel has its own vicarage. St. Paul has none. As a vicarage fund the Ecclesiastical Commissioners hold a sum of £1,500, the income of which is enjoyed by the vicar. There is a vicarage at Christ Church. It is attached to the church, which was originally a Primitive Methodist chapel and is stated to be of no architectural interest. The vicarage has no garden, and is otherwise inconvenient. It is proposed by the scheme that the church shall be pulled down and the site with the adjoining vicarage be sold. To this proposal, as a detail of the scheme, no objection is taken.

Christ Church has its own church schools. So, too, Emmanuel. At one time A St. Paul had also its own schools, but these being deficient in education requirement have been closed. The Christ Church schools are in that area of the parish which under the scheme is transferred to St. Paul. It is a provision of the scheme that the Christ Church schools shall become the schools of the extended parish of St. Paul.

St. Paul has a net annual income of approximately £344, together with £67 10s. B per annum from the parsonage house fund already referred to. If only permanent endowment be considered, the amount, apart from the £67 10s., is only £210. The income of Emmanuel is approximately £400; permanent endowment £350. The income of Christ Church is £400; permanent endowment £375.

The Martyrs Memorial Trustees are the patrons of St. Paul; the Vicar of Bolton is the patron of Emmanuel. The patronage of Christ Church is in the Crown and C the Bishop of Manchester alternately. Both have agreed to the extinction of their patronage rights, so that the patrons of the existing benefices of St. Paul and Emmanuel may become patrons of the new extended benefices of St. Paul and Emmanuel respectively. By this concession on the part of the Crown and the Bishop difficulties on this matter foreseen by the Commissioners in their report have been adjusted as they desired. D

It is with reference to these three parishes, as thus circumstanced, that the scheme is propounded. Under it the greater portion of the Christ Church area is transferred to St. Paul. As has already been said, only a small portion, and that conveniently contiguous, is transferred to Emmanuel. These two extended parishes retain their existing names: each will have its own church school, and each will be less inadequately endowed than at present. Under the scheme it is proposed E that £200 a year out of the endowment of Christ Church shall be transferred to the new St. Paul parish and £100 a year to the new Emmanuel parish, bringing the annual income of the one up to £544, with £67 10s. in lieu of a parsonage house, and the annual income of the other up to £500. With regard to the remaining endowments of Christ Church the scheme proposes that the net proceeds of the sale of the church site and parsonage house shall be held and accumulated by the F Ecclesiastical Commissioners for and towards the purchase of a suitable site and the erection of a new church for a district to be formed in or near Bolton and for or towards the endowment of such church and district and the provision of a parsonage house in connection therewith. It is further proposed that the residue of the annual endowment of Christ Church, amounting approximately to £88, shall be held and accumulated towards the endowment of the same new district. The G scheme has the support not only of the Bishop of the Diocese, but of the Parochial Church Councils and Vicars of St. Paul and Emmanuel and the patrons of all three benefices. It is opposed only by the parochial church council representing, it must be agreed, the congregation of Christ Church.

The case for that council was presented to their Lordships with clearness and candour by Mr. J. W. Stansfield. It was rested on the admitted existence of an H active church life in the parish of Christ Church. The living has been vacant for over eighteen months and the last vicar was, at the time of his resignation, advanced in years. Yet the parish has remained highly organised with its church school, Sunday school, mothers' union, boy scouts and girl guides. It has contributed generously to local charities and to missions. On Easter Day there were 93 communicants at two celebrations. Their Lordships are greatly impressed by I this record of Christ Church. In fact of it they express the view with reluctance that the scheme is nevertheless just such a scheme as is contemplated by the measure. It is true of almost every scheme thereunder that some individual or collective hardship attends the change. It seems to their Lordships that while in this case the hardship is, it may be hoped, only temporary, the advantages of the scheme are preponderant, with a good prospect of being lasting. This is not a scheme affecting parishes with a long tradition of separate and unchanged independence upon which reliance is so frequently and so effectively placed against similar

A schemes when put forward. Within a period not remote the area covered by these three parishes has been twice apportioned to accord with contemporary need. Again, under existing conditions there is hardly room for three separate organisations in an area so small, while the endowments, divided as they are, have become inadequate for the appropriate support of any of the three incumbents. Their Lordships feel that the spiritual needs of a parish of such small extent as Christ B Church should be amply and effectively met by its incorporation in the two adjoining parishes, and that there will be in the two united parishes, then not inadequately endowed, room for a fuller and more active life than has so far been possible in three. Nor are their Lordships insensible of the advantage to accrue to the large populations on the outskirts of Bolton at present totally unprovided for by the appropriation of the annual sum of £88 towards provision for their spiritual needs.

C Their Lordships, however, before expressing any final conclusion on the scheme must refer to and dispose of a question which arises upon a passage in the report of the inquiry commissioners to the Bishop. "There was some difference of opinion," they say,

> "between the commissioners on the main question. It was recognised by all D that if the needs of outlying parts of Bolton were not to be taken into account it would be difficult to justify any interference with Christ Church, and Mr. McCann (one of the commissioners) was of opinion that a sufficient case had not been made out. The other commissioners, however, were in favour of recommending the proposed unions."

Now this statement must be read in connection with the Measure, the effect of E which, on this subject, was expounded by LORD TOMLIN in delivering the judgment of their Lordships in *Re Union of Benefices of Great Massingham and Little Massingham, Norfolk* (1). In that judgment, LORD TOMLIN pointed out that there is no statement in the Measure of the principles which are to govern the union of benefices except in the provision in s. 2 (6) to the effect that the commissioners appointed to inquire and report shall have full regard to the circumstances and F interests of the parishes affected by their inquiry, and that it shall be their duty to consider the matters under inquiry

> "in their relation to such circumstances and interests and to the interests of religion in England generally,"

and he added that where a union of benefices is proposed the question of the diversion of surplus revenue seems, under s. 15 of the Measure, to be for the con- G sideration of the Ecclesiastical Commissioners not as one of the factors for determining whether there shall be union, but as a point for examination after a conclusion in favour of union has been reached.

When, to that statement of LORD TOMLIN'S, is added the further consideration that a report to the Bishop by the commissioners against a scheme is decisive and final, the question becomes important whether this avowal by the commissioners H that, apart from their recommended diversion of surplus revenue—a matter beyond their cognisance—they would have found it difficult to justify any interference with Christ Church, should not have effect given to it in their Lordships' report to His Majesty. Having once reached that conclusion were not the commissioners in duty bound, if properly advised, to report against the scheme? Must not their Lordships support a conclusion of the commissioners which, if expressed as it I should have been, would have been decisive against the scheme?

After full consideration their Lordships are satisfied that they are not required to make to His Majesty a report which, on the scheme as a whole, would accord neither with their own views nor with those of the majority of the commissioners. The answer to the difficulty raised by the terms of the report is found, they think, in this, that it is as a whole that the scheme is recommended by the commissioners. True, it is a condition of the scheme going forward at all that, as a result, it is recommended by them. But their actual report to the bishop is personal to himself, and No. 19 of the rules made under the Measure provides that it shall not be obligatory on the bishop or the Ecclesiastical Commissioners to disclose it to any party to the inquiry or any other person. The fact that in these cases the report is usually and properly attached by the Ecclesiastical Commissioners to their answer in no way alters its character or prevents the commissioners in a proper case from withholding it. In other words, the report itself is not a document of title. It is the pronouncement therein for or against a scheme which is vital.

Their Lordships, however, need not pursue this matter further on these lines. They are relieved of difficulty in the present case by the consideration that while in this scheme the diversion of the surplus income of Christ Church must strictly be taken to result from the later action of the Ecclesiastical Commissioners, it follows the recommendation of the inquiry commissioners, and that recommendation in turn may be regarded as a recognition and fulfilment of the duty imposed upon them by the Measure to have regard to the interests of religion in England generally.

Their Lordships will accordingly report to His Majesty in Council that the scheme be affirmed.

Solicitors: *Russell & Russell*; *Milles, Jennings White, & Foster.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

FRANKLIN *v.* DAILY MIRROR NEWSPAPERS, LTD.

[COURT OF APPEAL (Lord Hanworth, M.R., and Lawrence, L.J.), June 26, 1933]

[Reported 149 L.T. 433]

Libel—Interrogatories—Denial of libel—Alternative defence of fair comment—Intention of defendants—Interrogatories material only on question of malice not allowed.

The plaintiff in a libel action, who was the organiser and manager of an exhibition held at an art gallery, alleged that the defendant newspaper proprietors falsely and maliciously published certain statements concerning the plaintiff in his position and employment at the gallery. The statements complained of purported to be an account of the theft or disappearance of certain pictures from the gallery, of which the plaintiff was described as proprietor, but the plaintiff alleged that they meant and were understood to mean that he or his agents with his knowledge and authority stole the pictures or caused them to appear to have been stolen for the purpose of keeping them himself, and that the plaintiff was a thief. The defendants denied that the statements were published of or concerning the plaintiff in his position and employment, or bore the meaning alleged, or any meaning defamatory of the plaintiff, and pleaded that the statements were no libel, and, alternatively, that, if the statements were defamatory, they were fair comment on a matter of public interest and made without malice. On appeal against an order that the defendants answer interrogatories as to whether they intended "the words complained of or some and which of them" (i) "to apply and refer to the plaintiff": (ii) "to apply or refer to the plaintiff in his position and/or employment as alleged in the statement of claim";

Held: the interrogatories ought not to be allowed because

Per LORD HANWORTH: (i) in order to show that the words complained of were defamatory the plaintiff would have to show that they referred to him; if the plaintiff did show this, it would be for the defendants to establish that they were fair comment, and the question of the defendants' attitude, or malice, would become relevant only in reply to this defence of fair comment;

(ii) these interrogatories were, therefore, material only on the question of the reply to the defendants' defence of fair comment, but if they were answered the answers could be used by the plaintiff in support of his case on the first two issues, i.e., whether the words were defamatory and whether they were fair comment.

Jones v. *E. Hulton & Co.* (1), [1909] 2 K.B. 444, [1910] A.C. 20, and *Heaton* v. *Goldney* (2), [1910] 1 K.B. 754, applied. *Morley* v. *Patrick* (3) (1910), 21 Ont.L.R. 240, and *Norton* v. *Hoare* (*No. 2*) (4) (1913), 17 C.L.R. 310, not followed.

Per LAWRENCE, L.J.: the interrogatories in effect asked the defendants whether they meant, by the words complained of, the meaning alleged in the innuendo. *Morley* v. *Patrick* (3) (1910), 21 Ont.L.R. 240, and *Norton* v. *Hoare* (*No. 2*) (4) (1913), 17 C.L.R. 310, distinguished.

Notes. As to interrogatories in libel cases, see 12 HALSBURY'S LAWS (3rd Edn.) 71–73, para. 99, and for cases on the subject see 18 DIGEST 203–206, *1512–1544*.

Cases referred to:

(1) *Jones* v. *Hulton & Co.*, [1909] 2 K.B. 444; 78 L.J.K.B. 937; 101 L.T. 330; 25 T.L.R. 597, C.A.; on appeal, [1910] A.C. 20; 79 L.J.K.B. 198; 101 L.T. 831; 26 T.L.R. 128; 54 Sol. Jo. 116, H.L.; 32 Digest 17, *77*.

(2) *Heaton* v. *Goldney*, [1910] 1 K.B. 754; 79 L.J.K.B. 541; 102 L.T. 451; 26 T.L.R. 383; 54 Sol. Jo. 391, C.A.; 18 Digest 206, *1542*.

(3) *Morley* v. *Patrick* (1910), 21 Ont.L.R. 240.

(4) *Norton* v. *Hoare* (*No. 2*) (1913), 17 C.L.R. 310.

(5) *Spiers and Pond, Ltd.* v. *John Bull, Ltd.* (1916), 85 L.J.K.B. 992; 114 L.T. 641; 32 T.L.R. 317; 60 Sol. Jo. 353, C.A.; 18 Digest 204, *1523*.

Appeal from an interlocutory order of MACKINNON, J., made on June 16, 1933, affirming an order of a master that the defendants answer certain interrogatories delivered by the plaintiff in his action against them for libel.

The plaintiff was the organiser and manager of exhibitions held at galleries in Lower Regent Street, W., and organised an exhibition in March, 1930, of certain pictures including those of old masters. The galleries were owned by a company, the bulk of the shares in which were held by the plaintiff and his family. In the issue of March 12, 1930, of the "Daily Mirror" the defendants published a statement headed

> "£150,000 pictures vanish from London gallery. Mystery of eighteen paintings. Art gems by Rembrandt and Gainsborough. Yard puzzled. No sign of entrance having been forced."

The material part of the statement which followed was:

> "One of the most sensational art mysteries of recent times is engaging the attention of Scotland Yard. Eighteen pictures, whose value is placed as high as £150,000, have disappeared from the Carlton Galleries, in Lower Regent Street. The pictures were missed yesterday morning, and detectives are puzzled by the fact that they could find no sign of an entrance having been forced, all doors and locks being intact. It is stated that the police have formed the opinion that if the pictures were stolen, they were taken while the building was open."

The statement gave a list of the pictures and continued:

> "The owner of the Carlton Galleries is Mr. Franckle. Some of the pictures were on large canvases. The loss was discovered by the staff yesterday morning. . . ."

In their issue of the following day the defendants inserted a photograph of the plaintiff with the words underneath:

> "Mr. L. Franckl, proprietor of Carlton House Galleries, from which eighteen pictures have been stolen."

The statement of claim alleged that the defendants falsely and maliciously published the statement in the headnote set out concerning the plaintiff in his position and employment at the galleries, and meant and were understood to mean that the plaintiff or his agents with his knowledge and authority stole the pictures or caused them to appear to have been stolen, for the purpose of keeping them himself, and that the plaintiff was a thief. The defendants admitted that by Mr. Franckle or Franckl was meant the plaintiff but denied that the statement published of and concerning the plaintiff in his position and employment, or bore the meaning alleged or any meaning defamatory of the plaintiff and pleaded that it was no libel, alternatively, that if the words were defamatory they were fair comment on a matter of public interest and made without malice.

The interrogatories ordered to be answered by the defendants were:

> "1. Did you not intend the words complained of or some and which of them to apply and refer to the plaintiff? 2. If yea, did you not intend the said words complained of or some and which of them to apply or refer to the plaintiff in his position and/or employment as alleged in the statement of claim? 3. What information had you when you printed and published the said words complained of, which induced you to believe that the expressions of opinion, or any and which of them in the said words and figures contained, and which you allege in the defence herein are fair comments made in good faith and without malice, were true?"

The appeal was confined to the order to answer the first two of the interrogatories.

H. C. Marks for the defendants.

S. L. Lloyd (*Herbert Malone* with him), for the plaintiff, referred to *Morley* v. *Patrick* (3) and *Norton* v. *Hoare* (*No. 2*) (4).—When the jury are considering the whole of this statement they must say: Did the defendants, when they wrote that, intend that specific paragraph to refer to the plaintiff? [LORD HANWORTH, M.R.—It is clear from *Jones* v. *Hulton & Co.* (1) and *Heaton* v. *Goldney* (2) that it would be for the jury, on all the facts of the case, to say whether the defendants intended it to refer to the plaintiff and what would an ordinary person deduce from the words juxta the photograph. I should have thought it might be said to the jury that the photograph was put in as the photograph of the person with whom everybody ought to have sympathy, and that it is not defamatory at all. Nowadays, photographs are put into newspapers, and they are not good photographs at all, and one must sympathise with the persons whose photographs they are supposed to be.] Is not your Lordship dealing with the form as it stands? [LORD HANWORTH, M.R.—Yes, and that is what I think is your difficulty. First of all, you have to establish that by the ordinary rules the words are defamatory. Secondly, that they apply to the plaintiff, and when you have done that there has to be a plea and the establishment of fair comment. Then only comes the question of malice. But you want to jump all those steps and to introduce what is really matter for cross-examination, because, as VAUGHAN WILLIAMS, L.J., rightly says in *Heaton* v. *Goldney* (2) ([1910] 1 K.B. at p. 758). [His Lordship then quoted the passage, which is also quoted in his judgment (infra).] We have all heard the questions: "Do you really think the plaintiff is a thief?" and "What do you think now?"; and you put the defendant in the unfortunate position that he does not know what he thinks, and you put it to the jury that owing to the way in which he answered they can deduce what sort of man he is. But you want to take the short cut to all that. You had much better reserve that for cross-examination.]

LORD HANWORTH, M.R.—This is an appeal from an order of the Master which was confirmed by the judge, allowing the first two interrogatories which are submitted, and both those interrogatories ask the defendants whether they intended the words complained of to apply to and refer to the plaintiff, and, if they did, did they intend the words, and which of them, to apply to the plaintiff in his position or employment as stated in the statement of claim.

The point is a short one, and it has been very well argued, both by Mr. Marks for the defendants and by Mr. Lloyd for the plaintiff. We are of opinion that the appeal must be allowed, and allowed on the principles which are stated, both in the Court of Appeal and in the House of Lords, in *Jones* v. *E. Hulton & Co.* (1), and in the Court of Appeal in *Heaton* v. *Goldney* (2). It is quite true—and I agree with the view which has been expressed in *Spiers and Pond, Ltd.* v. *John Bull, Ltd.* (5)—that on these matters of interrogatories it is probably unwise to lay down a general rule, because the circumstances vary so much in particular libel actions. I am, however, satisfied that these two interrogatories ought not to be allowed within the principle of the two cases to which I have referred. Counsel for the plaintiff argues the matter in this way; he says that there is an issue of malice against the defendants, because the defendants ultimately rely, in the last paragraph of their defence, on fair comment. That is true; and counsel cited two colonial cases [*Morley* v. *Patrick* (3) and *Norton* v. *Hoare* (*No. 2*) (4)] in which some interrogatories of the same nature as those in the present case were ordered to be answered as being relevant to that issue of fair comment, or, rather, to an issue upon which express malice is raised. I hesitate to follow those cases. Interrogatories are, or may be, burdensome to the defendant; they may, indeed, embarrass the course of his defence.

In the present case the plaintiff, to succeed in proving that the words are defamatory, has to show that the words referred to him, the plaintiff. If he does so, the defendants will have to establish that they were fair comment, and only in answer to that plea of fair comment would the question of the defendants' attitude become relevant. If, however, these questions were answered, they could be used by the plaintiff in support of his case on the first two issues. Bearing in mind that interrogatories ought to be sparingly used and that the position of the defendants ought to be safeguarded on what are really the main issues of the case, I think that this is a case in which these two questions ought not to be put.

The distinction between what is matter for interrogatories and what is matter for cross-examination is often a fine one. As VAUGHAN WILLIAMS, L.J., said in *Heaton* v. *Goldney* (2) ([1910] 1 K.B. at p. 758):

> "It is only where the words complained of were spoken on a privileged occasion that the question whether there was express malice becomes a material issue, and malice must be proved as a fact. But then it is said that these interrogatories go to the question of amount of damages, or that they relate to matters which might tell against the party answering them, as showing what his conduct had been in relation to the case, or, in other words, which would be good ground for cross-examination of him."

I share that view indicated by the learned judge. The plaintiff is not, by a side-course, entitled to have something which would be material for use by him in his claim to prove what he has to prove, before the defence becomes necessary; and it is not until the question of the reply to the defendants' defence of fair comment arises that these interrogatories are material. The right course is to safeguard the position of the defendants and the court ought not to make an order that these interrogatories should be answered. I think our decision comes within the principle of the two cases to which I have referred, and I should hesitate for some time before I followed the two cases which have been decided in the Colonial courts, to which counsel for the plaintiff called our attention.

The appeal, therefore, must be allowed with costs.

LAWRENCE, L.J.—I agree. Without attempting to lay down any general rule applicable to all cases, I am clearly of opinion that in this case the interrogatories ought not to be allowed. What they come to, in effect, is to ask the defendants whether they meant, by the words complained of, what is alleged to have been their meaning in the innuendo. I asked counsel for the plaintiff whether he could cite any case in which such an interrogatory had been allowed, and he frankly told me that he knew of none in this country, but cited two cases, one [*Norton* v. *Hoare* (4)] from Australia and the other [*Morley* v. *Patrick* (3)] from Canada. In those cases the questions were different in form and in substance from what we have here. The alleged libel clearly gives the name of the plaintiff as the owner and the proprietor of the galleries from which it was said that the pictures had disappeared, and it is a mere matter of construction of the libel as a whole as to what is the true meaning of identifying him as the proprietor of the picture galleries and stating that the pictures disappeared when the galleries were open. The issue on the question of defamation will be what an ordinary person, reading that article, would think. So again, when it comes to the plea of fair comment, it will be for the jury to say whether there was fair comment. The article speaks for itself, and to my mind, how far an ordinary person would connect the plaintiff with one or other part of the libel, and the intention in that case, or what the defendants meant, is not relevant. The question is whether there was malice in the article, and interrogatory No. 3 is amply sufficient, because that asks the defendants what information they had about the plaintiff when they wrote the article, and that is a legitimate inquiry, and it is quite sufficient.

I agree, therefore, that the appeal should be allowed with costs to the defendants in any event.

Appeal allowed.

Solicitors: *Michael Abrahams, Sons & Co.*; *Dangerfield, Blythe & Co.*

[*Reported by* Geoffrey P. Langworthy, Esq., *Barrister-at-Law.*]

Re JONES. JONES *v.* JONES

[Chancery Division (Eve, J.), June 20, 1933]

[Reported [1933] Ch. 842; 102 L.J.Ch. 303; 149 L.T. 417;
49 T.L.R. 516; 77 Sol. Jo. 467]

Annuity—"Such an annuity as, after deducting therefrom income tax at the current rate for the time being, would amount to the clear yearly sum of £350"—Right of annuitant to sums subsequently repaid by Commissioners of Inland Revenue in respect of annuitant's tax reliefs.

A testatrix by her will gave her residuary trust funds to trustees on trust to pay to or apply for the benefit of her daughter M. "such an annuity as, after deducting therefrom income tax at the current rate for the time being, would amount to the clear yearly sum of £350 free of duty," and to E.M. a similar annuity of £60 to be applied towards the cost of dress and clothing for M. for her life.

The testatrix died on Jan. 1, 1930, and £131 12s. 7d. was repaid by the Commissioners of Inland Revenue in respect of repayment of tax on M.'s income for the three years to April, 1932.

Held: the tax repaid belonged to the annuitant because (i) "the current rate" meant the standard rate of income tax, not the rate at which the annuitant might ultimately have to pay tax;

(ii) "after deducting therefrom income tax at the current rate for the time being" merely fixed the amounts to be paid by the trustees each year;

(iii) the bequest was one of an annual sum liable to fluctuation with fluctuations in the standard rate, and was not an annuity bequeathed free of tax.

(iv) the tax deducted by the trustees was therefore paid by them to the commissioners on behalf of the annuitant: *Re Pettit, Lefevre* v. *Pettit* (1), [1922] 2 Ch. 765, distinguished.

Notes. Distinguished: *Re Maclennan, Few* v. *Byrne*, [1939] 3 All E.R. 81; *I.R. Comrs.* v. *Cook*, [1945] 2 All E.R. 377. Considered: *Re Tatham, National Bank, Ltd., and Matthews* v. *Mackenzie*, [1945] 1 All E.R. 29; *Re Arno, Healey* v. *Arno*, [1947] 1 All E.R. 64; *I.R. Comrs.* v. *Duncanson*, [1949] 2 All E.R. 846. Referred to: *Re Batley, Public Trustee* v. *Hert*, [1952] 1 All E.R. 1036.

As to entitlement to tax repaid by virtue of an annuitant's entitlement to tax relief, see 28 HALSBURY'S LAWS (2nd Edn.) 216, para. 388.

Case referred to:

(1) *Re Pettit, Lefevre* v. *Pettit*, [1922] 2 Ch. 765; 91 L.J.Ch. 732; 127 L.T. 491; 38 T.L.R. 787; 66 Sol. Jo. 667; 39 Digest 167, *587*.

Summons for determination of the question whether the sum of £131 12s. 7d. repayments of tax by the Commissioners of Inland Revenue, in respect of relief from tax to which an annuitant was entitled, belonged to the annuitant or to the fund out of which the annuity was paid.

The following facts are taken from the judgment:

The applicants are the executors and trustees of the late Martha Lloyd Jones, who died on Jan. 1, 1930, having by her will dated March 12, 1929, devised and bequeathed to them her residuary trust funds in trust to pay thereout to her daughter, the respondent, Mabel Lloyd Jones, or apply for her benefit or requirements, such an annuity as, after deducting therefrom income tax thereon after the current rate for the time being, would amount to the clear yearly sum of £350 free of duty, and to Emily Tonge Morrish such an annuity as, after deducting therefrom income tax thereon after the current rate for the time being, would amount to the clear yearly sum of £60 free of duty to be applied by her as and when required for and towards the costs and expenses of dress and clothing for her said daughter during her lifetime. And the testatrix declared that should there be at any time any surplus income in the hands of her trustees they should pay the same and the accumulations thereof to her son, the respondent, Hubert Lloyd Jones, once in every two years.

On March 25, 1931, a receiver was appointed under s. 116 of the Lunacy Act, 1890, of the dividends, interest, and income, and all arrears thereof, to which the said Mabel Lloyd Jones was or might become entitled; and on Dec. 8, 1932, the Commissioners of Inland Revenue paid to the receiver £131 12s. 7d. by way of repayment of income tax for the three years to April 5, 1932, in respect of the income of the said Mabel Lloyd Jones to that date. Her total gross income for that period amounted to £1,219 12s., of which the sum of £1,027 13s. 1d. consisted of the annuity of £350 and £176 3s. 5d. of the annuity of £60.

E. M. Winterbotham for the trustees.

J. H. Stamp, for the annuitant, claimed the whole sum of £131 12s. 7d. on the ground that the gift was one in effect not free from income tax.

Wilfrid Hunt, for the residuary legatee, contended the contrary and referred to *Re Pettit, Lefevre* v. *Pettit* (1).

EVE, J., [after stating the facts, continued:] The question now has been raised whether the £131 12s. 7d. is payable to the annuitant or whether so much of the amount as is attributable to the annuities ought to be treated as part of the residuary estate of the testatrix. The testatrix, be it observed, has not bequeathed the annuities free of income tax. Had she so done the case would have been covered by the decision in *Re Pettit, Lefevre* v. *Pettit* (1) and the residuary estate would have been entitled to so much of the amount repaid as represents repayment in respect of the tax payable on the annuities. What she has done is to provide A that the beneficiary shall in every year be paid two sums of such amounts as shall, after deduction of the income tax for the time being payable in respect thereof, leave £350 and £60. The income tax only comes in for the purpose of fixing in each year the amount to be provided. In this connection the current rate means the standard rate, not the rate at which the annuitant may ultimately have to pay, and in each of the two cases the bequest is of an annual sum liable to fluctuation B in accordance with the movement up or down of the standard rate. It is not an annuity bequeathed free of tax. On the contrary, the trustees will, by deduction from the sum set aside, each year pay on behalf of the annuitant the tax payable in respect thereof, and if the annuitant succeeds in recovering any part of the tax paid it will belong to her just as it would do in the case of an annuity not bequeathed free of tax. I think, therefore, that the question raised by the summons C ought to be answered in favour of the annuitants. The costs must be taxed and paid out of the residuary estate.

Solicitors: *Close & Co.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

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BURNETT STEAMSHIP CO., LTD. *v.* JOINT DANUBE AND BLACK SEA SHIPPING AGENCIES

[COURT OF APPEAL (Scrutton, Greer and Romer, L.JJ.), July 7, 1933] F

[Reported [1933] 2 K.B. 438; 103 L.J.K.B. 44; 149 L.T. 598; 49 T.L.R. 553; 38 Com. Cas. 326; 18 Asp.M.L.C. 443]

Shipping—Charterparty—Lay days—Loading—Exception of "time lost . . . owing to work being impossible through rain"—Period of rain sufficient to render work impossible—No cargo then available for loading.

By a contract in the Chamber of Shipping Danube Berth Contract form, G known as "Dancon," a ship was chartered to call at one or more places on the Danube for a complete cargo of grain. The time available for loading was fifteen days, thirteen hours. By cl. 4: "Should any time be lost whilst steamer is in a loading berth owing to work being impossible through rain, snow or storm . . . the amount of actual time so lost during which it is impossible to work owing to rain, snow or storm . . . to be added to the loading time. . . ." H While the ship was lying in loading berths at two places ready to receive cargo, rain occurred during working hours to an extent which would make it impossible to work cargo into the ship for periods amounting, in all, to two days, but when such rain occurred, though cargo was available in the sense that the charterers could have obtained it from various shippers, yet in fact the charterers had not booked cargo with the shippers and no cargo was alongside I the ship.

Held by GREER and ROMER, L.JJ. (SCRUTTON, L.J., dissenting): to bring themselves within cl. 4 the charterers must prove, not only that during the periods of rain work was impossible because of the rain, but also that in consequence of the rain they lost time in loading; at the material times the charterers had no cargo ready to load, and, had the rainy periods in fact been fine, the time taken in loading would have been the same; and, therefore, the charterers had not lost any loading time in consequence of rain.

Notes. Applied: *Compania Naviera Azuero S.A.* v. *British Oil and Cake Mills, Ltd.*, [1957] 2 All E.R. 241.

As to when a charterer is excused for failure or delay in loading, see 30 HALSBURY'S LAWS (2nd Edn.) 448–450, and for cases see 41 DIGEST 452 et seq.

Case referred to:

(1) *Vergottis* v. *William Cory & Son, Ltd.*, [1926] 2 K.B. 344; 95 L.J.K.B. 1002; 135 L.T. 254; 17 Asp.M.L.C. 71; 31 Com. Cas. 262; 41 Digest 565, *3899*.

Appeal from an order of MACKINNON, J., on an award stated in the form of a Special Case by an umpire.

The owners of the steamship *Burnhope* and the charterers entered into a contract dated April 9, 1931, which, in the words of MACKINNON, J., was "scarcely distinguishable from a charterparty" in the Chamber of Shipping Danube Berth Contract form known as "Dancon." The steamer was chartered to call at one or more places on the Danube for a complete cargo of grain. It being a berth charter, the charterers did not primarily provide the cargo, but "put the vessel on the berth" and there made individual contracts with shippers. By the said contract it was provided that the cargo should be loaded at the average rate of 400 units per running day (Sundays and non-working holidays excepted). The time available for loading under this provision depended upon the capacity of the steamer, and in this case worked out at fifteen days, thirteen hours. By cl. 4:

> "Should any time be lost whilst steamer is in a loading berth owing to work being impossible through rain, snow, or storm, or by the steamer being ordered by the port authorities to 'break out of berth' to let other vessels in or out, the amount of actual time so lost during which it is impossible to work, owing to rain, snow or storm, or by 'breaking out of berth,' to be added to the loading time, but in no case shall the allowance for any or all of the foregoing circumstances exceed, in the aggregate, time amounting to three days."

The steamship *Burnhope* voyaged to the Danube and loaded at three ports. The shipowners claimed six-and-a-half days' demurrage at £30 a day, or £195, the charterers having paid one day's demurrage or £30. The umpire found that, while the vessel was lying in a loading berth at Braila and Galatz ready to receive cargo, rain occurred on certain occasions during working hours to an extent which would make it impossible to work cargo into the ship, amounting to two days in all; but he also found that when such rain occurred, though cargo was available in the ports in the sense that the charterers could have obtained such cargo from various shippers, yet in fact the charterers had not booked cargo with the shippers at the times when rain occurred, and no cargo was then alongside the ship.

The question at issue was whether under cl. 4 of the contract the two days should be added to the loading time (fifteen days, thirteen hours). The umpire held that two days' time was lost while the steamer was in a loading berth owing to work being impossible through rain. MACKINNON, J., reversed this decision, holding that there was no amount of actual time so lost, as no cargo was alongside available for loading. The charterers appealed.

Sir Robert Aske for the charterers.

W. L. McNair for the shipowners.

SCRUTTON, L.J.—This case raises a short, but difficult question. A very experienced commercial arbitrator, who has probably dealt with as many charterparty cases as any judge on the bench, has decided one way, and a very experienced commercial judge has decided the other way, and there is a division of opinion in this court. I have come to the conclusion that the arbitrator was right, but I can quite understand the view taken by those who think the learned judge was right.

This is a Danube berth charter, which means that the charterer is not the person who is providing the cargo primarily. He is going, as it is called, to put the vessel "on the berth" and make individual contracts with shippers by which he hopes to fill up the ship at a sub-contract freight which will leave him a profit on the charter freight, and it was intended that the vessel should call at two or possibly three ports on the Danube. She was going to move about and pick up her shipping cargo where she could. One of the most important matters for which provision has to be made is the length of time allowed to the charterer in which to do that. He is entitled to keep the ship at the loading places for a certain amount of time by paying freight. If he exceeds that time he will have to pay demurrage, and there are different kinds of provisions for estimating how long he may keep the ship loading before he pays any demurrage. One very common way of doing it is by giving him a fixed number of days to load. When he has that fixed number of days, under the ordinary provisions he is not bound to load on every day; so long as he loads in the total number of days, he need not load on one, two or three of the days. He is under no obligation to put cargo on board on these individual days so long as he loads the ship in the specified number of days that has been allotted to him. There may be cases, and *Vergottis* v. *William Cory & Son, Ltd.* (1) is one, where the ship has got to go into a particular dock under particular regulations, and these regulations require the charterer to have cargo in the dock before the vessel is admitted, but that is quite a different case from this. The charterer may be liable for damages there for having contracted to load the ship in a dock and not having the necessary cargo which the dock regulations require before the ship can get in. There is nothing of that sort in this case.

This particular contract provided: "Cargo shall be loaded at the average rate of 400 units per running day." The words "average rate" show that the charterer need not load 400 tons on any particular day; so long as at the end of the specified number of days he has loaded his cargo into the ship, he has completed his contract, and he is not liable because, for example, on Monday, Tuesday or Wednesday he did not load any cargo at all; and, as he is not liable if on a particular day he does not load any cargo, obviously he need not, so far as the charterparty is concerned, have any cargo there on that particular day. He will not break his contract by having no cargo there on that day; but he is to load the ship at the average rate of 400 units per running day, and the time available for loading under that provision will depend upon the size of the ship. In this case the time available was fifteen days, thirteen hours—I call it fifteen days for simplicity—Sundays and non-working holidays excepted. In the course of the fifteen running days when you come to a Sunday, you are not to count it, and if you come to a non-working holiday, whatever that may be, you are not to count it, and there is no question that it would be no answer to say, you must count the Sunday because there was no cargo alongside on the Sunday, or the non-working holiday because there was no cargo alongside on the non-working holiday.

Then there comes another calculation. What provision was made about weather? The charterer was to have fifteen days for loading. Supposing it rained on the fifteen days, was he to have fifteen days for loading, or was he to have any more? That contingency is frequently dealt with by a clause providing that the charterer is to have so many "weather working days." In that case it is clear that it would be no answer for the shipowner to say: "Yes, Monday was not a 'weather working day,' but you, the charterer, had no cargo alongside that day, and so it must be counted as a 'weather working day.'" The shipowner cannot count a day on which it rains throughout the day as a "weather working day" because there was no cargo alongside. That is quite clear, in fact counsel for the shipowners does not attempt to dispute the proposition. There are other provisions in the charterparties in which the running days are extended in the ordinary forms of charter. For instance, all along the Pacific coast of South America there are practically no harbours, and cargo is taken from shore to ship in lighters, where there is frequently surf. In charterparties for voyages to that coast may be found the provision that "surf days" do not count, and "surf days" generally are certified by the master of the port. In such a case it would be no answer again for the shipowner to say: "Oh, yes, you say this is a 'surf day,' but you had no cargo there, and so you cannot count it as a 'surf day.'" The answer of the charterer, both in regard to weather working days and to surf days, would be: "I am under no obligation to have cargo there every minute of every day: I do not break my contract if on a particular day I have no cargo either alongside or contracted for, so long as in the specified period of running days I load the ship." Now, it may be that the charterer will load in less than the time in which he has contracted to load. Then there comes in a despatch clause for all time saved in loading the steamer, and the time saved in loading is that saved when the ship can get away before the end of the period which under the contract the shipowner has allowed the charterer within which to load the ship.

In this contract there is a provision with regard to weather which is not for time saved, but for time lost where the ship is kept longer than the contract time owing to weather. The clause is:

> "Should any time be lost whilst steamer is in a loading berth owing to work being impossible through rain, snow or storm, or by steamer being ordered by the port authorities to 'break out of berth' to let other vessels in or out, the amount of actual time so lost during which it is impossible to work, owing to rain, snow or storm, or by 'breaking out of berth' to be added to the loading time. . . ."

I must take the time during which it is impossible to work owing to rain, snow or storm as a definition of "actual time so lost"—the actual time in which it is impossible to work, and in respect of which, therefore, part of the fifteen days is of no use, because it is impossible to work in it, and such time is to be added to the running days which the charterer has for loading on the assumption that he can work on them.

The opposite view is this. The proposition that should any time be lost the amount of actual time so lost is to be added to the loading time, means that the charterer must show that the time has been lost because of the rain, and, if he had no cargo alongside, though he was not bound to have any cargo alongside, and though it was no breach of his contract not to have cargo alongside—if he has no cargo alongside when the rain occurs, then the time is not so lost, because he has no cargo alongside. Yet, if he happened to have cargo alongside, he could not have put it on board. I do not agree with that contention. I think the time saved and time lost both relate to the contract time within which the charterer has to load the ship. It is assumed there are so many days which the charterer has in which to load the ship; if he loads in less he has saved the ship time, but if he occupies more days in loading the ship he has lost the ship time, and if in the running days that the charterer has within which to load the ship there are so many days on which he cannot load the ship and on which it is impossible to load the ship, because of rain, those days are to be added to the days which by contract he has within which to load the ship. That is a short statement of the two points of view. The umpire has taken one view, and the learned judge has taken the other. Using such knowledge as I have I agree with the umpire.

GREER, L.J.—I agree with the view taken by MACKINNON, J., in the facts stated by the umpire in his award. The case is one of first impression. I cannot gather from the authorities any guide as to what construction should be put upon this contract except from the general principles that are always adopted in construing contracts. I agree with my Lord that this is a contract to load in a fixed time. A little arithmetic is required to find out the fixed time, but when that has been calculated the fixed time is found to be fifteen days, thirteen hours. The charterer has got to load the ship in that time unless he can find in the terms of the charter-party an excuse for not loading in that time, or a provision that the period so calculated has been extended by the terms of the charter. The question arises under cl. 4 of the contract. As I read the award, it was a finding that it was not established by the evidence that any cargo was available during the rainy periods; it was not a case of a continuous two days' rain, but of rainy periods happening at two different places amounting, in all, to two days. I ask myself whether in those circumstances it can be said that the charterer has brought himself within the words of the charterparty which entitle him to an extension of time. I think the words of cl. 4 mean that there are two propositions that the charterer has to prove in order to entitle him to that extension of time. He has to prove that work became impossible through rain, and that in consequence of that he lost time in loading. Unless he proves both those circumstances he does not bring himself within the clause. The charterer in the present case did prove that there were hours of time, amounting in all to two days, in which work was impossible through rain, but he did not prove that that resulted in any loss of time by him, because on the facts as found he was not there ready to utilise the time, and, therefore, he cannot say that he has established that it was the impossibility of loading that caused him to lose that time.

The result of that, if I am right in my view, which I hold with hesitation, as my Lord takes a different view, it follows that the charterer has not established any right under this charterparty to an extension of his days of loading, and that therefore, the learned judge was right, and the umpire was wrong.

ROMER, L.J.—It is a little embarrassing for me to have to cast the deciding vote on a question of construction of a document that is described by MacKinnon, J., as really almost indistinguishable from a charterparty, when Scrutton, L.J., and Greer, L.J., take diametrically opposite views upon that question. But unless, and I have no reason to suppose it is so, different principles of construction apply to such a document from those that are applied to the construction of any other document, I confess that I find myself unable to disagree with the view that has been expressed by MacKinnon, J., and by Greer, L.J.

The question is really a very short one, and it is this. Upon the facts found by the umpire, is it possible for these charterers to say that the two days to which the umpire refers in his award were lost owing to work being impossible through rain? The test of the question is this: Would that time have been lost if there had been no rain during those two days? The answer is obviously that the time would have been lost had those days been perfectly fine, because at the time that the rain was going on there was no cargo which could be loaded into the vessel. The learned umpire has not found, as was suggested, I think, by counsel for the charterers, that the charterers failed to secure cargo alongside the vessel at those times owing to the rain. I am not surprised that there is no such finding, because it would amount to this, that the charterers refrained from ordering cargo to be present alongside the vessel at these particular times, because they foresaw that at these particular times it would be raining. It is possible, of course, that they are such fine prophets with regard to the weather as that, though I doubt it; if they were, their proper place, I think, would be at the Meteorological Office. But inasmuch as it appears to be quite plain on the findings of fact that, had these periods been fine instead of rainy, the time taken in loading the vessel would have been exactly the same, neither more nor less, the charterers have failed to establish that the time was lost owing to rain. For these reasons I think the decision of MacKinnon, J., was right, and this appeal must be dismissed.

Appeal dismissed.

Solicitors: *W. & W. Stocken*; *Botterell & Roche.*

[*Reported by* C. G. Moran, Esq., *Barrister-at-Law.*]

Re WAVERTREE. RUTHERFORD *v.* HALL-WALKER

[CHANCERY DIVISION (Eve, J.), June 22, 1933]

[Reported [1933] Ch. 837; 102 L.J.Ch. 367; 149 L.T. 418; 49 T.L.R. 515; 77 Sol. Jo. 468]

Will—Gift of such of the furniture and effects at the time of testator's decease in or about his two residences as the legatee might select for the purpose of furnishing a residence—Construction.

A testator by his will gave to a legatee "such of the furniture and household effects which at the time of my death shall be in or about either of my residences, Horsley Hall or Sussex Lodge, as she may select for the purpose of furnishing a residence. . . ." The residuary estate was devised and bequeathed upon trust for an infant. At the time of the testator's decease both these houses were fully equipped as residences and there were motor cars in the garages, and other movable property, viz., consumable stores, garden implements and tools, and movable plants. The will further empowered the trustees thereof to expend a sum not exceeding £5,000 in the purchase of a house for the legatee.

Held: the legatee was absolutely entitled to the whole of the furniture and household effects in both the above-named residences, including the motor cars and other movable property, because

(i) neither the phrase "for the purpose of furnishing a residence" nor the authority to expend not more than £5,000 on the purchase of a house operated to cut down the bequest to the legatee. *Arthur* v. *Mackinnon* (1) (1879), 11 Ch.D. 385, and *Re Sharland* (2) (1896), 74 L.T. 664, applied.

(ii) the fact that the power of selection from the contents of two houses was for one house did not limit the right of selection to only one house, or to part of the chattels.

(iii) the phrase "in or about" included the motor cars and the other movable property.

Notes. As to a donee's rights of selection, see 34 HALSBURY'S LAWS (2nd Edn.) 36, para. 30; as to the meaning of "household effects" and "furniture," see ibid., 261–262, para. 312, notes (n) and (o); and for cases on these subjects see, respectively, 34 DIGEST 214, *408–412*, ibid. 713, *5596–5602*, and ibid. 714, *5619–5625*.

Cases referred to:

(1) *Arthur* v. *Mackinnon* (1879), 11 Ch.D. 385; 48 L.J.Ch. 534; 41 L.T. 275; 27 W.R. 704; 44 Digest 214, *411*.

(2) *Re Sharland, Kemp* v. *Rozey* (*No. 2*), [1896] W.N. 62; 74 L.T. 664; 40 Sol. Jo. 514, C.A.; 44 Digest, 214, *412*.

Summons as to the construction of a will.

The following facts are taken from the judgment:

The proceedings have been instituted to determine the true construction of cl. 14 of the testator's will. It is in these terms:

> "I bequeath to my said adopted daughter Rosemary such of the furniture and household effects which, at the date of my death shall be in or about either of my residences Horsley Hall or Sussex Lodge as she may select for the purpose of furnishing a residence for my said adopted daughter,"

and the questions submitted for the judgment of the court are: (i) Is the legatee entitled to select furniture and household effects from both of the residences mentioned, or must she elect from which of them she will make her choice, and thereupon be precluded from making any selection from the other? (ii) Does the bequest include motor cars, consumable stores, garden implements and tools, and movable plants? (iii) Is there any, and if so what, quantitative limit to the power of selection?

The residuary estate of the testator was devised and bequeathed on trust for an infant: at the testator's death both the above-mentioned houses were fully equipped as residences, and contained motor cars in their garages, and other movable property. By cl. 22 of the will the trustees were authorised to expend a sum not exceeding £5,000 on the purchase of a house for the legatee. A

Heckscher for the trustees of the will, the plaintiffs.

Morton, K.C., and *Potts*, for the legatee, Mrs. Kayser, cited *Arthur* v. *Mackinnon* (1), *Re Sharland, Kemp* v. *Rozey* (2). B

C. I. Radcliffe for the infant residuary devisee and legatee.

H. Gamon for a charity.

EVE, J., stated the facts and continued: I think that the questions should be answered as follows: (i) That the legatee is entitled to select from each of the two houses. The subject-matter of the gift comprises chattels in or about two residences, and the clause will not, in my opinion, bend to a construction which would make the word "either" equivalent to the phrase "one or other." (ii) The phrase "in or about" includes the motor cars and the other three items enumerated in this question. (iii) There is no quantitative limit to the power of selection. The phrase "for the purpose of furnishing a residence," whether it be explanatory of the motive underlying the bequest, or a reminder of the purpose for which the bequest is made, cannot operate to cut down the bequest. Moreover, it gives no indication of the sort or size of the house which is contemplated, and only raises an uncertainty. Nor does the fact that the power of selection from two houses of furniture is for one house lead to the conclusion either that the right to select is limited to one house, or that the power to select is to extend only to part of the chattels. Still less can the construction of this bequest be controlled by any reference to cl. 22 of the will whereby the trustees are authorised to expend a sum not exceeding £5,000 in the purchase of a house for the legatee. In my opinion this part of the case is concluded by the authority of *Arthur* v. *Mackinnon* (1), approved and followed by the Court of Appeal in *Re Sharland* (2). The legatee, in my opinion, is absolutely entitled to the whole of the furniture and household effects in both houses. C D E F

The costs of all parties will be taxed as between solicitor and client, and retained and paid out of the residuary estate.

Solicitors: *Mayo, Elder, & Rutherfords*; *Roche, Son, & Neale*; *Whitley & Co.*, Liverpool.

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*] G

Re PRUDENTIAL ASSURANCE CO.'S TRUST DEED. HORNE *v.* PRUDENTIAL ASSURANCE CO., LTD.

[CHANCERY DIVISION (Eve, J.), July 19, 1933]

[Reported [1934] Ch. 338; 103 L.J.Ch. 179; 150 L.T. 474; 49 T.L.R. 558; 77 Sol. Jo. 557]

Pension—Scheme—Trust deed—Provision for cesser of pension in the event of pensioner engaging in any business in competition with company—Validity of scheme.

The P. Assurance Co. established by a trust deed a pension scheme for its employees. The company thereby agreed to contribute a large annual sum towards the scheme, its employees also contributing certain sums calculated on a percentage of their wages. Clause 21 of the scheme provided that: "A pension shall cease and determine if the pensioner shall directly or indirectly engage in or be connected with any business, occupation or pursuit in competition with or adverse to the P. Assurance Co., and in such case the pensioner (if a contributor) shall be entitled to require the contributions actually made by him to the fund, after deducting the amount received by him in respect of his pension, to be repaid but without interest thereon." On the question whether cl. 21 was in unreasonable restraint of trade, and, therefore, unenforceable, and whether, if so, the whole scheme was thereby rendered invalid,

Held: (i) even if cl. 21 were unenforceable, this would not render the whole scheme invalid: *Wyatt* v. *Kreglinger and Fernau* (1), [1933] 1 K.B. 793, distinguished.

(ii) the question as to the validity of cl. 21 should therefore be left for determination if and when it arose.

Notes. As to a severable condition in unreasonable restraint of trade in a contract not vitiating the whole contract, see 32 HALSBURY'S LAWS (2nd Edn.) 427, para. 712, text and notes (s) and (t), and for cases on the subject see 43 DIGEST 46–47, *473–480*.

Case referred to:

(1) *Wyatt* v. *Kreglinger and Fernau*, p. 349; [1933] 102 L.J.K.B. 325; 148 L.T. 521; 49 T.L.R. 264, C.A.; Digest Supp.

Originating Summons as to the validity of a pension scheme.

By a trust deed made Dec. 24, 1918, between the Prudential Assurance Co., Ltd. (hereinafter called "the Prudential") of the one part and Frederick Schooling, James Moon, Alfred Corderoy Thompson, Sir George Ernest May, K.B.E., and Ernest Dewey (thereinafter called "the trustees") of the other part, after reciting that under a resolution of the directors of the Prudential dated Dec. 28, 1916, authority had been given to institute a staff pension scheme and that, in accordance with such authority, two several sums of £100,000 had been paid to the trustees and that the Prudential proposed to institute the pension scheme set out in the second schedule thereto and that the directors of the Prudential had, by a resolution dated Dec. 24, 1918, expressed their intention that the Prudential should make a fixed annual payment to the said fund for thirty years, if the funds of the Prudential permitted, in addition to certain other contributions, the Prudential thereby covenanted with the trustees to pay to them certain contributions in accordance with the scheme in the second schedule thereto, and it was thereby declared that the trustees should hold such contributions and other moneys and securities therein specified upon and subject to the trusts, powers and provisions declared by the said scheme and by that deed. The deed further provided that the trustees might vary or alter the trusts thereof so as to give effect to any variations or modifications of the said scheme. The deed also provided for the investment of moneys not immediately required for the scheme.

The second schedule to the trust deed contained the scheme, which provided that every person who entered the service of the Prudential on or after Jan. 1, 1919 (hereinafter called "the contributors"), should accept the scheme as a term of his employment. By part 2 of the scheme it was provided that every contributor should normally contribute to the fund at the rate of 3½ per cent. on his salary. Part 3 made provision for payment of benefits to contributors, to existing pensioners and to existing employees who were not bound to pay any contributions. The conditions regulating payments and the terms upon which they should be made were also specified. One of the terms regulating the payment of benefit was contained in cl. 21, which provided that:

> "A pension shall cease and determine if the pensioner shall directly or indirectly engage in or be connected with any business occupation or pursuit in competition with or adverse to the Prudential, and in such case the pensioner (if a contributor) shall be entitled to require the contributions actually made by him to the fund, after deducting therefrom the amount received by him in respect of his pension, to be repaid but without interest."

Part 4 of the scheme made provision for vesting the fund in trustees.

Owing to the decision of the Court of Appeal in *Wyatt* v. *Kreglinger and Fernau* (1) the question arose whether the inclusion of cl. 21 in the scheme affected its validity as a whole. The present trustees of the trust deed took out this summons to have it determined (i) whether, having regard to the provisions of the staff pension scheme constituted under the trusts of the said trust deed and upon the true construction thereof, and in particular of cl. 21 thereof, the plaintiffs, as such trustees, were entitled and ought to continue to collect from the defendant company and the contributors mentioned in the scheme the contributions therein mentioned and to apply the same in accordance with the provisions of the scheme; and (ii) whether, having regard to the provisions of cl. 21 thereof and upon the true construction thereof, the scheme was valid and effectual, and if invalid, whether in whole or in part, and if in part to what extent, and whether the scheme ought to be determined.

Spens, K.C., and *H. S. G. Buckmaster*, for the plaintiffs, the trustees of the trust deed, submitted that the scheme was valid.

R. S. King-Farlow, for the Prudential, submitted that cl. 21 was valid.

D. Ll. Jenkins for the defendant Canfield, representing contributors under the scheme.

J. F. Bowyer for three defendants, representing respectively employees not contributors, existing pensioners, and pensioners under the scheme.

EVE, J.—I have come to the conclusion that the scheme is valid, and that the trustees ought to go on administering it in accordance with the terms of the trust, leaving the question as to the validity of cl. 21 to be decided in future, if and when it should arise. The present case differs altogether from *Wyatt* v. *Kreglinger and Fernau* (1) because here I have not to determine the result of contractual relations between employer and employed, but to decide whether the introduction of cl. 21 into the trusts of this fund, which is vested in trustees for the benefit of a large number of beneficiaries, has the effect, assuming it to be unenforceable, of invalidating the whole of the valid trusts which are contained in the scheme. To hold that this would be the effect of it would be a very extravagant view to adopt. As has been pointed out, the clause is not unlike the limitations or conditions which are imposed in an endeavour to limit antecedent gifts in a trust contained in a settlement or will. Those conditions are not infrequently void, but that does not affect the beneficial interest except to free it from the burden or the control which the conditions have been framed to impose on it. I think the present scheme is of a nature which it is impossible to say would be destroyed because one of the trusts or one of the conditions or clauses incorporated in the scheme is a condition or clause which, if legal steps were taken to enforce it, might be found to be unenforceable. I propose, therefore, to make a declaration that the inclusion of cl. 21 in the scheme does not render the whole scheme invalid.

Solicitor: *H. H. Moseley.*

[*Reported by* MISS B. A. BICKNELL, *Barrister-at-Law.*]

Re JONES. PUBLIC TRUSTEE *v.* JONES

[CHANCERY DIVISION (Bennett, J.), December 12, 21, 1933]

[Reported [1934] Ch. 315; 103 L.J.Ch. 102; 150 L.T. 400; 78 Sol. Jo. 82]

Will—Entailed interest in personalty—Statutory provision as to personal estate directed to be held upon trusts corresponding to trusts affecting land subject to an entailed interest—Wording necessary to attract operation of statutory provision—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 130 (3).

Where a testator dies after 1925, s. 130 (3) of the Law of Property Act, 1925, which provides that: "Where personal estate (including the proceeds of sale of land directed to be sold and chattels directed to be held as heirlooms) is, after the commencement of this Act, directed to be enjoyed or held with, or upon trusts corresponding to trusts affecting land in which, either before or after the commencement of this Act, an entailed interest has been created, and is subsisting such direction shall be deemed sufficient to create a corresponding entailed interest in such personal estate," does not operate on a direction in his will unless the actual words mentioned in sub-s. (3) are used in the direction.

Re Price (1), [1928] Ch. 579, and *Re Hind, Bernstone* v. *Montgomery* (2), [1933] Ch. 208, applied.

Notes. For the present law as to the creation of entailed interests, see 34 HALSBURY'S LAWS (2nd Edn.) 343, para. 390. For the Law of Property Act, 1925, s. 130 (3), see 20 HALSBURY'S STATUTES (2nd Edn.) 707.

Cases referred to:

(1) *Re Price*, [1928] Ch. 579; 97 L.J.Ch. 423; 139 L.T. 339; Digest Supp.

(2) *Re Hind, Bernstone* v. *Montgomery*, [1933] Ch. 208; 102 L.J.Ch. 91; 148 L.T. 281; Digest Supp.

(3) *Re Fothergill's Estate, Price-Fothergill* v. *Price*, [1903] 1 Ch. 149; 72 L.J.Ch. 164; 87 L.T. 677; 51 W.R. 203; 44 Digest 945, *8009.*

Adjourned Summons as to the construction of a will.

Edward Brandram Jones, by his will dated April 30, 1923, left after the death of his wife

> "all the remainder and residue of my property (not herein previously disposed of) for the trustees to pay the income or allow it to be received by the beneficiaries in possession of the Poulstone estate as set out in my uncle Richard Jones's will in regard to the same to help a member of the family to hold the estate and reside thereon."

The testator's uncle Richard Jones by his will devised all his freeholds of inheritance:

> "To the use of my eldest son Richard Charles Stuart Jones and his assigns during his life without impeachment of waste and from and after the death of my said son Richard Charles Stuart Jones to the use of the first and every other son of the said Richard Charles Stuart Jones successively according to their respective seniorities in tail and in default or upon failure of such issue to the use of all the daughters of the said Richard Charles Stuart Jones as tenants in common in equal shares."

The uncle Richard Jones then declared that there should be remainder to his second son, namely, Henry Thomas Brandram Jones, on similar trusts and a remainder to the use of his third, fourth, fifth, sixth and every other of his son or sons severally and successively according to their respective seniorities and their respective assigns during the respective lives of such sons without impeachment of waste with ultimate remainder to the right heirs of the uncle Richard Jones.

The testator's uncle Richard Jones left four children him surviving. The eldest Richard Charles Stuart Jones, the first defendant, was tenant for life at the date of the summons. His only son was dead, and the second son of the testator's uncle, namely, Henry Thomas Brandram Jones, was tenant for life in remainder, and his son Henry Francis Brandram Jones, the third defendant, was tenant in tail in remainder. The latter had not executed any disentailing assurance.

The testator died on Feb. 1, 1929, leaving residuary personal estate of approximately the value of £20,000. The testator's widow died on Jan. 26, 1933. The Public Trustee, as surviving trustee of the testator's will, took out an originating summons asking (inter alia):

> "(i) Whether, on the true construction of the will of the said testator Edward Brandram Jones, his residuary estate, from the death of his widow Constance Penelope Harriet Jones on Jan. 26, 1933, was held in trust: (a) For the first defendant during his life with remainder in trust for his eldest or only son (if any) or in default of such son for his daughter or daughters (if any) and if more than one as tenants in common absolutely or in default of any such son or daughter for the second defendant during his life with remainder in trust for the third defendant absolutely; or (b) As if the same were capital moneys settled on trust to purchase real estate to follow the limitations of the Poulstone estate under the will of the said Richard Jones with effectual entailed interests; or (c) for the first defendant (Richard Charles Stuart Jones) absolutely."

Wilfrid Hunt for the Public Trustee.

Evershed, K.C., and *Hon. B. L. Bathurst* for the tenant for life, the first defendant.—The declaration of trust is not sufficient to create an entailed interest. [They referred to *Re Price* (1) and *Re Hind* (2).]

J. V. Nesbitt for an infant entitled in tail in remainder.—The testator has used words equivalent to the words of s. 130 (3). The will was made before the Act came into force, and before it was even passed, therefore the testator could not possibly use the words of the subsection. The testator, however, died after the Act came into force, therefore the provisions of the subsection apply provided it is clear that the testator directed the property to be held on the same trusts as those of the Poulstone estate. [He referred to *Re Fothergill's Estate*, *Price-Fothergill* v. *Price* (3).]

G. D. Johnston for the next-of-kin.—The questions discussed do not apply to this case, because only a life interest has been granted. [He referred to Law of Property (Entailed Interests) Act, 1932 (22 & 23 Geo. 5, c. 27).]

Cur. adv. vult.

Dec. 21. **BENNETT, J.,** read the following judgment.—This question arises on the will of Edward Brandram Jones, who gave his wife a life interest in all his property, and after her death said [his Lordship read the residuary gift contained in the will, and continued:] Under the testator's uncle's will the first defendant, Richard Charles Stuart Jones, is tenant for life in possession of the Poulstone

Estate, with remainder to his son, who has died, in tail, with remainder to the second defendant Henry Thomas Brandram Jones for life, with remainder to the third defendant Humphrey Francis Brandram Jones in tail. The fourth defendant, Richard Edmund Brandram Jones, is the son of the third defendant and is an infant. The third defendant has not executed any disentailing assurance.

The question is: what are the respective interests (if any) of these four defendants in the testator's property, which is personal property.

First, as a matter of construction, in my judgment, the meaning of the residuary gift is that the trustees are to pay the income to the person or persons for the time being entitled in possession to the Poulstone Estate as set out in the will of the testator's uncle, Richard Jones, and it is clear, I think, on that construction, that until the Law of Property Act, 1925, came into operation, the whole of the residue of the testator's estate, it being personal property, would have vested absolutely in the third defendant, the tenant in tail in remainder, subject to the prior life interests of the first and second defendants respectively. This seems to be well established—see *Re Fothergill's Estate, Price-Fothergill* v. *Price* (3) ([1903] 1 Ch. at p. 167).

Now that conclusion disposes of the interests of the clients of counsel for the next-of-kin, but it leaves for consideration the interests of the fourth defendant, an infant entitled in tail in remainder, and counsel for him has argued that s. 130 (3) of the Law of Property Act, 1925, interferes with the operation of the well-established rule stated in the case I have referred to, and operates so as to create an estate tail in the personal estate, in which his client has an interest until by a disentailing assurance the third defendant, who is his father, bars the entail. The question turns entirely upon the language of s. 130 (3) of the Law of Property Act, 1925. The language is as follows: I omit the words in brackets: [His Lordship read the section.] The question is an extremely narrow one, and is whether by the will of this testator it is possible to say that the personal estate is directed to be held upon trusts corresponding to trusts affecting land. The decision and observations of CLAUSON, J., in *Re Price* (1) and of MAUGHAM, J., in *Re Hind, Bernstone* v. *Montgomery* (2) show that the subsection is to be construed strictly, and the whole question is highly technical. The conclusion at which I have arrived is that before the section operates you must find in the will to be construed a direction that the property is to be held with and upon trusts corresponding to trusts affecting land. In other words, there must be a use of the actual words mentioned in the subsection. They are not used in the will before me, and therefore, in my judgment, the subsection does not apply, with the result that the question must, in my judgment, be answered by saying that the residuary estate is, from the death of the testator's wife, to be held upon the trusts mentioned in cl. 1 (a) of the originating summons.

Solicitors: *Bridges, Sawtell & Co.*; *E. G. & J. W. Chester.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

Re CARR'S SETTLEMENT. RIDDELL *v.* CARR

[CHANCERY DIVISION (Farwell, J.), July 11, 1933]

[Reported [1933] Ch. 298; 102 L.J.Ch. 327; 149 L.T. 601; 49 T.L.R. 581]

Annuity—Deficiency of income—Annuity charged on leasehold property—Exercise by owner of leasehold property of statutory right of redemption—Income of capital sum obtained from redemption less than amount of annuity—Rights of tenants for life vis-à-vis the remaindermen—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 191.

Under a settlement the income of a certain fund was to go to a wife for life, and after her death to her husband for life, and after the death of the survivor to their three daughters in equal shares for their respective lives. There was a remainder to the children of those daughters, with a remainder over. Part of the fund consisted of an annuity of £300 charged on certain leasehold property, and it was provided in the settlement that the annuity of £300 should be treated as income. There was also a provision that if the husband and wife together, or the survivor of them, so required, or after the death of the survivor, if the trustees in their absolute discretion thought fit, then the trustees should sell the annuity and invest the proceeds in the manner authorised. The annuity was never sold under the above provisions, but after the deaths of the husband and the wife the owner of the leasehold property subject to the rentcharge producing the annuity redeemed the rentcharge under the powers given to him by s. 191 of the Law of Property Act, 1925, and paid the capital sum to the trustees. The trustees invested the capital sum, but the income thereof was less than £300.

Held: the trustees should realise in each year sufficient of the capital to produce, with the income, £300 p.a., which they should pay to the tenants for life, because

(i) the relative rights of the tenants for life and remaindermen under the settlement could be altered only by a sale by the direction of the husband and wife or the survivor of them or at the discretion of the trustees or, possibly, under an order of the court for the administration or the execution of the trusts.

(ii) the compulsory sale to the owner of the leasehold property was not a sale at the discretion of the trustees, and these relative rights remained unaltered thereby.

(iii) this was the best way to give effect to these rights.

Notes. As to the relative rights of tenant for life and remainderman in relation to an authorised investment, see 29 HALSBURY'S LAWS (2nd Edn.) 665, para. 949; as to statutory redemption of a rentcharge, see 28 ibid. 230, para. 417; and for the Law of Property Act, 1925, s. 191, see 20 HALSBURY'S STATUTES (2nd Edn.) 806.

Case referred to:

(1) *Rowlls* v. *Bebb*, [1900] 2 Ch. 107; 69 L.J.Ch. 562; 82 L.T. 633; 48 W.R. 562; 44 Sol. Jo. 448, C.A.; 43 Digest 618, *589*.

Adjourned Summons as to the relative rights of the tenants for life and remaindermen under a settlement.

By an indenture of settlement dated Aug. 23, 1892, certain trusts were declared affecting certain funds called the first fund and the second fund. Only the trusts affecting the second fund are relevant to this application. The second fund consisted of two annuities of £150 each (referred to in the settlement as the annuity of £300) and also some shares. It was provided in the settlement that as to the yearly produce of the second fund (the payment from time to time accruing of the said annuity of £300, which formed part of that fund, being while the same should remain unconverted treated as yearly produce) the trustees or trustee should pay so much thereof as should accrue during the life of Helen Sarah Carr to her so that the same should, while she might be married, be for her separate use without power of anticipation. The settlement then provided that after the death of Helen Sarah Carr the produce of the second fund should be paid to her husband, Henry Lascelles Carr, for his life, and after the death of the survivor of them, in equal shares to their respective three daughters for their respective lives with remainder to their children, with an ultimate remainder over.

There was also the following provision:

> "It is hereby declared that the trustees or trustee may retain as well the said annuity of £300 specified in the said Second Schedule hereto as all or any of the shares constituting the First Fund and the residue of the Second Fund respectively in their present states of investment and while the last-mentioned annuity shall remain unconverted the whole of the accruing payments thereof shall for the purposes of this settlement be treated as income, but that if and when the said Henry Lascelles Carr and Helen Sarah Carr, or the survivor of them shall in writing so require, and after the death of the survivor of them if and when the trustees or trustee shall in their or his uncontrolled discretion think it expedient so to do, the trustees or trustee shall sell the annuity of £300 specified in the Second Schedule hereto and shall invest the money produced by sale thereof in a manner hereinafter authorised."

H. L. Carr and H. S. Carr died, leaving their three daughters them surviving.

Subsequently, under the provisions of s. 191 of the Law of Property Act, 1925, on the application of the owner of the leasehold property on which the respective annuities were charged, the Minister of Agriculture and Fisheries certified as the payment in consideration whereof the redemption of the charges could be effected the sums of £3,346 and £3,279 respectively. The trustees in due course invested the aggregate sum in the purchase of £6,667 6s. 3d. War Loan. The income of the investment was less than the amount of the two annuities.

This summons was taken out to decide the question whether there should be paid to the persons entitled for the time being to the income of the trust funds, merely the income of the above £6,667 6s. 3d. War Loan, or whether the trustees should sell in each year sufficient capital to produce income to make with the income of the £6,667 6s. 3d. the sum of £300 a year less income tax.

Section 191 of the Law of Property Act, 1925, provides:

> "(1) Where there is a rent being either (a) a quit rent, chief rent or other annual or periodical sum issuing out of land . . . the Minister shall at any time, on the requisition of the owner of the land or of any person interested therein, certify the amount of money in consideration whereof the rent may be redeemed. Where the rent is not perpetual, the Minister may authorise the purchase of a Government annuity of an amount equal to the rent, payable during the residue of the period for which the rent would have been payable, in such names as he may think fit, and give directions as to the payment of the annuity, and the amount required to purchase that annuity shall be the redemption money. (2) Where the rent is perpetual and was reserved on a sale, or was made payable under a grant or licence for building purposes, the redemption money shall be such sum as would (according to the average price, at the date of redemption, of such Government securities as may for the time being be prescribed by the Treasury) purchase sufficient of such Government securities to yield annual dividends equal to the amount of the yearly rent redeemed. (3) Where the person entitled to the rent is absolutely entitled thereto in fee simple in possession, or is empowered to dispose thereof absolutely, or to give an absolute discharge for the capital value thereof, the owner of the land, or any person interested therein, may, after serving one month's notice on the person entitled to the rent, pay or tender to that person the amount certified by the Minister. (4) If the Minister is satisfied (a) that any person who has been in receipt of a rent, or claims to be entitled thereto, is unable or unwilling to prove his title either to dispose thereof absolutely, or

> to give an absolute discharge for the capital value thereof, or neglects to apply to any competent body or person for any requisite order or consent; or (b) that a person entitled to the rent or any part thereof cannot be found or ascertained . . . the Minister may authorise the owner or other person interested in the land affected by the rent to pay the amount of the redemption money certified by the Minister or the Government annuity into court, to an account entitled in the matter of the rent and of the land affected. (5) On proof to the Minister that such payment (whether into court or otherwise) or tender has been made, he shall certify that the rent is redeemed under this Act; and that certificate shall be final and conclusive, and the land shall be thereby absolutely freed and discharged from the rent."

Hon. C. Russell for the plaintiffs, the trustees.

L. W. Byrne for the tenants for life.—The trustees were given a discretion to convert, but they never exercised their discretion. The property must therefore be treated as unconverted even though it has been sold under the statute. As the settlement provided that the whole amount of the annuities, namely, £300, should be treated as income of the fund until the annuities were converted, it follows that the tenants for life are entitled still to £300 a year as representing the annuities, and the present income should be supplemented out of capital to make up that sum. [He referred to *Rowlls* v. *Bebb* (1).]

Richmount for the remaindermen.—There has been a conversion here, and it makes no difference that it was conversion by statute. The trustees can only be called upon to pay to the tenants for life the income which they obtain from the investment of the amount derived from the conversion.

FARWELL, J.—This summons raises a curious point on a settlement which was made on Aug. 23, 1892; so far as I know, it has not arisen before in this exact form in any reported case, and counsel have not been able to give me any authority which assists me in arriving at a conclusion. [His Lordship stated the facts, read the material parts of the settlement, and continued:] The annuities in question have been realised, but neither with the consent nor at the request of Henry Lascelles Carr and Helen Sarah Carr, nor the survivor of them, nor at the uncontrolled discretion of the trustees. They have, in fact, been sold because the owner of the leasehold properties desired to redeem the property from the charges and took advantage of the provisions of s. 191 of the Law of Property Act, 1925, to effect that purpose. That section provides: [His Lordship read s. 191 (1), (2), (3) and (4), and continued:] I cannot have any doubt myself that on the true construction of that section it enables a compulsory sale to be made. The owner of the land which is subject to the rentcharge can require the Minister to certify what the capital value of the rentcharge is, and, the Minister having so certified, the owner is entitled on proper notice to tender the amount so found to the owner of the rentcharge—that is to say, to the person who takes the annual payment—and if that person refuses or neglects to accept the tender, or cannot be found, then the Minister can authorise the money to be paid into court, and on proof of such payment or tender then the Minister certifies that the rent is redeemed under the Act—

> "and that certificate shall be final and conclusive; and the land shall be thereby absolutely freed and discharged from the rent" (s. 191 (5)).

The result of that is that the trustees in this case cannot be said to have exercised any discretion in the matter one way or the other. It is suggested that because they took the money when it was tendered to them they exercised their discretion, and that if they had wanted to indicate that they were not exercising their discretion they should have refused to take the money and compelled the owner of the leaseholds to pay it into the court, and then, I suppose, they would have proceeded to take the money out. If they had taken that course I think it might well have been said that they had put the trust fund to an unnecessary expense, for which they might be personally liable, and I cannot conceive that merely by accepting the tender, instead of putting the owner of the leaseholds to the trouble and themselves to the expense of the payment into court, they had exercised any discretion. So the question is this: the annuities have come to an end; a capital sum is in the hands of the trustees which represents the capital value of the annuities; the annuities were not sold, either with the consent of the two tenants for life or the survivor of them or under the discretionary power of the trustees. What, then, is the position so far as the capital money is concerned? There is no provision in the settlement as to what is to happen if the annuities cease to exist for any such reason as in this case, and, in my judgment, the true view is this: the annuities must be treated as still subsisting so far as the relative rights of the tenants for life and remaindermen are concerned. The only way in which their relative rights could have been altered under the settlement was either by a sale by the direction of the two tenants for life or the survivor of them or at the discretion of the trustees or, it may be, under an order of the court for the administration or the execution of the trusts; but in no other way is it possible for their respective rights to be altered. They remained the same, so far as these annuities are concerned, and the tenants for life are entitled, so far as it is possible, to remain in the same position vis-à-vis the remaindermen as they were before the sale took place. How is that to be effected? In my judgment the right course to adopt is that which is suggested by para. 1 (b) of the originating summons. The trustees should sell in each year sufficient of the capital to produce, with the income, £300 a year, less income tax, and this annual sum will be payable to the tenants for life.

Solicitors: *Smith, Rundell, Dods, & Bockett.*

[*Reported by* J. H. G. Buller, Esq., *Barrister-at-Law.*]

HAMPSHIRE REGISTRATION OFFICER *v.* AINSLIE

[Court of Appeal (Scrutton, Greer and Slesser, L.JJ.), February 3, 1933]

[Reported 148 L.T. 496; 97 J.P. 121; 49 T.L.R. 233;
31 L.G.R. 165]

Elections—Registration of voters—Appeal against refusal to register—Appeal by claimant's agent, in own name, to county court—Representation of the People Act, 1918 (7 *& 8 Geo.* 5, *c.* 64), *s.* 14.

A. appeared as agent for Miss R. before the registration officer on her claim to be registered as a local government elector. The claim was disallowed, and A. appealed, or purported to appeal, to the county court under s. 14 of the Representation of the People Act, 1918. He was described as "appellant," with the words added ("appeal in connection with a claim made by R."), both in the notice of appeal and in the order subsequently made in the county court. The county court judge allowed the appeal, and the registration officer appealed to the Court of Appeal.

Held: (i) the appeal must be struck out because the right of appeal against the registration officer's decision was given by the statute to Miss R., the claimant; (ii) the county court judge, therefore, had had no jurisdiction to hear the appeal by A., and the Court of Appeal could not cure the defect of jurisdiction by adding Miss R. as a party.

Notes. The Acts of 1918 and 1928 have now been repealed: the current election law is contained in the Representation of the People Act, 1949, s. 45 (1) and (5) of which corresponds to s. 14 (1) and (5) of the Act of 1918. The relevant regulations are now the Representation of the People Regulations, 1950 (S.I. 1950, No. 1254), reg. 12 (3) of which provides that any person entitled to appear and be heard may do so either in person or by any other person on his behalf. These changes do not appear to affect the authority of this decision.

As to who may bring a registration appeal, see 14 HALSBURY'S LAWS (3rd Edn.) 43, para. 75, and as to how a claimant or objector may appear and be heard before the registration officer, see ibid. 30, para. 50. For the Representation of the People Act, 1949, s. 45 (1), (5), see 8 HALSBURY'S STATUTES (2nd Edn.) 615, 616, and for the Representation of the People Regulations, 1950, reg. 12 (3), see 7 HALSBURY'S STATUTORY INSTRUMENTS.

Case referred to:

(1) *Stribling* v. *Halse* (1885), 16 Q.B.D. 246; Colt. 409; 55 L.J.Q.B. 15; 54 L.T. 268; 49 J.P. 727; sub nom. *Stubbing* v. *Haise*, 2 T.L.R. 24; 20 Digest 23, *133*.

Appeal from the county court.

Mr. Claud John Ainslie made a claim, duly acting on behalf of Miss Bessie May Radford, before the registration officer for the Parliamentary county of Hants, for her registration as a local government elector for the East Ward of the Borough of Lymington. The claim was made in respect of Miss Radford's occupation of a bedroom by reason of her service as a charge nurse at the Lymington Public Assistance Institution, and it was disallowed by the registration officer. Mr. Ainslie appealed against this decision of the registration officer to the county court in his own name. The notice of appeal and the order subsequently made by the county court judge were headed:

> "In the Matter of the Representation of the People Acts and in the Matter of an appeal against the decision of the Registration Officer for the Parliamentary County of Hants. Between Claud John Ainslie, of Wilfur House, Hants, appellant, and the Registration Officer for the Parliamentary County of Hants . . . (appeal in connection with a claim made on behalf of Bessie May Radford) respondent."

There was no nomination in writing of Mr. Ainslie by Miss Radford to act on her behalf in the appeal, and no allowance of his appearance without such a nomination by the county court judge as being due to mistake or other reasonable cause. The county court judge allowed the appeal, and ordered the name of Miss Radford to be entered in the Register of Local Government Electors.

From this decision the registration officer appealed to the Court of Appeal, the respondent being described as Claud John Ainslie.

By s. 14 (1) of the Representation of the People Act, 1918:

> "An appeal shall lie to the county court as defined by rules of court from any decision of the registration officer on any claim or objection which has been considered by him under this Act, or the placing or refusal to place any mark against any name on the register, and rules of court shall be made for the purpose of determining the procedure on any such appeals, and for applying and adapting thereto any enactments relating to county courts and the procedure therein. Provided that an appeal shall not lie where a claimant or objector has not availed himself of his opportunity, as provided in the First

> Schedule to this Act, of being heard by the registration officer on the claim or objection, or as to the placing or refusing to place any such mark as aforesaid."

By sub-s. (5):

> "On any appeal under this section the registration officer shall be deemed to be a party to the proceedings."

By r. 12 (1) of the County Court (Registration Appeals) Rules, 1918:

> "Any party to an appeal may appear or act on the appeal (a) in person; (b) by any solicitor who would be entitled to appear for such party in an action in the county court; (c) by counsel; or (d) by any other person nominated by such party in writing signed by him to appear or act on his behalf and approved by the judge; but not otherwise: Provided that the judge may allow any party to appear or act by a person not nominated in writing as required by para. (d) if he is satisfied that such person is in fact authorised to appear or act for such party, and that the failure to obtain a nomination in writing is due to mistake or other reasonable cause."

W. Blake Odgers for the registration officer, the appellant.—The registration officer has appealed that a decision may be obtained as to the validity of *Stribling* v. *Halse* (1), a decision of the Divisional Court of the King's Bench Division. [Scrutton, L.J.—It does not appear that the proper appellant, Miss Radford, was before the county court on the appeal. Mr. Ainslie was the appellant; he is so described in the notice of appeal. It does not appear that Mr. Ainslie was nominated in writing to appear or act for Miss Radford or that the learned county court judge allowed him to so appear though not so nominated on being satisfied that Mr. Ainslie was in fact authorised by Miss Radford to appear and that the failure to obtain the nomination in writing was due to mistake or other reasonable cause. Mr. Ainslie acted throughout as if he himself were the appellant. That being so, the county court had no jurisdiction to hear the appeal.]

H. L. Murphy for Mr. Ainslie, the respondent.—It must be admitted that Mr. Ainslie was the appellant in the county court, but he was so with the consent of Miss Radford, though there was no nomination in writing. The registration officer did not raise the point in the county court as to jurisdiction, and I understand that he does not do so here. I ask that Miss Radford may be added as a party to the appeal.

SCRUTTON, L.J.—This is a most unsatisfactory case. The court is anxious, if it can, to avoid technicalities, but the truth is that those who have brought this appeal have been so obsessed with the importance of the question whether *Stribling* v. *Halse* (1) was rightly decided that they have not been particular to observe the rules governing appeals from the decisions of registration officers to the county court.

Miss Bessie May Radford claimed to be registered as a local government elector, in respect of her occupation of a bedroom by reason of her service as a charge nurse at the Lymington Public Service Institution. Apparently the lady put in a claim by a Mr. Ainslie, an agent for one of the political parties, who stated that he was acting on her behalf, and the claim was a claim on behalf of this lady; it was not the claim of Mr. Ainslie. It was the lady who wanted to be registered as a local government elector. The registration officer, after considering the matter and hearing statements by Mr. Ainslie made on behalf of the lady, decided that she was not entitled to be so registered.

In my opinion, under the Representation of the People Acts and the County Court (Registration Appeals) Rules, 1918, the person to appeal against that decision was Miss Radford. It was not Mr. Ainslie who had appeared on her behalf before the registration officer. But the proceedings on the appeal were conducted on the assumption that Mr. Ainslie was the appellant, and he was so described in the notice of appeal and in the order subsequently made in the county court.

The learned county court judge, again, was so interested in the cases that were cited to him that he does not appear to have made up his mind as to who was the appellant. We are very reluctant to shut out an appeal on the ground of anything like technicality, but in the view I take of the case this is more than a technicality; it is a matter of jurisdiction. Mr. Ainslie, who appeared as the appellant in the county court, had no right to appeal against the decision of the registration officer; the right was in the lady whose vote had been refused. Now the Court of Appeal finds that it has before it an appeal against an order made by a learned judge in the county court on an appeal to that court by a person who had no right to bring the appeal. We think the right course to take is to strike out this appeal.

GREER, L.J.—In this case, as I understand, the proceedings before the registration officer were quite in order, and in those proceedings Mr. Ainslie appealed on behalf of the claimant, Miss Bessie May Radford, and the claim that he made on her behalf was disallowed by the registration officer. Now the result of that was, if the claim was justified, that Miss Radford had been deprived of a right which she had in accordance with the law of the country, and she was the person who was entitled to claim that effect had not been given to the right that Parliament had conferred upon her. It is quite true that when she brought her appeal before the county court she was entitled to appear and argue it herself; and in certain circumstances and subject to certain conditions provided for in the rules she was entitled to have her case argued for her even by Mr. Ainslie, who was not a professional advocate in the strict sense of that term entitled to appear in any court of justice. However, the proceedings in the county court ought to have been proceedings between the claimant and appellant Miss Bessie May Radford and the registration officer. Instead the notice of appeal was drafted in such a way as to make Claud John Ainslie the appellant in the proceedings in the county court; and the order that was made in the county court was headed in this way:

> "Between Claud John Ainslie, of Wilfor House, Hants, appellant, and the Registration Officer for the Parliamentary County of Hants. (Appeal in connection with the claim made on behalf of Bessie May Radford, respondent.)"

In that heading, for which I think the county court judge was responsible, it is Claud John Ainslie who is appearing as the appellant so that he is appearing as appellant in connection with a claim made before the registration officer on behalf of Bessie May Radford. In my judgment, in these circumstances there was no appeal before the county court judge which gave him any jurisdiction to deal with the matter at all. The only way in which I think this matter can be dealt with correctly is by saying that the county court judge's order should be set aside on the ground that it was made without jurisdiction, and that there are no costs payable in relation to this appeal.

SLESSER, L.J.—I agree. Counsel for the respondent has very frankly stated that in the form in which this appeal came before the county court judge he cannot defend it, but he asks us in our discretion to rectify the matter by permitting the lady to appear on the record as the party, as I understand, not only in the proceedings here but before the county court judge. In my view, this case is one which goes to jurisdiction. The right of appeal to the county court judge is given by s. 14 of the Representation of the People Act, 1918, and it is there expressed by sub-s. (1) that rules of court shall be made for the purpose of determining the procedure on any such matter, and rules of court have been made. Those rules contemplate, particularly r. 12, that a party to an appeal, who in this case would have been the lady, might appear in certain circumstances by other persons nominated by such party. Now in the first place here no person did appear, as the record stands, on behalf of the lady. Had they appeared a further difficulty would have been that, there was no nomination in writing signed by the lady for Mr. Ainslie to appear in her behalf, and it was not said that there was any failure to obtain a nomination in writing, due to mistake or other reasonable cause. It would appear that as the matter stands Mr. Ainslie would have had no right to appear for Miss Radford if he had so purported to appear. The whole proceedings seem to me, therefore, entirely wrong and to have the effect of depriving the county court judge of the jurisdiction by which he purported to act. I agree that the result should be as stated by my Lord.

Appeal struck out.

Solicitors: *Robbins, Olivey, & Lake*, for *F. V. Barber*, Winchester; *Taylor, Jelf & Co.*, for *Heppenstall, Clark, & Rustom*, Lymington.

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

BREMER OELTRANSPORT G.M.B.H. *v.* DREWRY

[COURT OF APPEAL (Slesser and Romer, L.JJ.), February 1, 13, 1933]

[Reported [1933] 1 K.B. 753; 102 L.J.K.B. 360; 148 L.T. 540]

Practice—Service out of jurisdiction—Arbitration clause in charterparty made in England—Action on award—Action "to enforce contract made within jurisdiction"—Breach committed within jurisdiction.

By a charterparty dated Nov. 19, 1929, made in London it was provided that disputes should be settled at Hamburg by an arbitrator, and on a dispute an award was made on April 18, 1933, that the defendant pay to the plaintiffs £20,913 and costs. The award stated no place for the payment of the sum awarded, but the plaintiffs were a Hamburg firm. The plaintiffs applied for leave to serve their writ in an action for the amount due under the award out of the jurisdiction on the grounds (i) that this action was to enforce a contract made within the jurisdiction within Order XI, r. 1 (e) (i), and (ii) that the action was against the defendant in respect of a breach (viz., the defendant's failure to pay the sum awarded) committed within the jurisdiction within Order XI, r. 1 (e).

Held: (i) the plaintiff's action was based on the charterparty, and not on the award, and was, therefore, an action to enforce a contract made in England, and so was an action within Order XI, r. 1 (e) (i) in respect of which leave to serve the writ out of the jurisdiction could be given; but

(ii) the breach was not committed within the jurisdiction because, as no place of payment was stated in the award, the sum awarded was payable in Hamburg and it was the duty of the debtor to seek out his creditor, and, therefore, leave could not be given on that ground.

Notes. Referred to: *Malik* v. *Narodni Banka Ceskoslovenska*, [1946] 2 All E.R. 663.

As to common law submissions to arbitration, see 2 HALSBURY'S LAWS (3rd Edn.) 3, para. 4; as to the effect of an arbitrator's award, see ibid. 44, para. 98; and as to enforcement of an award by action, see ibid. 51, para. 113. For cases as to the effect of an award, see 2 DIGEST 534 et seq., *1703* et seq.; and as to its enforcement by action, see ibid. 572, *2043*.

Cases referred to:

(1) *Purslow* v. *Baily* (1704), 2 Ld. Raym. 1039; 1 Salk. 76; sub nom. *Boisloe* v. *Baily*, 6 Mod. Rep. 221; 87 E.R. 972; 2 Digest 542, *1760*.

(2) *Wood* v. *Griffith* (1818), 1 Wills. Ch. 34; 1 Swan. 43; 36 E.R. 291; 2 Digest 583, *2162*.

(3) *Nickels* v. *Hancock* (1855), 7 De G.M. & G. 300; 3 Eq. Rep. 689; 1 Jur.N.S. 1149; 44 E.R. 117, L.JJ.; 2 Digest 583, *2165*.

(4) *Blackett* v. *Bates* (1865), 1 Ch. App. 117; 35 L.J.Ch. 324; 13 L.T. 656; 12 Jur.N.S. 151; 14 W.R. 319, L.C.; 2 Digest 584, *2166*.

(5) *Lievesley* v. *Gilmore* (1866), L.R. 1 C.P. 570; Har. & Ruth. 849; 35 L.J.C.P. 351; 15 L.T. 386; 12 Jur.N.S. 874; 2 Digest 314, *14*.

(6) *Norske Atlas Insurance Co.* v. *London General Insurance Co.* (1927), 43 T.L.R. 541; Digest Supp.

(7) *Hodsden* (*Hodgson*, *Hosdell*) v. *Harridge* (*Harris*, *Harwich*) (1669), 2 Wms. Saund. 64; 1 Lev. 273; 2 Keb. 462, 497, 533, 536; 1 Sid. 415; 83 E.R. 403; 2 Digest 535, *1715*.

(8) *Dilley* v. *Polhill* (1732), 2 Stra. 922; 2 Barn.K.B. 42, 55; 93 E.R. 943; 2 Digest 573, *2046*.

(9) *Ferrer and Rollason* v. *Oven* (1827), 7 B. & C. 427; 1 Man. & Ry. K.B. 222; 6 L.J.O.S.K.B. 28; 108 E.R. 783; 2 Digest 313, *7*.

(10) *Lang* v. *Brown* (1855), 25 L.T.O.S. 297, H.L.; 2 Digest 417, *696*.

(11) *Rein* v. *Stein*, [1892] 1 Q.B. 753; 61 L.J.Q.B. 401; 66 L.T. 469, C.A.; 12 Digest (Repl.) 513, *3851*.

(12) *Llanelly Railway and Dock Co.* v. *London and North-Western Rail. Co.* (1873), 8 Ch. App. 942; 42 L.J.Ch. 884; 29 L.T. 357; 21 W.R. 889; affirmed (1875), L.R. 7 H.L. 550; 45 L.J.Ch. 539; 32 L.T. 575; 23 W.R. 927, H.L.; 22 Digest (Repl.) 33, *132*.

(13) *Welch* v. *Ireland* (1805), 6 East 613; 2 Smith K.B. 666; 102 E.R. 1424; 2 Digest 575, *2060*.

(14) *Thomas* v. *Hamilton* (1886), 17 Q.B.D. 592; 55 L.J.Q.B. 555; 55 L.T. 385; 35 W.R. 22, C.A.

(15) *Lazard Bros. & Co.* v. *Banque Industrielle de Moscou*, [1932] 1 K.B. 617; 101 L.J.K.B. 65; 146 L.T. 240, C.A.; affirmed, [1933] A.C. 289; 102 L.J.K.B. 191; 148 L.T. 242; 49 T.L.R. 94; 76 Sol. Jo. 888, H.L.; 10 Digest (Repl.) 1299, *9161*.

Interlocutory Appeal from the decision of GODDARD, J., dated Jan. 13, 1933, refusing to set aside an order of BRANSON, J., made ex parte on Nov. 29, 1932, giving the plaintiffs leave to issue a writ against the defendants and to serve it out of the jurisdiction. R.S.C., Ord. XI, r. 1 provides that service out of the jurisdiction may be allowed whenever

> "(e) the action is brought . . . to enforce a contract . . . or to recover damages in respect of the breach of a contract—
>
> (i) made within the jurisdiction, or is one brought . . . in respect of a breach committed within the jurisdiction of a contract wherever made."

The facts and arguments are fully stated in the judgment.

Sir Robert Aske for the defendant, the appellant.
C. T. Miller for the plaintiffs, the respondents.

Cur. adv. vult.

Feb. 13. The judgment of the court was read by

SLESSER, L.J.—In this case BRANSON, J., on an application ex parte by the plaintiffs on Nov. 29, 1932, made the following order:

> "That the intended plaintiffs be at liberty to issue a writ of summons against the intended defendant. And it is further ordered that the intended plaintiffs be at liberty to serve notice of the said writ at Paris or elsewhere in the

A Republic of France, and that the time for appearance to the said writ by the said intended defendant be within twelve days after the service of the said notice of writ."

On Jan. 5, 1933, the defendant applied to GODDARD, J., for an order that the order

> "of the HONOURABLE MR. JUSTICE BRANSON herein dated Nov. 29, 1932, the writ B of summons issued herein, and the notice thereof ordered to be served, and the service thereof on the defendant, and all subsequent proceedings herein be set aside on the ground that the award sued upon does not provide that the amount awarded is payable in England and that there is therefore no breach within the jurisdiction of the award or of the charterparty referred to."

C GODDARD, J., after hearing the parties by counsel on Jan. 13, 1933, ordered that the defendant's application be dismissed and that the costs of the application be the plaintiffs' in any event. From that order the defendant appeals to this court.

The facts of the case, from an affidavit of Mr. John Essberger, of Hamburg, sworn on Nov. 19, 1932, at Hamburg, in support of the ex parte application, appear to be as follows:

D On Nov. 19, 1929, by a charterparty made in London in the English language, the defendant agreed to hire a vessel of the plaintiff company called the *Mittelmeer* or a substitute sister ship for as many consecutive voyages as the vessel could perform over two years. The charterparty was exhibited to the affidavit, and in the charterparty, by cl. 18, it was provided that:

> "Any dispute arising during the execution of this charterparty shall be settled E in Hamburg, owners and charterers each appointing an arbitrator—merchant or broker—and the two thus chosen, if they cannot agree, shall nominate a third, whose decision shall be final. Should one of the parties neglect or refuse to appoint an arbitrator—merchant or broker—within twenty-one days after receipt of request from the other party, the single arbitrator appointed shall have the right to decide alone, and his decision shall be binding on both parties. F For the purpose of enforcing awards, this agreement shall be made a rule of court."

In the summer of 1931 disputes arose between the plaintiffs and the defendant and, in accordance with the terms of the charterparty, the parties proceeded to arbitration in Hamburg, and on April 18, 1932, an award was duly made in Ham- G burg which decided as follows:

> "Defendant, the complaint being refused, is sentenced to pay to plaintiff £20,913 13s. 7d.; the cost of arbitration, stipulated at RM 10,000, and his expenses are to be presented by plaintiff; defendant has to indemnify plaintiff for two-thirds of same. The non-judicial expenses are to be neutralised against one another."

H And it was further decided:

> "As per cl. 2 of the charter, payment is to be made in English currency, i.e., effectively. The printed clause that the money can be changed into a Continental currency has been cancelled."

I The reference to the printed clause that the money can be changed "into Continental currency has been cancelled" is directed to a provision as to the freight in which cl. 2 of the printed charterparty, after stating "the freight to be payable in London upon delivery of the cargo in cash without discount," the words "if on the Continent, at the current rate of exchange on London at sight" were deleted.

It remains to set out the endorsement on the writ which so far as material is as follows:

> "The plaintiffs' claim is £21,333 4s. 7d., the amount due and payable by the defendant to the plaintiffs under an award in writing, dated April 18, 1932, of

> Dr. Rudolph Firle Friederick Locj and Dr. Knauer, the duly appointed arbitrators, in an arbitration held between the parties pursuant to a submission in writing contained in a charterparty entered into by the plaintiffs and the defendant dated Nov. 19, 1929, for the chartering of the plaintiffs' tank steamer *Mittelmeer* or substitute."

The defendant, who, we are told, is a British subject, is resident in Paris, and the plaintiffs claim to serve their writ out of jurisdiction on two grounds: First, they say, that the action is one brought against the defendant to enforce a contract made within the jurisdiction (Order XI, r. 1 (e) (i)), and, secondly, that the action is one brought against the defendant in respect of a breach committed within the jurisdiction (Order XI, r. 1 (e), final paragraph). I deal with these two grounds separately.

It was argued for the defendant that, in so far as Order XI, r. 4, requires that the grounds on which the application is made shall be set out in the affidavit in support of the application, the first of these grounds was not so set out, and that the point was, therefore, not open to the plaintiffs. I am of opinion that this contention is not well-founded. Paragraph 1 of Mr. Essberger's affidavit of Nov. 19, 1932, states that the charterparty was made in London. It is true that, when he is arguing in para. 7 of that affidavit, he relies on the fact that a breach arose within the jurisdiction of the court. That is to raise the second ground, but, in my opinion, having averred that the charterparty was made in London, he has sufficiently indicated that he relies on that fact. If he had relied solely on the second ground the place of making the contract would be irrelevant, for that rule expressly provides that if the breach be committed within the jurisdiction, service out of jurisdiction may be ordered with respect to a breach committed within the jurisdiction of a contract wherever made.

I proceed, therefore, to consider the case made on behalf of the plaintiffs that this award, on which they seek to sue, arose in respect of a contract made within the jurisdiction. This contention raises at the outset the following juridical problem. What is the nature of an action based on an award? On the one hand, it is said for the plaintiffs that, in so far as the submission is a contract whereby the parties to it impliedly undertake to abide by and carry out the award of the arbitrators, the submission is contained in the charterparty which is made in London, and, therefore, the enforcement of the award would be the enforcement of a contract made within the jurisdiction; on the other hand, it is contended for the defendant that the action is brought on the award itself, and that, consequently, as the award was made in Hamburg, the action is not the enforcement of a contract made within the jurisdiction.

The respective contentions require for their proper consideration some study of the history of the legal principles which govern the enforcement of awards at common law and in equity. The contention of the plaintiffs that the submission is the contract on which an action based on the award is founded is well supported by authority. In *Purslow* v. *Baily* (1) HOLT, C.J., said (2 Ld. Ray at p. 1040) that the submission was an actual mutual promise to perform the award of the arbitrators; and that in such actions, while he was a practiser, and since he had been a judge, the submission had been always held sufficient evidence to maintain the action. This view is accepted in the latest edition of RUSSELL ON ARBITRATION (12th Edn.) at p. 276, and there are many later dicta to be found, more particularly in cases for the enforcement by or for specific performance on the equity side, to the like effect.

Thus in *Wood* v. *Griffith* (2) ELDON, L.C., said (1 Wills. Ch. at p. 44):

> "That a bill will lie for the specific performance of an award, is clear, for the award is nothing more than an agreement, on terms which a third party points out."

A In *Nickels* v. *Hancock* (3) BRUCE, L.J., said (7 De G.M. & G. at p. 314):

> "The bill now before us has been filed for the purpose of obtaining specific performance of the award, in the exercise by this court, not of any jurisdiction peculiar to awards, but of its ordinary jurisdiction applicable to agreements. Many, therefore, if not all, of the principles applicable to ordinary cases or suits for the specific performance of agreements must apply to the present
> B case."

And TURNER, L.J. (7 De G.M. & G. at p. 318):

> "In considering, therefore, the question whether the court ought in any particular case to interfere for the purpose of enforcing an award, the first point to be looked at is: what have the parties agreed to submit to the arbitrator?" "The rights of the parties in respect of specific performance are the same as
> C if the award had simply been an agreement between them":

(per LORD CRANWORTH, L.C., in *Blackett* v. *Bates* (4) (L.R. 1 Ch. App. at p. 124). See, also, ERLE, L.J., in *Lievesley* v. *Gilmore* (5), where he says (L.R. 1 C.P. at p. 572):

> "There was, therefore, an agreement between the parties that the matters in
> D difference should be referred, and that the award should be performed."

So far it would appear clear that in the opinion both of common law and equity judges the award is to be regarded as merely the working out of a term of the original agreement of submission, and there is other, perhaps more indirect, authority to the same effect; as in *Llanelly Railway and Dock Co.* v. *London and North-Western Railway* (12), where JAMES, L.J., said (L.R. 8 Ch. App. at p. 949):

> E "It would be difficult to say that the real question between the parties could be determined by the arbitrator under that clause [the clause in the agreement] because, if the plaintiffs are right in their contention, they have determined that part of the agreement as well as everything else."

In LEAKE ON CONTRACT, 7th Edn., p. 717, it is said:

> F "A submission by consent implies an agreement to perform the award, upon which an action will lie for non-performance. The action may be in the form of a claim for debt or damages or for specific performance."

On the other hand, counsel for the defendant has cited to us certain decisions which seem to support the view that action may be brought on the award itself. The most recent cited was *Norske Atlas Insurance Co.* v. *London General Insurance*
G *Co.* (6). There the plaintiffs' claim was based on an award made in Norway by Norwegian arbitrators. The defendant said that the award was made pursuant to a submission in a treaty of re-insurance against marine risks in a written agreement and that the treaty was a treaty of marine insurance, and was not expressed in a policy sufficient to satisfy the Stamp Act and the Marine Insurance Act. The plaintiffs argued that this agreement was not a contract of insurance at all.
H MACKINNON, J., was of opinion that if the plaintiffs were suing on the treaty for marine losses under insurances the pleas the defendant was making would be fatal to the plaintiffs. They would be suing on a contract of marine insurance which, first of all, was not expressed in a policy, and, secondly, was not stamped as a policy needs to be. He continues (43 T.L.R. at p. 542):

> "The plaintiffs, however, were not suing on the contract, but on the award,
> I and the only things to be proved by them were (i) the submission, (ii) the conduct of the arbitration in accordance with the submission, and (iii) the fact that the award was valid according to the lex fori of the place where the arbitration was carried out and where the award was made."

Certainly, in this case, MACKINNON, J., seems to treat the action as one on the award as such and not as an action on the marine re-insurance contract, which he finds was invalid.

The issue which I have here to consider was not directly argued before the learned judge, the point according to counsel being whether the contract of marine re-insurance was or was not invalid, and the authorities cited were none of them related to the problem whether the action was brought on the award or on the contract of submission; nor does the learned judge, although his decision on the point is clear, cite any authority on that head.

Nevertheless, there does exist earlier authority which supports his view, namely. *Hodsden* v. *Harridge* (7). In that case, there being disputes between the plaintiff and the defendant, the parties submitted themselves to arbitration; and, the arbitrators disagreeing, an umpire awarded £15 to the plaintiff. The defendant pleaded in bar the Statute of Limitations, and the question was whether the action of debt on the award was within the statute of James I or not. Counsel for the plaintiff argued that the award was not within the statute because the words stated were

> "all actions of debt grounded upon any lending or contract without specialty shall be sued within six years."

He argued, first, that in so far as the umpire had made his award in writing under his hand and seal, it was a specialty, and so without the statute; and, secondly, that admitting there was no specialty, the action for debt on the award was not limited by statute, because only actions of debt without speciality were limited which were grounded upon any lending or contract, and that this action of debt was not so founded upon any lending. In the result KELYNGE, C.J., held that there was a sufficient speciality, while TWYSDEN, J., held that it was not within the statute because it was not founded upon any lending or contract. It is stated that the other judges agreed with both points, and TWYSDEN, J., on motion for judgment said in terms that it was resolved by the court for the plaintiff on both points.

The second point concerns us not in the present case, but the decision of the court that the action on the award was made on a specialty is a decision in favour of the defendant's contention in this case, because the specialty was only in the award itself and not in the agreement of submission to arbitration, so that clearly the court held the action to be based on the award itself and not on submission which was under seal.

In *Dilley* v. *Polhill* (8) there is a distinction drawn by the court between an action so brought on a bond of submission and where it is on the award. The question there arose whether in an action for debt on an award a mutual submission must be shown in the declaration. It was argued that an award is the determination of a third party between two others who submit to his judgment, and that the submissions create a mutual obligation on both to acquiesce in his decision. The court said:

> "There is a great deal of difference where the action is brought upon the bond of submission and where it is upon the award; in the first case [the bond], the defendant by craving oyer shows that there were mutual submissions, the condition always so reciting it; but in the other case [where it is upon the award] it must be averred before you can properly introduce your award."

On a reference to arbitration the submission used sometimes to be made by mutual bonds, the obligation being in the form of a common money bond to abide the event of the award.

And in *Ferrer and Rollason* v. *Oven* (9) the court held that in action in debt on an award it is necessary for the plaintiff to allege a mutual submission. In the language of BAYLEY, J. (7 B. & C. at p. 430):

> "By declaring on the award the plaintiff takes upon himself the onus of proving a mutual submission. By declaring on the bond he transfers the burden of proof to the defendant; for it lies on the latter to discharge himself from the penalty by showing a performance of the conditions."

This view is expressed in BULLEN AND LEAKE, 3rd Edn., p. 71, where the indebitatus count on an award is stated to be

A
> "Money payable by the defendant to the plaintiff for money awarded by the arbitrator to be paid by the defendant to the plaintiff, by an award of the said arbitrator made under a submission to his arbitration by the plaintiff and defendant, of matters in difference between them."

The plea of "never indebted" to an indebitatus count on an award denies the B submission to arbitration, say the same learned authors at p. 488. So that it appears clear that under the old pleading the averment of submission was essential to an action upon the award though not to an action upon a bond of submission.

As I understand the argument of counsel for the defendant, he asks us to consider the present action to be one analogous to the old action of debt on bond conditioned to perform an award, but the action in the present case cannot possibly be brought C within the observations of the court in such cases as *Dilley* v. *Polhill* (8) and *Ferrer* v. *Oven* (9), where it is said that by declaring on the bond the plaintiff need not prove the mutual submission. In cases on bond before the statute 8 & 9 Wm. 3, c. 11, the plaintiff sued for the penalty without assigning the breaches, and in the earlier cases it must always be borne in mind that in actions in debt on the bond the action may have been for penalty. They are not material D for the present problem. I observe that in *Welch* v. *Ireland* (13) the court used the phrase (6 East at p. 614): "The bond being to perform an award—in other words to perform an agreement."

In *Lang* v. *Brown* (10) the Lord Chancellor said (25 L.T.O.S. at p. 298):

> "What we have to consider, therefore, is whether the award which was then made is an award which the parties agreed should be binding upon them."

E And again:

> "There is this provision in the deed of submission. The parties begin thus; they agree to submit all differences."

It would appear, therefore, that the greater weight of authority is in favour of the view that in an action on the award the action is really founded on the agree- F ment to submit the difference of which the award is the result. The legislation dealing with awards supports this view.

By 3 & 4 Will. 4, c. 42, s. 3, it was provided that: "All actions of debt upon any award where the submission is not by specialty" should be commenced and sued within the there stated time—this points to the conclusion that the legislature in 1833 in an Act said to be "for the better advancement of justice," in dealing G with limitations of actions, had regard to the nature of the submission in founding the action of debt upon the award.

Interesting as these problems are, even if there still be recognised by the law such an action on the award itself (whether there is no order of court under the Arbitration Act, 1889, s. 12, or under the Arbitration (Foreign Awards) Act, 1930, neither of which here apply) as appears to have been contemplated in *Hodsden* v. H *Harridge* (7), and assumed by MACKINNON, J., in *Norske Atlas Insurance Co.* v. *London General Insurance Co.* (6), it is sufficient for the purpose of the plaintiffs here to show that, at any rate, they are entitled to say that on their claim they are suing on the charterparty made in London and more particularly on the submission to arbitration therein contained. The few cases which appear to support the view that an action may be brought on the award in any view do not exclude in any I event an action brought on the agreement to refer differences, and for this purpose, in my view, the submissions are here sufficiently stated to be in the charterparty of Nov. 19, 1929.

Without, therefore, finally determining whether an action may or not be brought on an implied contract in the award itself, I am clearly of opinion that it may be brought on an agreement containing a term to refer disputes, and that the present claim is properly pleaded as arising from such an agreement. It is, therefore, a claim in an action for the enforcement of a contract made within the jurisdiction. If it appears that a claim is partly within and partly without the order authorising service out of jurisdiction the judge may give leave for service. It is a matter A within his discretion: *Thomas* v. *Hamilton* (14).

As regards the second contention, that the plaintiffs are bringing an action in respect of a breach committed within the jurisdiction, I think that they fail. It is said in the first place that their affidavit, on which their ex parte order was obtained, contained a serious inaccuracy when it states in para. 5 that the damages were assessed payable in England in cash. I agree with this contention. There B is no authority for saying that the award requires the payment to be made in England, and such an inaccuracy on an ex parte affidavit might well vitiate the rights which were then won by them. In the language of SCRUTTON, L.J., in *Lazard Bros. & Co.* v. *Banque Industrielle de Moscou* (15) ([1932] 1 K.B. at p. 637):

> "Persons applying ex parte to the court must use the utmost good faith, and if they do not, they cannot keep the results of their application." C

But here, even were the affidavit to be unimpeachable, I think that the plaintiffs fail. The award, in fact, states no place of payment, and, as no evidence of German law was given, it is to be assumed that English law prevails in such a matter, and in such a case it is the duty of the debtor to seek out his creditor.

> "Primâ facie, in commercial transactions, when cash is paid by one person to D another, that means it is to be paid at the place where the person who is to receive the money resides or carries on business"

(*Rein* v. *Stein* (11), [1892] 1 Q.B., per KAY, L.J., at p. 758)—in this case at Hamburg. Thus, if it is suggested that the defendant committed a breach by non-payment of the sum awarded, the alleged breach was not within the jurisdiction.

The allegation in the affidavit that payment was to be made in England is thus E irrelevant and need not be considered. I think that this appeal should be dismissed, solely on the ground that the agreement which it is sought to enforce is based on the charterparty and not on the award itself and, therefore, was made within the jurisdiction.

In the result, therefore, this appeal must be dismissed with costs.

F

Appeal dismissed.

Solicitors: *Holman, Fenwick, & Willan*; *Thomas Cooper & Co.*

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A

MASON *v.* MASON AND COTTRELL

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P.), May 8, 15, 1933]

B [COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), May 30, 31, 1933]

[Reported [1933] P. 199; 102 L.J.P. 91; 149 L.T. 346; 49 T.L.R. 489]

C *Divorce—Costs—Set-off—Wife's costs against husband—Intervener's costs against wife—Intervener's costs assigned to husband after taxation—Rights of wife's solicitor—R.S.C., Ord.* 65, *r.* 1, *r.* 14.

Divorce—Costs—Security for wife's costs—Extended security order made during trial—Effect.

A wife presented a petition for divorce on the ground that the husband had committed adultery with a woman named, who intervened. The husband D cross-petitioned for divorce alleging that the wife had committed adultery with the co-respondent. Before the trial the husband was ordered to give security for the wife's costs in the sum of £340, which sum he paid into court. By an order made on Nov. 28, 1932, during the trial, the security was extended to cover such further costs of the trial as might properly be incurred E by the wife. A jury gave a verdict that no adultery was proved against either the wife or the husband. The husband's petition was dismissed with costs for the wife on the issue of her adultery, but the wife was ordered to pay the costs of the intervener on the issue as to the intervener's adultery. The husband gave notice to the wife and her solicitors that he had taken an assignment of the amount (£244) due to the intervener for her costs. After the wife's costs F had been taxed and an order made for the payment of them by the husband to the wife's solicitors, the husband paid the wife's solicitors the amount of those taxed costs less the security for them already paid out, and less the £244 costs of the intervener, which he claimed to be entitled to set off. The wife's solicitors obtained a garnishee order nisi against the husband's banking account on the ground that they were creditors of the husband in respect of the £244.

G **Held:** (i) the only person entitled to take garnishee proceedings was the actual creditor: i.e., the wife and not her solicitors: dictum of LORD HANWORTH, M.R., in *Re a Debtor* (1), [1929] 2 Ch. at p. 152, adopted; *Re Muirhead* (2) (1876), 2 Ch.D. 22, applied;

(ii) the assignment of costs by the intervener after taxation was valid and effective: *Hambleton* v. *Brown* (3), [1917] 2 K.B. 93, approved;

H (iii) the orders for security, and, in particular, the order of Nov. 28, 1932, did not make the wife a secured creditor in respect of the unpaid balance of the husband's costs;

(iv) the wife's solicitors could have no better rights than the wife, and the assignment of the intervener's costs to the husband therefore entitled him to rely on the debt so assigned as a set-off against their claim.

I (v) even if the court had had a discretion whether or not to allow the set-off claimed by the husband under R.S.C., Ord. 65, r. 14 (which provides that a set-off for costs between parties may be allowed despite a solicitor's lien)—that discretion should in the circumstances of the case be exercised in the husband's favour; and, therefore, that the garnishee order should be discharged.

Per the Court of Appeal: All that the order extending the wife's security does is to release the wife from any limit which has been imposed on the costs she can recover out of the fund in court if an order for costs is made in her favour by estimate before the trial.

Notes. The power to make charging orders in respect of a solicitor's costs is now contained in s. 72 of the Solicitors Act, 1957, which replaced s. 69 of the Act of 1932.

Applied: *James Bibby, Ltd.* v. *Woods*, [1949] 2 All E.R. 1.

As to garnishee orders in respect of divorce costs, see 12 HALSBURY'S LAWS (3rd Edn.) 475, para. 1062; as to costs of a successful wife, see ibid. 399, para. 888; as to those of a successful intervener, see ibid. 398, para. 885; as to a husband's bond for security, see ibid. 466, para. 1043; and as to set-off of costs despite a solicitor's lien, see 31 HALSBURY'S LAWS (2nd Edn.) 250, para. 272. For cases as to a husband's liability for wife's costs, see 27 DIGEST (Repl.) 561 et seq., *5136* et seq. For the Solicitors Act, 1957, s. 72, see 37 HALSBURY'S STATUTES (2nd Edn.) 1116.

Cases referred to:

(1) *Re a Debtor* (*No. 76 of 1929*), [1929] 2 Ch. 146; 141 L.T. 250; Digest Supp.

(2) *Re Muirhead, Ex parte Muirhead* (1876), 2 Ch.D. 22; 45 L.J.Bcy. 65; 34 L.T. 303; 24 W.R. 351, C.A.; 4 Digest 124, *1127*.

(3) *Hambleton* v. *Brown*, [1917] 2 K.B. 93; 86 L.J.K.B. 1223; 117 L.T. 146; 8 Digest (Repl.) 554, *87*.

(4) *Robertson* v. *Robertson and Favagrossa* (1881), 6 P.D. 119; 51 L.J.P. 5; 45 L.T. 237; 29 W.R. 880, C.A.; 27 Digest (Repl.) 570, *5258*.

(5) *Smith* v. *Smith, Major, Child, and Rabett* (1882), 7 P.D. 84; 51 L.J.P. 31; 46 L.T. 696; 30 W.R. 688; 27 Digest (Repl.) 570, *5248*.

(6) *Palmer* v. *Palmer and Stockley*, [1914] P. 116; 83 L.J.P. 58; 110 L.T. 752; 30 T.L.R. 409; 58 Sol. Jo. 416; 27 Digest (Repl.) 571, *5259*.

(7) *Hall* v. *Hall*, [1891] P. 302; 60 L.J.P. 73; 65 L.T. 206; 7 T.L.R. 590, C.A.; 42 Digest 275, *3087*.

(8) *Gundry* v. *Sainsbury*, [1910] 1 K.B. 645; 79 L.J.K.B. 713; 102 L.T. 440; 26 T.L.R. 321; 54 Sol. Jo. 327, C.A.; 42 Digest 126, *1207*.

(9) *Puddephatt* v. *Leith* (*No. 2*), [1916] 2 Ch. 168; 114 L.T. 1159; 85 L.J.Ch. 543; 114 L.T. 1159; 60 Sol. Jo. 568; 42 Digest 285, *3195*.

(10) *Mercer* v. *Graves*, [1872] 7 Q.B. 499; 41 L.J.Q.B. 212; 26 L.T. 551; 20 W.R. 605; 42 Digest 286, *3213*.

(11) *Holt* v. *Holt and Fleeming* (1858), 28 L.J.P. & M. 12; 27 Digest (Repl.) 509, *4513*.

(12) *Keats* v. *Keats and Montezuma* (1859), 1 Sw. & Tr. 334; 28 L.J.P. & M. 57; 32 L.T.O.S. 321; 5 Jur.N.S. 176; 7 W.R. 377; 164 E.R. 754; 27 Digest (Repl.) 396, *3260*.

(13) *Evans* v. *Evans and Robinson* (1859), 1 Sw. & Tr. 328; 28 L.J.P. & M. 136; 32 L.T.O.S. 244; 23 J.P. 407; 5 Jur.N.S. 606; 7 W.R. 181; 164 E.R. 751; 27 Digest (Repl.) 570, *5246*.

Appeal from an order of LORD MERRIVALE, P., discharging a garnishee order nisi obtained by a wife's solicitors against the husband's banking account.

On the wife's suit for restitution of conjugal rights, the husband pleaded just cause and made a cross-charge of adultery. The wife later petitioned for divorce on the ground of adultery. The woman cited intervened and denied the charges. The husband cross-petitioned for divorce on the ground of adultery, which the wife and the co-respondent denied. The husband, pursuant to orders of the court made on May 6 and Nov. 16, 1932, paid £340 into court as security for the wife's costs before the beginning of the hearing. During the proceedings on Nov. 28, 1932, an order was made for the extension of the security to cover such further costs of the trial as might properly be incurred by the wife. A jury found that no adultery had been committed by any of the parties, and the divorce petitions were dismissed. The wife's petition for restitution stood over, and was finally dismissed, being compromised by a deed of separation.

In respect of the proceedings for dissolution, the co-respondent was dismissed from the suit with costs against the husband. The intervener was dismissed from the suit with costs against the wife. The wife was allowed her costs except in respect of her charges against the husband and the intervener. The intervener assigned her taxed costs to the husband. These were taxed at £244, which the husband retained out of £366 said to be due to the wife's solicitors in respect of the wife's costs, over and above £340 lodged in court as security, which had been paid out to the wife's solicitors. For the payment of the balance, £244, the wife's solicitors obtained a garnishee order nisi on the husband's banking account. The order to pay the £366 had been drawn for payment to the wife's solicitors.

The husband took out this summons to discharge the garnishee order on the grounds that the wife's solicitors were not creditors of his under R.S.C., Ord. XLV, so as to be entitled to attach moneys due to him, and that he had satisfied his liability under his wife's judgment against him by the payment of £121 odd, and he asserted the set-off by way of the assignment of the intervener's costs.

The summons was adjourned into court for argument.

H. B. D. Grazebrook for the wife's solicitors.—An order for the payment of a wife's costs is an order to pay to the wife's solicitors. Under the order for security, as extended in November, 1932, there can be no set-off by the husband of the intervener's costs assigned to him such as would exclude the wife's solicitors' lien. The order was duly made for payment of those costs to the solicitors. In *Hall* v. *Hall* (7) the Court of Appeal held that the court will not make an order for costs to the prejudice of the lien of the wife's solicitor unless he has so conducted himself as to justify so strong a measure.

Hilbery, *K.C.* (with him *T. Bucknill*), for the husband.—The garnishee order nisi was invalid, as the wife's solicitors are not entitled to appear as judgment creditors against the husband. The wife's order for costs pending suit was fully satisfied and when the trial was concluded the President, after expressing strong views as to the charges against the husband and the intervener, granted the wife her costs except in respect of her charges against her husband and the intervener. The assignment of the intervener's costs to the husband was made in due form of law under s. 126 of the Law of Property Act, 1925, and notice thereof given to the wife and her solicitors. Though the order for the wife's costs directed payment to the solicitors, it was merely in their capacity as the wife's agents, but otherwise they had no locus standi and could not be judgment creditors as against the husband. It was held by the Court of Appeal in *Gundry* v. *Sainsbury* (8) that where a solicitor agreed with his lay client that the latter should not pay him any costs, and, therefore, the county court judge made no order for costs against the defendant, the plaintiff could not recover from the defendant more costs than he was liable to pay his solicitor, insomuch as party and party costs were awarded as an indemnity only. Any proceeding to enforce an order to pay made by the Divorce Court must be taken by the creditor, and in *Re a Debtor* (1) it was held that in order to found a bankruptcy notice it was necessary that the order should direct payment to the party and not to the solicitors. In *Puddephat* v. *Leith* (9) the whole question as to set-off of costs and solicitor's lien was dealt with, and YOUNGER, J., said ([1916] 2 Ch. at p. 179):

> "I think I have a discretion in this case, and . . . in my opinion I ought to exercise it in favour of the set-off notwithstanding the plaintiff's solicitor's lien."

The learned judge emphasised also that R.S.C., Ord. LXV, r. 14, had shown that old views as to the sanctity of a solicitor's lien no longer obtained, and that would be significant if in the present case a question of lien really arises, but I submit it does not.

Cur. adv. vult.

May 15. **LORD MERRIVALE, P.**—The questions which have here to be determined arise on decrees with directions as to costs made in cross-suits between husband and wife, which were finally disposed of as to the actual issues between the parties some months ago. The husband in an amended answer in the wife's suit for restitution of conjugal rights charged adultery with the co-respondent. He made a like charge in a suit for divorce in which he was petitioner. The wife denied the accusation, and charged the husband with having committed adultery with the intervener and with a woman unknown. The intervener defended herself against this imputation. The co-respondent named by the husband appeared and defended as party to the husband's suit. In the event the jury found that none of the alleged acts of adultery had taken place. The suits had been consolidated for trial, and the decree which disposed of the case contained orders for payment of costs by the husband to the wife and to the co-respondent in respect of the husband's charge of adultery; and for payment of costs by the wife to the intervener in respect of the wife's charge of adultery against her.

On taxation the intervener's costs were ascertained at £244 6s. 9d., and an order for payment by the wife was made on Feb. 27, 1933. The wife's costs were taxed and certified at £706, there being in court £340 paid in by the husband under orders for security and the co-respondent's costs at £177; and as to each bill an order for payment was made on March 10, and served on the husband on March 14. The payment of the intervener's costs not having been made by the wife, the husband, on March 8, had obtained an assignment of the same from the intervener, of which, next day, he gave notice to the wife and her solicitors, and on March 21 he paid the co-respondent's costs. He also paid £121 14s. 7d., in discharge, as he contended, of the balance of costs due from him to his wife, asserting a right to set-off against £244 6s. 9d. of the wife's claim, the like amount due from her under the order for costs made in favour of the intervener, of which he had become assignee.

The order against the husband for payment of £366 as the balance of the wife's costs was drawn in common form to pay to Messrs. William White & Co., the solicitors of the wife, the sum of £366 1s. 4d., being, with the sum of £170 still in court and the £170 already paid out, the amount of the wife's costs as taxed and certified. It was served on March 14, and on March 23 an affidavit was filed on behalf of the solicitors which set forth the order in question as an "order that the husband should pay to Messrs. William White & Co. the sum of £366 1s. 4d.," and on the footing of such an order the solicitors applied for and obtained—as of course—a garnishee order nisi attaching by way of execution all moneys due to the husband from his bankers. The garnishee order nisi was the proper preliminary to an application by the solicitors under R.S.C., Ord. XLV, r. 1, for an order on the bank to pay to the solicitors so much of any money standing to the husband's credit in their books as should suffice to satisfy the claim of the solicitors in respect of the sum of £244 which the husband sought to meet by way of set-off of the wife's debt to the assignee assigned by the assignee to him.

Forthwith the garnishee order nisi was challenged by the husband on two grounds. Firstly, that the wife's solicitors were not creditors of his so as to be entitled under Order XLV to attach moneys due to him, and, secondly, that he had satisfied his liability under his wife's judgment against him by the payment of £121 14s. 7d., and asserted the set-off of £244 6s. 9d. already mentioned. As to the first objection to the garnishee order nisi, what has to be determined is whether the wife's solicitors were persons who had obtained "a judgment or order" against the husband for the recovery or payment of money—that is, were they his creditors? The order relied on is that of March 10, 1933, that the husband

> "do within seven days pay to Messrs. William White & Co., the solicitors of the wife, the sum of £366 1s. 4d., being with the sum of £170 still in court and £170 already paid out the amount of the wife's costs as taxed and certified."

An affirmative answer to the question I have formulated would seem to involve a conclusion that the solicitors and the wife had each obtained a judgment or order against the alleged debtor. If so, each would be a competent applicant for the garnishee order, and entitled under the terms of Order XLV, r. 1, "upon affidavit by himself or his solicitor" to attach moneys due to the debtor.

In the everyday practice of this Division the application by the solicitor for payment by the husband of the wife's costs is taken to be an application by the wife. If this were not so it would seem that the wife's solicitor, without misconduct on his part as solicitor, might be personally condemned in the costs of an unsuccessful application. In my view, the person who is entitled to take garnishee proceedings is the actual creditor. A somewhat similar question arose in the Court of Appeal in 1929 in *Re a Debtor* (1). There, on an order in divorce for payment by the co-respondent to the solicitors of the petitioner of the petitioner's costs of the suit, the solicitors proceeded in bankruptcy against the co-respondent, and it was objected that they were not creditors. The judgment of the court did not proceed on this ground, but in the course of the judgment of the Master of the Rolls, LORD HANWORTH, these words occur ([1929] Ch. at p. 152):

> "The person at whose suit proceedings are taken must be the principal, the person in whose interest the proceedings are necessary. In my opinion the petitioning husband in this case was the person who was really the principal, for whose indemnity legal proceedings were necessary. The solicitors were merely acting as a necessary part of the machinery under which the sum enured for the benefit of the petitioner, but they were not principals as against the debtor."

This was not a decision, but it appears to me to support the contention raised on the part of the husband in the present case, and my conclusion upon this matter is that the solicitors were not entitled to become applicants as of their own right under Order XLV, r. 1.

The main question between the parties, however, is that of the husband's right to set off against his liability under the wife's order for costs against him the debt for costs due from the wife to the intervener which the intervener has assigned to him. That the decreed right to costs was a chose in action which the intervener had power to assign could hardly be denied. The assignment was made after taxation, and the considered judgment of ATKIN, J., in *Hambleton* v. *Brown* (3) seems to me to place beyond doubt the right to assign which the intervener purported to exercise. The actual assignment as one of the facts in the case was not impugned on any ground affecting its validity as between the intervener and the husband. Whether the right of set-off asserted on the husband's behalf existed and was effectually exercised depends on the nature and extent of the wife's rights as to costs under the decree, and the rights of the solicitors in respect thereof as claimants in their own interest.

The case for the solicitors is put on two grounds. They assert that in point of law a wife's solicitors in proceedings under the Matrimonial Causes Acts have a beneficial interest in the debt created by any decree for costs made in her favour, and beyond that have a lien either under the Solicitors Acts or under the general law. By virtue of s. 69 of the Solicitors Act, 1932, a solicitor may, almost as of course, secure for himself a charge upon "property recovered or preserved through his instrumentality" in a suit in which he acts for the client. Any court before which a solicitor has been employed to prosecute or defend a suit may declare the solicitor entitled to such a charge. But the charge does not exist until the declaration has been made, and no such declaration has been made in the present case. In view of that fact it is not necessary to consider whether the chose in action created by the decree for costs is "property recovered or preserved" within the meaning of the statute. At the time when the husband's right of set-off was asserted no charge upon it had been declared.

As to set-off of costs, the general rule of the High Court is that contained in Order LXV, r. 14—"a set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien." The operation of this rule is demonstrated in a judgment of YOUNGER, J., in *Puddephat* v. *Leith* (9). The introduction of the rule, Order LXV, r. 14, established a definite principle of general application where there was formerly much conflict in practice. One of the many judgments which that controversy educed was delivered by COCKBURN, C.J., in *Mercer* v. *Graves* (10), where the Chief Justice said with regard to the solicitor's claim of a lien in respect of costs:

> "there is no such thing as a lien except upon something of which you have possession. . . . Although we talk of an attorney having a lien upon a judgment, it is, in fact, only a claim or right to ask for the intervention of the court for his protection when, having obtained judgment for his client, he finds there is a probability of his client depriving him of his costs."

The provisions of Order LXV, r. 2, seem to apply primâ facie to proceedings by way of set-off in a cause. They do not, at any rate, enlarge the general rights of the solicitor as solicitor. Assuming no effectual set-off to have been made before the present application came on for hearing, the matter would be one for the exercise of judicial discretion upon consideration of the relevant facts. It was thus dealt with in *Hall* v. *Hall* (7) and in *Puddephat* v. *Leith* (9). I shall revert to this matter later.

The controversy between the wife's solicitors and the husband as the matter developed here turned in reality not on the provisions of the Solicitors Acts, but on the privileged position of a wife's solicitor as against the husband in a matrimonial cause. The Matrimonial Causes Act, 1857, s. 51, empowered the court having jurisdiction in divorce to make such order as to the wife's costs in a suit for divorce as might seem just, and the procedure of the Ecclesiastical Courts which had rendered provision for the wife's costs obligatory upon the husband in normal cases was given effect throughout the jurisdiction under the Matrimonial Causes Act, 1857. Very soon after the passage of this Act it was held that, as in earlier times, the husband might be ordered to provide for his wife's costs day by day: see *Holt* v. *Holt and Fleeming* (11). The principle involved was declared at a later date by COTTON, L.J., in *Robertson* v. *Robertson* (4):

> "When the wife has to take proceedings against her husband, or he against her—all her property being in him—she ought to be provided at his expense with the means of bringing her case before the court, or of properly defending the case brought against her."

The full court under the Act of 1857 had stated the same principle in *Keats* v. *Keats and Montezuma* (12): "The wife should be enabled to bring her case to a hearing and to defend herself." And in *Evans* v. *Evans and Robinson* (13), at the same early period, the court had held that "the wife's proctor has a lien on the moneys paid into court in respect of the wife's costs."

There are limitations, however, on the privilege of the wife and the incidental right of the "proctor," now the solicitor. The privilege was limited to requiring the provision by the husband of the moneys needed for the purpose specified. Under the Matrimonial Causes Acts the court orders payment into court of specified amounts before, and, in proper cases, during the hearing, or the giving of security for prescribed amounts in lieu of actual payment into court. This is everyday practice, and it was followed in the present case. Certain costs were taxed and paid, and payment into court of estimated costs was ordered; a few days before the hearing there was an order which included the estimated amount of the costs of the hearing. These orders were duly complied with. In the result, there was in court at the hearing £340 paid in by the husband as security for the wife's costs. Up to this amount the wife was a secured creditor in respect of costs ultimately ordered to be paid to her by the husband and the security enured for the benefit of her solicitors. They have accordingly taken out of court the whole sum the husband had been ordered to pay in.

I have to determine whether the solicitors have the right they assert in respect of the unpaid balance of the wife's costs ordered to be paid by the husband by the

A order dated March 10, 1933. The final order as to costs in the suit was made on Dec. 5, 1932; the wife's petition for restitution was dismissed on March 10, 1933. No new or extended order for security for the wife's costs could be made now, and there was no suggestion before me of any right of the wife in that way. Looking at the orders as they stand, the wife is the husband's creditor for the unpaid balance of her taxed costs, but is not a secured creditor, and her solicitors can have no B larger right than hers. In my judgment, the intervener's assignment to the husband of the wife's debt to her, notice whereof was duly given to the wife, entitled the husband to rely upon the debt so assigned as a set-off against his debt of equal amount; I hold, therefore, that the wife's solicitors, as such, have no valid claim to recover the sum in question from the husband.

Assuming the question of discretion to arise in respect of the right of set-off as C between the intervener and her assignee and the wife and her solicitors—under the provisions of Order LXV, r. 14—I should exercise that discretion in favour of the husband. I take into consideration the whole course of the litigation, the nature of the charges against the husband and the intervener, and the mode in which they were originated and pursued, and the fact that after all the litigation now in question the marriage tie between the husband and wife remains in force with D serious effects in respect of liability.

The garnishee order nisi must, of course, be discharged. It never ought to have been applied for on the footing on which the application was made, and it has involved a good deal of costs. The application was the application of the solicitors, and was so asserted here. The solicitors, being the applicants, must consequently pay the costs of that application. The order for taxation will be limited to taxation E of so much of the costs which have been involved in this latest controversy as arise by reason of the garnishee order nisi.

His Lordship said he would make no order as to the remainder of the costs of the interlocutory proceedings since the hearing and would certify for junior counsel only. He declined to give leave to appeal.

The wife's solicitors appealed.

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Serjeant Sullivan, K.C., and *H. B. Durley Grazebrook* for the wife's solicitors.
Malcolm Hilbery, K.C., and *T. Bucknill* for the husband.

The arguments in the court below were in substance reproduced.

LORD HANWORTH, M.R.—This appeal raises what is an interesting point, and it has been well presented to the court on both sides. The appeal fails. The G facts must be stated. On Sept. 2, 1931, the wife presented a petition against her husband for restitution of conjugal rights. On Oct. 27 of that same year the husband put in an answer; and on Feb. 4, 1932, there was a reply entered by the petitioner, the wife. On May 6, 1932, a cross-petition was presented by the husband against the wife and a named co-respondent, based on adultery, and security was ordered making provision for the wife's costs. On Aug. 25 the co-respondent H filed an answer, and on the 29th the wife filed an answer, asking for divorce against her husband on the ground of his adultery with a named woman, the woman being named Trist. On Sept. 8 the husband filed a reply to the wife's petition, and the woman Trist, who was an intervener, filed on answer.

The matter came for trial before the learned President and was concluded on Nov. 29. The jury (for it was tried by a jury) found that there had been no I adultery committed by the wife, that the husband had not committed adultery with the intervener, and that the intervener had not committed adultery with the husband. The result was that both petitions were dismissed, and the co-respondent was dismissed from the suit with an order for costs against the husband, and the intervener was dismissed from the suit with an order that her costs should be paid by the wife. In the meantime there had been some orders made in the usual course, making provision for the wife's costs. An order had been made on May 6, 1932, ordering the husband to pay into court a sum of £140, or otherwise to give security, but, in fact, the money was paid into court. That was £140 on May 6, 1932; and just before the trial there was a further order that in addition to the £140 already ordered a sum of £200 should be paid into court or secured. It was paid into court. That order was made on Nov. 16, 1932. The result was that when the hearing began on Nov. 25 there was standing to the credit of the wife a total sum of £340; of that £170 had at that time already been paid out, leaving a sum of £170 still undisposed of and standing pursuant to the orders which I have referred to.

The case lasted some days, and on Nov. 28, after the usual mid-day adjournment, counsel for the wife came into court and applied for an extension of the security, which was granted. That order is one which has caused the difficulty in this case, and I must refer to the terms of the order and the meaning of the granting of that application in a moment. The trial had taken place and the order was made as I have indicated. On March 8 of this year 1933 the intervener, Mrs. Trist, assigned, by a deed of assignment, the sum which was payable to her by the wife to the husband. That assignment is an absolute assignment. It recites what had happened in respect of the proceedings, and then that by a judgment delivered in a consolidated suit the intervener was dismissed from the suit and it was adjudged that the intervener should recover against the wife the costs incurred by her by reason of her intervention in the proceedings; and then the assignment, as I say, is absolute in favour of the husband. Notice of that assignment was given and served on the wife and her solicitors on March 9. The costs to which the intervener was entitled, and which would pass under the assignment, were taxed on March 16 at a sum of £244 6s. 9d. The costs of the wife were taxed, and there was an order made on March 10 ordering that the costs due to the wife should be the amount of £366 1s. 4d. beyond the amount which had already been provided for the costs, the £340, in other words, the total amount due to the wife in respect of her costs was a sum of £706 1s. 4d. On March 10 this order was made:

> "I do order the husband within seven days to pay to Messrs. White & Co. [they were the solicitors for the wife] the sum of £366 1s. 4d., being, with the sum of £170 still in court and £170 already paid out, the amount of the wife's costs as taxed and certified"

by one of the registrars of the division. It will be observed that that order directs this payment of £366 1s. 4d. to the solicitors, but take note of the fact that it is to be paid to them as solicitors of the wife. On March 23 the solicitors took out a garnishee order nisi under Order XLV, r. 1, against the funds which were in the hands of a bank and belonged to the husband. The garnishee proceedings continued, and the question came before the President whether or not that garnishee order nisi should be made absolute or should be discharged.

On May 15 the learned President discharged the order nisi. The only ground on which the solicitors could claim to attach the moneys and have the garnishee order made absolute was that they fulfilled the condition contained in Order XLV, r. 1, that they were a "person" who had "obtained a judgment or order for the recovery or payment of money," and they claimed to be persons who had fulfilled that condition because they said that by the order of March 10 there had been an order made that the £366 1s. 4d. should be paid to them, and hence that they had a right; and, more than that, they said this, that the order which was made on Nov. 28, which "extended the security in favour of" the wife, was something which put them in the position of secured creditors because they were the persons who were entitled to receive the money under an order, and that the reason why that security had been ordered was because the wife had become and was becoming indebted to them in respect of the costs of carrying on the petition.

First of all, what was the meaning of the order made on Nov. 28? It is claimed by counsel for the wife's solicitors that the effect of that order was to put the wife in possession of security for her costs and that from and after that time, whether any money was forthcoming or had been paid into court, or whether a bond had been given for it or not, the effect and operation of that order was to place the

A wife on the sure ground of having in all cases a fund which she could dip into for the payment of her costs. On the other hand, it is said by counsel for the husband that so to interpret the order is to misunderstand the well-settled practice of the Divorce Court.

Attention has been called to *Robertson* v. *Robertson and Favagrossa* (4), which went to the Court of Appeal and which, at first sight, would seem to give colour B to the contention that the wife is to have and has a right to have all her costs and those costs secured to her whatever may be the ultimate order that is made. It is, however, plain from the criticism of that decision in *Smith* v. *Smith* (5), before HANNEN, J., that the terms of the judgment were not accepted in full, and that appears to be so from the practice of the Divorce Court. In *Palmer* v. *Palmer and Stockley* (6) SIR SAMUEL EVANS, P., calls attention to both *Robertson* v. *Robertson* C (4) and *Smith* v. *Smith, Major, Child, and Rabett* (5), and he calls attention to the order which, in November, 1908, LORD GORELL directed should be "the usual order for wife's costs." He directed that it should be in the following form:

> "And it is further ordered that the petitioner do pay to the respondent her taxed costs not to exceed the amount ordered to be paid into court or secured for the wife's costs of hearing, together with such further sum as, in the D opinion of the taxing registrar, would have been allowed if the duration of the trial had been known at the time of such previous order."

It would seem that that order is not easy to construe, because the words

> "not to exceed the amount ordered to be paid into court or secured for the wife's costs of hearing"

E seem to impose a limitation or to recognise that a limitation of the amount up to which the wife is secured has been imposed, and then the order seems to go on to extend that; but saving always that there is to be a further sum which, in the opinion of the taxing registrar, would have been allowed if it could have been ascertained beforehand how long the trial would have taken.

After careful consideration of the terms of that order and of the reason why it F was so drawn up, we have come to the conclusion that the interpretation suggested by counsel for the husband is the right interpretation. It does not mean that there is to be a further sum actually paid into court; it does not mean that the wife thereafter is a secured creditor in the sense that she has a right to dip into this fund for all her costs. It means this, that she is released from any limitation of such costs which apparently has been imposed upon her, and that if it is found G thereafter that her costs will amount to a sum which is beyond the amount provided or estimated before the trial takes place and in respect of which there may be money available in court to meet them, she is not to be held bound by the estimate originally made of what her costs would be. Released then from that limit, she can still go on and come back to that fund if and when she obtains an order at the trial of the petition for a larger sum of costs than had been estimated for before H the trial took place. To put a different construction on it would appear to fetter the discretion of the court as to what costs the wife is entitled to be paid. By s. 51 of the Matrimonial Causes Act, 1857, there is a discretion given to the court to make such order as to costs as to the court may seem just. That section is now replaced by s. 50 of the Judicature (Consolidation) Act, 1925. But the discretion of the court, although it depends on a different section in a different act, still I remains the same, and it would be unfortunate if this order which is made under the circumstances and in the course of the trial were to be interpreted as to, in effect, limit the discretion of the court by giving the wife an absolute right or security up to a certain limit. All that the order does is to release her from any limit which has been imposed by estimate before the trial, but the court is not fettered in any way, and her right in respect of any more money which may be ordered thereafter to be payable to her must be a right which she can exercise in the ordinary course and without being treated as having a fund secured to her for the payment of that sum.

When the order is interpreted in that form it will be seen that the wife has got A
no sum allocated or appropriated to her, and if that be so it cannot be said that there has been a sum over which there can be a lien in favour of her solicitor. *Mercer* v. *Graves* (10) seems to make that plain enough, because it is pointed out in the course of that case what is the nature of a lien of a solicitor. It is in effect merely a claim for the equitable interference of the court who may order the judgment to stand as security for a solicitor's costs and that payment of the amount B
of it, or such an amount as will cover them, be made to the solicitor in the first instance, and that lien is one which prevails over a fund which is in sight; that right is one which, so to speak, cannot prevail at large. That being so, there does not appear to be any order which gives a right to the solicitor to come to the court and ask for the garnishee order. The order of March 10 gives the solicitor a right to receive the money in right of the wife, but he is really the conduit pipe to receive C
the money and no more.

As to the reasoning which I referred to in *Re a Debtor* (*No. 76 of 1929*) (1), *Re Muirhead, Ex parte Muirhead* (2) illustrates the true position of such an order as that order of March 10. It does not make the person who is to receive the money the dominus of the money; it merely indicates how and through what channel the money shall be received and paid. The reasoning of *Re Muirhead* (2) seems plainly D
to indicate that the person who is the channel has not got any independent right which he can assert. Under those circumstances, it would appear that there is no ground for saying that the solicitor who is one of the appellants in this case can fulfil the conditions which are required in the first sentence of Order XLV, r. 1.

More than that, it would also appear plain from *Hambleton* v. *Brown* (3) that an assignment can be made of the fruits of an order such as was made in favour of E
the intervener, Mrs. Trist. That assignment was an absolute assignment, of which notice in writing was given, and the husband would have a right to set that off against a sum which was ultimately payable to the wife, there being two sums of different amounts due from the one spouse to the other. In respect of that it is suggested that there might still be some intervening right of the solicitor. As I have pointed out, there does not appear to be a solicitor's lien. There was no order F
made under the Solicitors Act giving a right to the solicitor. There was no charging order made under 23 & 24 Vict., c. 127, s. 28, and the result is that there is a good set-off between those two sums. The learned President has said that if and so far as the question arose or became necessary to decide he would exercise in his discretion the powers under Order LXV, r. 14, which provides that

> "A set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought." G

For the reasons I have given it does not appear that there is a solicitor's lien which needs to be neglected or set aside, but we take note of the fact that the learned President, before whom the case was tried, was minded, if it was necessary H
to exercise the powers given under that rule, and we should follow the indication of his opinion and judgment on that point also. For these reasons, in addition to those which are given by the President, the appeal is dismissed with costs.

LAWRENCE, L.J.—I agree.

ROMER, L.J.—I agree. It has been frequently laid down, and by judges of I
great eminence, that where a wife is herself taking proceedings against her husband in the Divorce Court, or the husband is taking proceedings against her in that court, the necessary advice and assistance of solicitors is a necessary of the wife; it is one of the necessaries that the wife is entitled to procure, pledging the credit of her husband for the purpose. From that two results ensue—results, however, that are perfectly distinct the one from the other, though I cannot say that in every case to which our attention has been called the distinction has always been carefully observed. The one result is that, as between the husband and wife as adverse

litigants in the Divorce Court, the husband is ordered to pay to the wife her party and party costs—I need not pause to consider whether the whole or part of them—whether he succeeds in the proceedings or whether he fails. The second result is this, that the solicitor has a personal right to recover from the husband, in proceedings properly brought for the purpose, the balance of the wife's solicitor and client costs so far as they have not been otherwise recovered or paid to him. In the present case on Nov. 29, 1932, an order was made giving effect to the first of the two results that I have mentioned, and the husband was ordered to pay the wife's party and party costs. After those costs had been taxed, an order was made on March 10, 1933, directing the husband to pay those costs, less the sum of £340 that had already been paid into court by way of security by the husband, to the solicitor. That order, however, was made merely as a matter of procedure and was not made for the purpose of giving effect to the right of the solicitor against the husband personally, the right that I have said forms the second of the two results that ensue from the principle laid down by the courts. In other words, in this case the solicitor was not a person who had, within the meaning of Order XLV, r. 1, obtained a judgment or order for the recovery or payment of money; it was the wife, and the wife only, who had obtained such a judgment or order. That being so, the solicitor had no right to obtain, as he did obtain, a garnishee order, and the learned President was quite right on those grounds, even on those grounds alone, in discharging the order.

That being so, it is quite unnecessary to determine as to whether, as between the wife and the husband, the husband could set off, against the costs that he had been ordered to pay to the wife, a sum which he had procured to be assigned to him that was due from the wife to the intervener. Having heard the arguments addressed to us upon the subject, I will only say this, that I am not at all convinced that such a right of set-off would be defeated either by the order that was made on Nov. 28 or by anything that might be deemed to emerge material to the subject from Order LXV, r. 14. As regards the order made on Nov. 28, I agree with what has been said by the Master of the Rolls as to its effect. It does appear that that is the effect which judges in the Divorce Court intend that such an order shall have. I will only add this, that I think that it is a great pity, that being so, that such an order should still be referred to as an order for "extended security" or "further security" or "additional security." It appears that it does not give to the wife any one of the three.

For these reasons I agree that this appeal fails.

Appeal dismissed.

Solicitors: *William White & Co.*; *Blundell, Baker & Co.*

[*Reported by* WILLIAM LATEY, ESQ., *and* GEOFFREY P. LANGWORTHY, ESQ., *Barristers-at-Law.*]

THE MINERVA

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bateson, J.), June 27, 30]

[Reported [1933] P. 224; 102 L.J.P. 129; 149 L.T. 567; 49 T.L.R. 563; 18 Asp. M.L.C. 426]

Admiralty—Jurisdiction—Action in rem—"Damage done by ship"—"Damage received by a ship"—Grain elevator—Part of elevator being hoisted by ship's derrick—Broken derrick—Damage to elevator—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 22 (1) (*a*) (*iii*) (*iv*).

The plaintiffs, owners of the grain elevator *N.P.*, claimed damages in respect of injuries sustained by the *N.P.* The plaintiffs alleged that when a part of the elevator was being hoisted out of the steamship *M.*, a foreign ship lying alongside a wharf in the docks at Birkenhead, by means of the derrick of the *M.*, the span of the derrick broke and in consequence the part of the elevator fell, doing damage to the *N.P.* The plaintiffs accordingly commenced an action in rem against the owners of the *M.* The defendants appeared under protest, and moved to set aside the writ and proceedings on the ground that the court had no jurisdiction to entertain an action in rem.

Held: (i) the damage sustained by the *N.P.* was "damage received by a ship . . ." within the meaning of s. 22 (1) (a) (iii), of the Supreme Court of Judicature (Consolidation) Act, 1925, and there was, therefore, jurisdiction thereunder to entertain an action in rem against the *M.*; (ii) there was also jurisdiction under s. 22 (1) (a) (iv), as the damage, having been caused by part of a ship, was "damage done by a ship" because (a) to constitute such damage it was not necessary that the ship should be the active cause of the damage, and (b) a ship while discharging her cargo was still in process of navigation.

Notes. Section 22 (1) (a) (iii), (iv) of the Judicature Act, 1925, has been repealed: similar provisions are now contained in s. 1 (i) (e), (d), of the Administration of Justice Act, 1956. Section 33 (2) has also been repealed; and s. 3 (2)–(6) of the 1956 Act now makes provision as to the admiralty jurisdiction in rem.

As to the meaning of "damage done by a ship" and "damage received by a ship," see 1 HALSBURY'S LAWS (3rd Edn.) 60, para. 119, text and notes (a)–(f), and for cases on the subject see 41 DIGEST 140 et seq., *473* et seq. For the Administration of Justice Act, 1956, s. 1 (i) (d), (e), s. 3 (2)–(6), see 36 HALSBURY'S STATUTES (2nd Edn.) 3, 11 and 12 respectively.

Cases referred to:

(1) *The Chr. Knudsen*, [1932] P. 153; 101 L.J.P. 72; 148 L.T. 60; 48 T.L.R. 619; 18 Asp.M.L.C. 347; Digest Supp.

(2) *The Zeta*, [1893] A.C. 468; 63 L.J.P. 17; 69 L.T. 630; 57 J.P. 660; 9 T.L.R. 624; 7 Asp.M.L.C. 369; 1 R. 307, H.L.; 1 Digest 245, *1728*.

(3) *The Clara Killam* (1870), L.R. 3 A. & E. 161; 39 L.J.Adm. 50; 23 L.T. 27; 19 W.R. 25; 3 Mar.L.C. 463; 1 Digest 141, *493*.

(4) *The Industrie* (1871), L.R. 3 A. & E. 303; 40 L.J.Adm. 26; 24 L.T. 446; 19 W.R. 728; 1 Asp.M.L.C. 17; 1 Digest 139, *468*.

(5) *Good* v. *London Steamship Owners' Mutual Protecting Association* (1871), L.R. 6 C.P. 563; 20 W.R. 33; 29 Digest 439, *3396*.

(6) *The Warkworth* (1884), 9 P.D. 145; 53 L.J.P. 65; 51 L.T. 558; 33 W.R. 112; 5 Asp.M.L.C. 326, C.A.; 41 Digest 918, *8088*.

(7) *The Vera Cruz* (*No. 2*) (1884), 9 P.D. 96; 53 L.J.P. 33; 51 L.T. 104; 32 W.R. 783; 5 Asp.M.L.C. 270, C.A.; on appeal sub nom. *Seward* v. *The Vera Cruz*, 10 App. Cas. 59; 54 L.J.P. 9; 52 L.T. 474; 49 J.P. 324; 33 W.R. 477; 1 T.L.R. 111; 5 Asp.M.L.C. 386, H.L.; 41 Digest 768, *6320*.

(8) *The Theta*, [1894] P. 280; 63 L.J.P. 160; 71 L.T. 25; 43 W.R. 160; 7 Asp. M.L.C. 480; 6 R. 712; 1 Digest 144, *512*.

(9) *The Sneyd* (1895), 29 I.L.T.Jo. 317.

(10) *Currie* v. *McKnight*, [1897] A.C. 97; 66 L.J.P.C. 19; 75 L.T. 457; 13 T.L.R. 33; 8 Asp.M.L.C. 193, H.L.; 1 Digest 251, *1793*.

(11) *Harmer* v. *Bell, The Bold Buccleugh* (1852), 7 Moo.P.C.C. 267; 19 L.T.O.S. 235; 13 E.R. 884, P.C.; 41 Digest 928, *8168*.

(12) *Re Margetts and Ocean Accident and Guarantee Corpn.*, [1901] 2 K.B. 792; 70 L.J.K.B. 762; 85 L.T. 94; 49 W.R. 669; 17 T.L.R. 538; 45 Sol. Jo. 557; 9 Asp.M.L.C. 217, D.C.; 29 Digest 214, *1707*.

(13) *Hayn, Roman, & Co.* v. *Culliford and Clarke* (1879), 4 C.P.D. 182; 48 L.J.Q.B. 372; 40 L.T. 536; 27 W.R. 541; 4 Asp.M.L.C. 128, C.A.; 41 Digest 430, *2699*.

(14) *Northcote* v. *Henrich Björn, The Henrich Björn* (1886), 11 App. Cas. 270; 55 L.J.P.D. & A. 81; 55 L.T. 66; 6 Asp.M.L.C. 1, H.L.; 41 Digest 278, *1302*.

(15) *Westrup* v. *Great Yarmouth Steam Carrying Co.* (1889), 43 Ch.D. 241; 59 L.J.Ch. 111; 61 L.T. 714; 38 W.R. 505; 6 T.L.R. 84; 6 Asp.M.L.C. 443; 41 Digest 940, *8310*.

(16) *Hamilton* v. *Baker, The Sara* (1889), 14 App. Cas. 209; 58 L.J.P. 57; 61 L.T. 26; 38 W.R. 129; 5 T.L.R. 507; 6 Asp.M.L.C. 413, H.L.; 41 Digest 937, *8279*.

Appeal from order of the district registrar at Liverpool.

The plaintiffs, the Grain Elevating and Automatic Weighing Co. of Liverpool, who were owners of the grain elevator *New Perseverance*, claimed damages in respect of injuries to the *New Perseverance* caused by the fall of a part of the elevator which was being hoisted out of the Norwegian steamship *Minerva* in Birkenhead Docks on Jan. 10, 1933. The span of the derrick of the *Minerva* broke whilst the part of the elevator by which the damage was done was being hoisted, causing the damage in question.

The plaintiffs issued a writ in rem in the Liverpool District Registry claiming for the damage sustained by the *New Perseverance*. An appearance under protest was entered by the owners of the *Minerva*. On a motion by the defendants to set aside the writ and subsequent proceedings, the district registrar at Liverpool set the writ aside on the ground that the *Minerva* was not at the time of the damage being navigated.

The plaintiffs appealed.

Brightman for the plaintiffs.—There is jurisdiction to entertain an action in rem for damage done by a ship under s. 22 (1) (a) (iv). This was damage done by the ship. The rope which broke was part of the ship. It was a bad rope, and it is alleged that it was negligent to have a bad rope. There is clearly jurisdiction to entertain such a claim. The district registrar was wrong in thinking that the vessel at the time of the damage must be in the course of navigation. There is no authority for such a proposition; but assuming that his view was right, this ship was in fact being navigated. Whilst she is discharging her cargo she is still being navigated, for the voyage is not yet complete. If this was not "damage done by a ship" it was certainly "damage received by a ship," and there was, therefore, jurisdiction to entertain the action under sub-s. (1) (a) (iii).

Willmer for the defendants.—"Damage done by a ship" means damage done by a ship as the active cause of the damage. This was really the ground on which the district registrar proceeded. A ship cannot be the active cause of damage whilst she is tied up alongside a wharf; she is not being navigated under such conditions, but is being merely used as a floating warehouse. In *The Chr. Knudsen* (1) the court assented to the proposition that "damage done by a ship" means damage done by the negligent navigation of a ship. It is submitted that this is correct, and that here the ship was not being navigated. As to the point that this was damage received by a ship, it was submitted that sub-s. (1) (a) (iii) must be read subject to some limitation; otherwise it would include damage done to a ship by collision with a dock owing to the negligence of the owners of the dock. In such a case the result of construing the subsection without some limitation would be to give a right of action in rem against the dock owner, involving a right to arrest the dock, which would be absurd. It is submitted that the proper limitation is this, that the damage must be done by a ship or by something capable of being arrested, so that the jurisdiction in rem can be exercised.

Brightman replied.

Cur. adv. vult.

June 30. **BATESON, J.,** read the following judgment.—This appeal succeeds. It is an appeal from the district registrar of Liverpool, who set aside the writ in the action on the grounds, as I understand, that there was no jurisdiction to arrest a foreign ship in the circumstances of the case.

I assume the allegations contained in the endorsement of the writ and in the affidavit which was read to be true. The endorsement of the writ is:

> "The plaintiffs' claim is for damages for injury sustained at Birkenhead during the month of January, 1933, by their grain elevator *New Perseverance* by reason of the negligence of the defendants or their servants in the navigation and management of the defendants' steamship *Minerva* and or owing to the negligence or breach of duty of those in control of her."

The affidavit of Mr. Fitzsimmons, the man in charge of the *New Perseverance*, says that:

> "At about 4 p.m. on Jan. 10, 1933, the *New Perseverance* completed the discharge of a cargo of grain from the after hold of the above-named steamship *Minerva*, which was lying at East Tower, Seacombe Warehouses, Birkenhead. The elevator was thereupon taken down in order that it could be stowed on the *New Perseverance*. In the course of this operation one-half of the elevator remained on board the *Minerva* whilst those on board the *Minerva* made the necessary preparations to enable them to transfer the half elevator to the *New Perseverance* by means of the wires and derricks belonging to the *Minerva*.
>
> "When those on board the *Minerva* had got everything ready, the half of the elevator which had remained on board the *Minerva* was hoisted from the *Minerva* by her derrick, but before it had been safely placed on board the *New Perseverance* the wire broke and the half elevator fell on to the deck of the *New Perseverance*, doing damage to the *New Perseverance* and to the half elevator."

Then he says:

> "The wire which broke was an ordinary 2¼ in. wire, such as most vessels carry, and formed part of the equipment necessary for working the derrick."

In addition it was agreed that I was also to assume that the wire which broke on the *Minerva* was the span. That is, as I understand it, the wire which connects the derrick to the mast and holds it up. If the span breaks the derrick and its burden fall in a heap.

On this material it is clear that the case is one in which the claim is that the *New Perseverance* received damage to her deck and her elevator by the negligence of the defendants' servants in handling and using the gear of their ship *Minerva*. It also seems that the damage to the *New Perseverance* was done by the faulty gear of the *Minerva*, that is, by a part of the *Minerva* herself. The dropping of the elevator by the gear, and the dropping of the elevator and the gear together, did damage to the *New Perseverance*, her deck and her elevator.

The Supreme Court of Judicature Act, 1925, s. 22 (1) (a) (iii) and (iv) and s. 33 (2) are the sections in point. Subsection (1) (a) of s. 22 says that

> "the High Court shall in relation to Admiralty matters have the following jurisdiction, that is to say, the jurisdiction of hearing and determining all the following questions or claims."

Subsection (iii): "Any claim for damage received by a ship," and sub-s. (iv): "Any claim for damage done by a ship." Section 33 (2) says:

> "The Admiralty jurisdiction of the High Court may be exercised in proceedings in rem or in proceedings in personam."

In my view, the words of the statute in sub-s. (1) (a) (iii), "damage received by a ship," are clear, and are as wide as could well be conceived, as LORD HERSCHELL said in *The Zeta* (2):

> "This is undoubtedly damage received by a ship. The plaintiffs allege it was received owing to the negligence of the defendants' servants in and about the navigation and management of defendants' ship. They may proceed in rem under s. 33 (2) or in personam, that is to say, against the defendants' res, or against the defendants in person."

This writ is against the res by, from, and on which the cause of the injury to the plaintiffs' vessel arose. The res is here and can be arrested, and it seems to me that it is within the four corners of the Act. There is no limitation on the words. Decisions on other words, or other subsections, or clauses, do not seem to me to help.

Further, the claim can be put under sub-s. (iv) as damage done by a ship. The damage here may be said to be done by the derrick and its load falling on the ship *New Perseverance*. That is damage done by defendants' ship. If part of the ship does the damage I think that is enough—if it were done by an anchor or by a propeller.

It is common enough, in this Division in its Admiralty jurisdiction—and, indeed, in the old Admiralty Court—for such cases to be tried and for a vessel to be arrested. I quite agree with counsel for the defendants in saying that "done by a ship" connotes the ship as the active cause of damage, i.e., if he means the ship or part of it. It will not do to say that sub-s. (iii) only applies if the damage is done by a ship, otherwise there would be no need of sub-s. (iii) at all.

The reason why the old Admiralty Court Act of 1840, confined as it was to damage received, was amended by the Act of 1861 was because it was thought right to preserve all the old jurisdiction, and to extend it to cases within the body of a county which would have been within the jurisdiction if occurring on the high seas. If on the high seas a mast or a jibboom had fallen on another ship no question could have arisen as to the jurisdiction in rem and the right to arrest the ship. Nowadays, such an accident might easily happen in refuelling a ship at sea. In this case there was damage received by parts of one ship through failure to act properly of a part of another ship in the hands of the defendants' servants. I think I am only giving effect to the plain words of the statute passed as recently as 1925.

Several cases and dicta were cited. In *The Clara Killam* (3) the claim was by the owners of a telegraph cable against a ship whose mate had cut the cable. That was held to be damage done by a ship. It seems to me that if there were jurisdiction in such a case and the ship may be arrested—as it was in that case—this case is a good deal stronger. In 1871 in *The Industrie* (4) the claim was for injury received by a ship forced ashore by another vessel under way. Under the words "damage received by a ship" it was held that there was jurisdiction in such a case, and the ship was arrested. That is the one case where the words "damage received by a ship" arose among the cases cited to me.

In the same year—1871—in *Good* v. *London Steamship Owners' Mutual Protecting Association* (5), a case where a seacock was left open so that the cargo became damaged, WILLES, J., held that "improper navigation" covered something improperly done by a ship or a part of a ship in the course of the voyage. It is a decision which seems rather far away from the matter that I have to consider, but it does show that in considering what is a ship in such circumstances, part of a ship is, of course, all that is necessary.

In 1884 *The Warkworth* (6) was a case where the steering machinery went wrong for want of a pin, and the collision due to the vessel failing to steer properly was held to be "improper navigation" under the limitation section. That, again, does not seem to be very much in point, because it is on the limitation section and not on the sections in question.

Also in 1884, *The Vera Cruz* (*No. 2*) (7) was decided. That was, again, an action under the Fatal Accidents Act, 1846 (Lord Campbell's Act), and it was held that an action under that Act by a defendant of a person fatally injured does not come within the Act of 1861, where the words are the same, namely, "damage done by a ship." There was no actual injury to the person who was claiming and on whose account the action was brought. This is what BRETT, L.J., laid down and BOWEN, L.J., said: "Injury to the family is not done by the ship." BOWEN, L.J., also said, "done by a ship" means "done by those in charge of a ship"—that the ship is the "noxious instrument," BRETT, L.J., spoke of the ship as being "the active cause." Of course the words "done by a ship" mean that it must be done by the ship. The House of Lords affirmed the decision of the Court of Appeal.

In 1894 *The Theta* (8) was decided. That was the case of a man falling down the hold of a ship, and it was held that this was not "damage done by a ship." That seems to be pretty obvious.

Then in 1895 in *The Sneyd* (9) there was "personal injury to a stevedore by derrick breaking." It was held that the ship was not the active cause. In the report there are no arguments reported; there are no reasons given; I do not know who decided the case; and, at any rate, it is only a decision on the words "damage done by the ship." I should imagine—but, of course, it does not appear that it could hardly have been on the words "damage received by the ship." It is a decision under the Irish Act which, I am told, contains the phrase "damage done by and damage received." But it does not touch the argument as regards "damage received by a ship." Of course, if there had been a report of a case which could have been read to see what the facts and reasons were, and what the argument was, I should have paid considerable attention to it, but, under any circumstances, I do not think it would bind me, and it does not, to my mind, by any means conclude this case.

In *Currie* v. *McKnight* (10), also known as *The Dunlossit*, some of the crew of the ship cut the cables of another ship in order that they might get away to sea, and the question was whether there was a maritime lien or not. There was no question of jurisdiction or of remedy in rem except, I think, that the argument was that the remedy in rem was enough for a maritime lien. Damage done by a ship in navigation is what seems to have been considered, but the real question was whether *The Bold Buccleugh* (11)—under which the maritime lien for damage done by a collision was held to exist—applied to such a case or not, and it was held that it did not.

In 1901 in *Re Margetts and Ocean Accident Corpn.* (12) it was held that a collision with a ship's anchor to which another was riding was a collision with the vessel within the meaning of the clause in that case. It does not seem to assist very much in construing the clauses in this case, but it does show that the anchor to which a vessel was riding was considered to be part of a vessel within the meaning of the clause in that case.

Then the last case of all was *The Chr. Knudsen* (1), where I was faced with an obiter dictum of my own—which, of course, I can disregard. The substance of that case was that I held that the sinking of a barge in dock by a ship was damage done by the ship to the dock owner who had to clear it away.

These are all the cases which were cited before me except that in reply counsel for the plaintiffs referred to *Hayn, Roman & Co.* v. *Culliford and Clarke* (13), which I do not think it is necessary to discuss.

Practically all these cases except the one I have mentioned turn on the words "damage done by a ship." Even if I am wrong in my view that this is, or may be, a claim for "damage done by a ship" to the elevator and deck of a ship, it leaves the claim for "damage received by a ship" still good, and nothing that I can see prevents me holding that the jurisdiction which can be exercised in rem is properly exercised by arresting the *Minerva*.

The argument of counsel for the defendants seems to involve adding words to the statute which are not there. He says that you cannot have damage "received by a ship" unless it is done by a ship, with the ship as active cause. The section does not say so. The plaintiffs, he says, must show that the ship caused the damage, but I cannot find that in this particular sub-s. (iii), or anywhere. He also says that the remedy in rem and the maritime lien are the same thing—at least, that is what I understand. That idea has been exploded, I think, since the case of *The Henrich Björn* (14), the necessaries case; the towage case—*Westrup* v. *Great Yarmouth Steam Carrying Co.* (15); the master's disbursements case—*The Sara* (16), which has since been remedied by statute. These last three cases I have mentioned were argued largely on the basis that maritime lien and remedy in rem were convertible terms—an argument which completely failed. No doubt there are a great many cases where there is a remedy in rem, and there is no maritime lien where the jurisdiction of this division on the Admiralty side is exercised—by arresting the ship. Counsel for the plaintiffs pointed out that the *Minerva* was being navigated as she was completing her discharge in the course of the navigation to deliver her cargo and that the cases show that there is no need of movement of the ship to entitle him to sue.

Appeal allowed.

Solicitors: *Botterell & Roche*, for *Weightman, Pedder, & Co.*, Liverpool; *Hill, Dickinson, & Co.*

[*Reported by* Geoffrey Hutchinson, Esq., *Barrister-at-Law.*]

WILLIAMS *v.* GRUNDY'S TRUSTEES

[King's Bench Division (Finlay, J.), December 11, 1933]

[Reported [1934] 1 K.B. 524; 103 L.J.K.B. 204; 150 L.T. 378; 18 Tax Cas. 271]

Income Tax—Assessment—Additional assessment—Discovery of omission by surveyor—Erroneous view as to effect of will—Subsequent realisation of error—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 125 (1).

A testator, who died on Dec. 26, 1926, by his will devised and bequeathed the residue of his estate to his trustees on trust for sale and to stand possessed of the proceeds in trust for "my said grandson [R.W.A.] if and when he shall attain the age of twenty-one years." Other trusts were declared in default of the said grandson attaining the age of twenty-one years. R.W.A. was a minor, and an American subject resident in the United States of America. In 1927 the trustees sent to the inspector of taxes a copy of the testator's will, and in 1929, in making a return for the purposes of income tax, they erroneously, but honestly, stated that the interest received by them on a holding of war stock was not liable to tax because it formed part of the income held in trust for R.W.A. until he attained the age of twenty-one years (i.e., because R.W.A. had a vested interest in it). After discussion with the trustees, the inspector made no assessment in respect of the interest, but in 1931 a new inspector realised that an error had been made and raised additional assessments for previous years in respect of the interest on the war stock. On the question whether it was open to the inspector to make the additional assessments,

Held: the assessments were properly made because, in forming the view that the interest was wrongly omitted from the first assessments, the inspector had discovered the omission within the meaning of the Income Tax Act, 1918, s. 125 (1).

Dictum of BRAY, J., in *R.* v. *Kensington Income Tax Comrs.* (1), [1913] 3 K.B. 870, at p. 889 applied.

Dictum of ROWLATT, J., in *Anderton* v. *Birrell* (2), [1932] 1 K.B. 271 at p. 281 explained.

Notes. The Income Tax Act, 1918, s. 125, was replaced by the Income Tax Act, 1952, s. 41.

Referred to: *Commercial Structures, Ltd.* v. *Briggs*, [1948] 2 All E.R. 1041; *Earl Beatty* v. *I.R. Comrs.*, [1953] 2 All E.R. 758.

As to additional assessments, see 20 HALSBURY'S LAWS (3rd Edn.) 669–671, paras. 1314, 1315; and for cases on the subject see 28 DIGEST 98, 99, *586–592*. For the Income Tax Act, 1952, s. 41, see 31 HALSBURY'S STATUTES (2nd Edn.) 49.

Cases referred to:

(1) *R.* v. *Kensington Income Tax Comrs.*, [1913] 3 K.B. 870; 83 L.J.K.B. 364; 109 L.T. 708; 6 Tax Cas. 279; on appeal, [1914] 3 K.B. 429; 83 L.J.K.B. 1439; 111 L.T. 393; 6 Tax Cas. 613; 30 T.L.R. 574, C.A.; affirmed sub nom. *Kensington Income Tax Comrs.* v. *Aramayo*, [1916] 1 A.C. 215; 84 L.J.K.B. 2169; 113 L.T. 1083; 6 Tax Cas. 621; 31 T.L.R. 606; 59 Sol. Jo. 715, H.L.; 38 Digest 121, *888*.

(2) *Anderton* v. *Birrell*, [1932] 1 K.B. 271; 101 L.J.K.B. 219; 146 L.T. 139; 16 Tax Cas. 200; Digest Supp.

(3) *Haythornthwaite* v. *Kelly* (1927), 11 Tax Cas. 657, C.A.; Digest Supp.

Case Stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

"1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on Feb. 22, 1933, Helena Rigby Grundy, John Thomas Furber, and Frederick Redmond, trustees of W. W. Grundy deceased (hereinafter called the trustees), appealed against additional assessments made in respect of interest on registered 5 per cent. war stock under Case III of Sched. D of the Income Tax Act, 1918, as shown below:

	£	s.	d.
For the year 1928–29 in the sum of	35	15	0
For the year 1929–30 in the sum of	358	5	0
For the year 1930–31 in the sum of	417	15	0
For the year 1931–32 in the sum of	449	5	0

"2. W. W. Grundy died on Dec. 26, 1926. By his will dated April 26, 1926, he appointed his wife, Helena Rigby Grundy, and his friends, John Thomas Furber and Frederick Redmond, to be executors and trustees, thereinafter referred to as 'my trustees,' and after bequeathing certain pecuniary and other legacies devised and bequeathed the residue of his estate to 'my trustees . . . upon trust to sell call in and convert the same into money and to stand possessed of the proceeds in trust for my said grandson Robert Wilson Appleton if and when he shall attain the age of twenty-one years, but if my said grandson shall not attain the said age of twenty-one years then in trust as to both capital and income for Margaret Bird Grundy, John Thomas Appleton, Allan Wilson Grundy, and Reginald Calder Grundy, or the survivor or survivors of them and if more than one in equal shares as tenants in common.'

A "3. The said will was duly proved by the said executors and trustees on Feb. 9, 1927, and at all material dates the trustees have been possessed of the residue of the said estate upon the trusts declared by the said will.

"4. The said Robert Wilson Appleton, who is a minor, is an American subject resident in the United States, and not ordinarily resident in the United Kingdom. None of the income of the trust has been applied towards his maintenance, but the B whole has been received and accumulated by the trustees. Part of the funds of the said trust were at all material dates invested in registered 5 per cent. war stock the interest on which forms the subject of the assessments under appeal.

"5. In August, 1927, probate of the will of W. W. Grundy and a copy of the will were forwarded by the trustees to the inspector of taxes at Wallasey. In April, C 1929, the trustees made an income tax return for the year 1929–30. In this return they referred to the interest received by them on their holding of registered 5 per cent. war stock, but added a note that the income was not taxable and formed part of the said residuary estate, and that the income was held in trust for Robert Wilson Appleton a domiciled American until he attains the age of twenty-one years. A statutory declaration was made on July 17, 1929, by J. T. Furber, one D of the said trustees, that the said Robert Wilson Appleton was the beneficial owner of the war stock in question, and was entitled to the interest thereon. The liability of the trustees to income tax was fully discussed between the trustees and the inspector of taxes in connection with the making of an additional assessment for the year 1928–29, which the inspector of taxes had told the trustees would be made in due course; after this discussion the trustees were informed in August, 1929, by E the inspector that the proposed assessment would not be made. The trustees made returns for the years 1930–31 and 1931–32, and on these returns it was stated that the said income was not taxable and was being held in trust for the said Robert Wilson Appleton 'until he attains the age of twenty-one.'

"6. Nothing further happened, and no assessment in respect of the interest on the said war stock was made until December, 1931, when an inspector of taxes who F had after the year 1929 been appointed to the Wallasey district came to the conclusion that the trustees were liable to assessment to income tax in respect of the interest aforesaid and caused additional assessments to be raised on the trustees for the years 1928–29, 1929–30, 1930–31, and 1931–32. It is these additional assessments which formed the subject of appeal before the commissioners.

"7. It was contended by counsel on behalf of the trustees that the inspector had G not made any discovery within the meaning of s. 125 of the Income Tax Act, 1918, which would justify the making of the additional assessments appealed against and that the assessments should therefore be discharged.

"8. On behalf of the Crown it was contended that the inspector had, within the meaning of s. 125, discovered: (a) that the interest in question was chargeable to tax and had been omitted from the first assessments; (b) that the trustees had not H been assessed to tax in respect of the said interest; and (c) that the trustees had been allowed or had obtained exemption or relief not authorised by the Income Tax Acts.

"9. The commissioners who heard the appeal gave their decision in the terms following: It is not disputed that in this case the facts were completely made known at the time to the Inland Revenue by the appellant trustees and were fully I examined by both sides. The then inspector of taxes formed an opinion on those facts and acted upon his opinion. A new inspector of taxes has since re-examined the same facts and formed a different opinion. These being the circumstances of this case, we hold that there has been no discovery within the meaning of s. 125 of the Income Tax Act, 1918. We allow the appeal and discharge the assessments.

"10. The appellant immediately after the determination of the appeal declared to the commissioners his dissatisfaction therewith as being erroneous in point of law and in due course required them to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 149."

The relevant portions of the Income Tax Act, 1918, are as follows:

> "Section 125 (1): If the surveyor discovers that any properties or profits chargeable to tax have been omitted from the first assessments, or that a person chargeable has not delivered a full and proper statement, or has not been assessed to tax, or has been undercharged in the first assessment, or that a person chargeable has been allowed, or has obtained from and in the first assessments, any allowance, deduction, exemption, abatement, or relief not authorised by this Act, then and in every such case (i) where the tax is chargeable under Sched. B or E . . . ; (ii) where the tax is chargeable under Sched. D, the additional commissioners shall make an assessment, on the person chargeable, in an additional first assessment, in such sum as, according to their judgment, ought to be charged, and any such assessment shall be subject to objection by the surveyor, and to appeal. . . ."

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *Reginald P. Hills* for the Crown.

Eric Errington for the taxpayers, the trustees.

FINLAY, J.—In this case, notwithstanding the skilful argument of Mr. Errington, an argument which lost nothing from its brevity, I have arrived at a conclusion which differs from that of the Special Commissioners.

Additional assessments were made on certain trustees in respect of 5 per cent. war stock. It is a familiar circumstance with reference to that particular stock that it is not liable to tax if in the beneficial ownership of a person resident abroad. The stock in question was left to a young gentleman who is resident in the United States. It was left on these terms:

> "To stand possessed of the proceeds in trust for my said grandson, Robert Wilson Appleton, if and when he shall attain the age of twenty-one years and if my said grandson shall not attain the age of twenty-one years then in trust as to both capital and income."

The whole of the income was received and accumulated by the trustees in England. In August, 1927, the testator having died in 1926, probate and a copy of the will were forwarded to the then inspector of taxes at Wallasey. In April, 1929, the trustees made an income tax return. They referred to the interest received by them on their holding of registered war stock but added a note that the income was not taxable and formed part of the residuary estate, and that the income was held in trust for Mr. Appleton, a domiciled American, until he attained the age of twenty-one years. That was followed by a statutory declaration by one of the trustees that Mr. Appleton was the beneficial owner of the war stock and was entitled to the interest thereon. Now, all that was mistaken and is admitted to have been mistaken, but there was not the slightest deception; the whole thing was discussed fully between the trustees and the inspector of taxes. The question arose as to the making of an additional assessment for the year 1928–29, and, as the result of discussion, the inspector of taxes intimated that the proposed assessment would not be made. The trustees continued to make returns for the subsequent years, for 1930–31 and 1931–32, and on those returns it was stated that the income was not taxable and was being held in trust for Mr. Appleton until he attained twenty-one years of age. Subsequently, a new inspector of taxes came into the district and, as it is admitted, he rightly came to the conclusion, that the trustees were liable to assessment to income tax in respect of the interest, because the interest of Mr. Appleton in this fund was contingent only. I do not attach importance from the point of view of the actual decision of the case to the circumstance that the inspector of taxes was different. It would have been, in my opinion, the same thing if the old inspector of taxes had on a resurvey of the facts in the light of fuller knowledge changed his opinion. In these circumstances, additional assessments were raised for the years 1928–29, 1929–30, 1930–31 and 1931–32; the appeal was made against those assessments, and the appeal came before two very experienced Special Commissioners, Mr. Sanders and Mr. Jacob, and they gave their finding in this way:

> "It is not disputed that in this case the facts were completely made known at the time to the Inland Revenue by the appellant trustees and were fully examined by both sides. The then inspector of taxes formed an opinion on those facts and acted upon his opinion. A new inspector of taxes has since re-examined the same facts and formed a different opinion. These being the circumstances of this case, we hold that there has been no discovery within the meaning of s. 125 of the Income Tax Act, 1918."

The matter, to my mind, turns on the correct interpretation of s. 125 of the Act. Section 100 requires the delivery of the statement; s. 119 gives the surveyor power to examine the assessments and the statements; s. 121 lays down that the Sched. D assessments are to be laid before the additional commissioners and gives power to the surveyor to make an objection if he likes; then there is s. 122, which requires the additional commissioners to enter their assessments in books, and requires that the General Commissioners shall allow and confirm the assessments. So far as to the first assessments. Now we come to the additional assessment, and the provision with regard to that upon which the whole case turns is in s. 125 (c), which provides:

> "If the surveyor discovers that any properties or profits chargeable to tax have been omitted from the first assessment; or that a person chargeable has not delivered any statement or has not delivered a full and proper statement, or has not been assessed to tax, or has been undercharged in the first assessments; or that a person chargeable has been allowed, or has obtained from and in the first assessments, any allowance, deduction, exemption, abatement, or relief not authorised by this Act, then and in every such case, where the tax is chargeable under Sched. D, the additional commissioners shall make an assessment, on the person chargeable, in an additional first assessment, in such a sum as, according to their judgment, ought to be charged."

It will be observed that the subsection contemplates that the surveyor shall discover and on his discovery, not he, but the additional commissioners have to make an assessment. This section has been the subject of judicial consideration in several cases. I may refer to *R.* v. *Kensington Income Tax Comrs.* (1), [1913] 3 K.B. 870. It is proper to mention that this decision was subsequently reversed, but reversed on quite other points, and nothing in the reversal affects the particular point with which I am dealing. The matter is discussed by all three judges in their judgments. I think it is only necessary to read a passage from the judgment of Bray, J. He says ([1913] 3 K.B. at p. 889):

> "The question which we have to consider is what is the meaning of the word 'discovers.' That word obviously has more than one meaning, and the question which we have to consider is what meaning it has in this section. Does it mean, as is contended by the applicant, 'ascertain by legal evidence?'. . . The stage preceding an appeal is not that at which legal evidence is required, and it seems to me to be clear that the word 'discovers' cannot mean ascertains by legal evidence. In my opinion, it means, comes to the conclusion from the examination he makes and from any information he may choose to receive."

If one applies that, there seems to be little doubt that if 'discover' means coming to the conclusion from his examination, that applies here. In *Haythornthwaite* v. *Kelly* (3), Lord Hanworth, M.R., lays down the law in precise accordance with the views which have been expressed by Bray, J. He says (11 Tax Cas. at p. 664):

> "It is to be observed that that period of six years may, and I daresay in some cases does, put a very serious burden indeed upon the subject, because it means this, that although the subject may have cleared up his income tax—I use rather a neutral word—five years before, yet he is still liable to have a further assessment made upon him for a period which does not expire until six years after the expiration of the year of assessment."

The view indicated by the Master of the Rolls in that judgment seems to me to be in accordance with the views indicated by the Divisional Court, in the case to which I have already referred.

So far, the matter would have appeared to be reasonably clear. Here is a question whether an interest is vested or is contingent. If vested, one view prevails; if contingent, another; and quite obviously the thing is one on which persons of intelligence applying their minds to the facts might arrive at an erroneous conclusion; and both parties here quite honestly did, as is admitted, arrive at an erroneous conclusion, with the result, of course, that there was an escape of tax. Now, the argument very clearly put by counsel for the taxpayers in answer to the argument of the Attorney-General was this. He said: "Discovery means the finding out of some fact, being a fact which did exist at the time, but was not known to them," and he cited a passage from the judgment of Rowlatt, J., (and how anxiously one considers everything that Rowlatt, J., says I need not say) in *Anderton* v. *Birrell* (2). The facts differ widely from those in the present case. There had been an allowance in respect of bad debts, and the inspector argued in the light of something which he had discovered years after as to the treatment of their debts by the company, that he had discovered that the allowance was erroneous. It was held by the learned judge that that would not do, and there is one sentence in his judgment which has given me anxiety. He says ([1932] 1 K.B. at p. 281):

> "But the mere fact of such discussion of the means of ascertainment indicates an assumption that there was something to be ascertained somehow. How greatly it would have simplified the problem if it could have been said that the inspector makes a 'discovery' if he merely changes his opinion, without any new information at all."

He goes on with a sentence which rather tends, I think, to favour the view which I take, if it has any bearing, in this way:

> "Moreover, it is to be remembered that income tax is an annual tax for the service of the year, and when one finds a provision for an additional assessment within a period of six years, one is led to expect machinery, not for a mere revision, but for the bringing in of something which had been overlooked."

With regard to the latter words, I should say that this was the bringing in of something which had been overlooked. It had been overlooked that the interest of this young gentleman was not vested, but was contingent. But, undoubtedly, the earlier words I frankly agree, lend weight to the argument which was so well urged on me by counsel for the taxpayers. I have, however, come to the conclusion on a survey of the authorities as a whole, that it must not be supposed that Rowlatt, J., there was speaking otherwise than with reference to the facts of the particular case which was before him. One would think that there could be no doubt as to the result of that case, but I do not find it possible to read the words used by Rowlatt, J., as meaning that an inspector can never make a discovery if the meaning of that discovery involves merely a change of opinion. I cannot think that that was what was meant, and it does not seem to me that that view is consistent with the authorities to which I have already referred.

Quite naturally, my attention was called to the inconvenience which might arise in cases of this sort. I do not think I can give effect to that argument because nothing is better settled than the principle that there is no estoppel as against the Crown. I do not think that that inconvenience, though I do not doubt that in some cases very real inconvenience might be caused by an additional assessment made five years after the event, is a matter which I am entitled to take into account. I have considered, as carefully as I can, the authorities, but, if one looks at the section itself, it is difficult to say that on the facts of this case the surveyor had not discovered, found out, that there were properties or profits chargeable to tax which had been omitted from the first assessments. He did find out that fact. The properties or profits had been omitted from the first assessments, and he found that out. They had been omitted from the first assessment, so to speak, with his sanction, because he, like those making the return, supposed that they were not properties or profits chargeable to tax. He discovers, he finds out that they are, and I have difficulty in seeing why this section does not then precisely apply.

On these grounds, I think this appeal succeeds.

Solicitors: *Solicitor of Inland Revenue*; *Ratcliffe, Smith, Abercromby & Co.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

THE LADY BELLE

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J., assisted by Trinity Masters), July 27, 1933]

[Reported [1933] P. 275; 102 L.J.P. 134; 150 L.T. 117;
49 T.L.R. 595; 18 Asp.M.L.C. 451]

Shipping—Collision—"Crossing" rule—Failure of "give-way" vessel to keep out of way—Failure of "stand-on" vessel to take any action—Apportionment of blame—Evidence—Statements in preliminary act—Value—Regulations for Preventing Collisions at Sea, art. 21.

Two steam vessels, the *M.* and the *L.B.*, were on crossing courses so as to involve risk of collision. The *M.* had the *L.B.* on her starboard side, and it was, therefore, her duty under the Sea Rules to keep out of the way of the *L.B.* Owing to bad look-out the *M.* failed to take any action to keep out of the way of the *L.B.* The *L.B.* kept her course and speed in accordance with art. 21, but she failed to take any action under the note to art. 21, which provides that when the stand-on vessel "finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision." At the trial of their claim for damages in respect of the collision from the owners of the *L.B.* the plaintiffs, the owners of the *M.*, admitted that the *M.* was partly to blame and called no evidence. They relied on the statement in the preliminary act filed on behalf of the owners of the *L.B.*, that the only measures taken by the *L.B.* to avoid the collision were to keep her course and speed, as evidence of negligence on the part of the *L.B.* The plaintiffs further contended that the *L.B.* should have attempted to attract the attention of those on the *M.* by sounding a warning blast or toots.

Held: (i) such statements in the preliminary act had the highest evidential value and could rightly be used as admissions against the parties making them; (ii) the *L.B.* was partly to blame for failing to take any action under the note to art. 21, but she was not to blame for not attempting to attract the attention of those on board the *M.* by sounding any warning blast or toots, it not being the practice of seamen to do so, and such warning blast or toots not being recognised by the regulations; (iii) blame should be apportioned as to three-fourths to the *M.* and one-fourth to the *L.B.*

Notes. The "Collision Regulations" now in force are the International Regulations for Preventing Collisions at Sea, 1948, which are scheduled to S.I. 1953 No. 1557. Rule 21 of the 1948 Regulations corresponds to Art. 21 of the Regulations on which this case was decided.

A As to the contents of the preliminary act, see 1 HALSBURY'S LAWS (3rd Edn.) 86, and as to when the stand-on vessel must act, see 30 HALSBURY'S LAWS (2nd Edn.) 762, and for cases on the subject see 41 DIGEST 742, *5935–5940*.

Cases referred to:

(1) *The Seacombe*, [1912] P. 21; 81 L.J.P. 36; 106 L.T. 246; 28 T.L.R. 107; 56 Sol. Jo. 140; 12 Asp.M.L.C. 142, C.A.; 41 Digest 685, *5144*. B

(2) *The Ranza* (1898), 79 L.J.P. 21, n.; Digest Supp.

Damage Action.

The plaintiffs, owners of the steamship *Mona*, claimed damages from the defendants, owners of the steamship *Lady Belle*, in respect of a collision which took place in the entrance to the Bristol Channel some ten to twelve miles to the southward and westward of the Smalls Light on the early morning of April 22, 1933. C

The facts and contentions of counsel appear from the judgment.

Willmer for the plaintiffs.
Hayward for the defendants.

LANGTON, J.—This is an unusual case, and it has come before the court in unusual circumstances. D The plaintiffs' ship, the *Mona*, was the giving-way ship in a crossing case. The defendants' vessel, the *Lady Belle*, was the stand-on ship. The *Mona* was a vessel of no great size—654 tons and 186ft. in length—and the *Lady Belle* was smaller still—a vessel of 331 tons gross and 140ft. in length. The plaintiffs pleaded a somewhat elaborate story as their description of how this collision came to pass; the defendants pleaded an engagingly simple story. When the plaintiffs came to examine their position before the hearing they came to the E conclusion that their case, as pleaded, could not be supported, and they, therefore, took the course of coming into court without any evidence at all, relying on certain admissions in the preliminary act of the defendants and the logs of the defendants' vessel. That is not the way in which I like to try collision cases, and an argument arose as to whether the plaintiffs had in fact made out a primâ facie case. Counsel for the defendants contended that the statements in the preliminary act were not F in themselves evidence. As to that, I have no doubt that they are. As FLETCHER MOULTON, L.J., pointed out in *The Seacombe* (1), such statements have the highest evidential value, are admissions, and can rightly be used by the other side as admissions against the parties making them. The point was not perhaps of great importance, because the same admissions are in the logs, and no one disputes for a moment that the logs are evidence. G

Having said that I do not like trying collision cases in this way, it is only fair to the plaintiffs to say that I do not think, in this particular case, that their method of dealing with the matter has really either embarrassed the court or made any difference to the parties, because the defendants, when they came to put forward their case, put into the witness-box a witness who gave most transparently truthful evidence, and left the question as to what were the real facts of the case beyond H any possible doubt. But it is seldom that a single witness only can leave the court in no doubt, and it is for that reason that I say that if it is desired that the court should do justice between parties in this class of case it is highly desirable that at least one witness should be produced by each side to give the court a real opportunity of examining and understanding the respective cases.

I will now deal with the facts. The *Mona* was the giving-way vessel, with the I *Lady Belle* on her starboard hand. It is not necessary to state the matter with more precision than that. I got further precision from the plaintiffs themselves, because, calling no witnesses, their admission was that the *Lady Belle* was at all material times substantially on their starboard hand. The *Lady Belle's* second officer, Mr. Flynn, was called before me, and gave the clearest evidence that the *Mona* was approaching her for a distance of something like four miles on a perfectly steady course on the port hand of the *Lady Belle*. In circumstances of that sort it is unique in my experience to hear from a perfectly credible witness, and the only witness called before me on either side, that neither vessel took any steps whatever to keep out of the way. That is the plain, unvarnished truth that emerged from Mr. Flynn. Mr. Flynn said, not once but over and over again, that he neither took steps nor considered taking steps. It did not occur to him, he said, even to give blasts on the whistle to wake up the *Mona*. "I was depending on her," said Mr. Flynn, "to go under my stern," and he summed up the matter in two sentences: "I think there is no use in having a rule of the road if a man does not abide by it. I thought I had done the best thing I could, to keep my course and speed." Thus the matter is beyond all possible dispute, and the only question for the court is: "What is the responsibility of the *Lady Belle* in these circumstances; and if, as I think, there is some responsibility upon her, what is the degree of her culpability as compared with the culpability of the *Mona*?"

In fighting the case in this defensive fashion it occasionally happens that the fault of the person so defending becomes a little obscure. So much time is spent in examining the exact degree of the fault of the vessel which is claimed to be without fault that the one which has admitted faults is, perhaps, a little apt to get off lightly. On July 17, a letter was written by the plaintiffs' solicitors to the defendants' solicitors in these terms:

> "Please take note that we formally admit that the *Mona* is partly in fault for the collision, and that in order to dispose of the case without incurring further expense, our clients would be prepared to settle on the terms of the *Mona* being two-thirds in fault and the *Lady Belle* one-third."

They go on to say they do not intend to call any evidence at the trial. I am not for one moment questioning the propriety of that course. It has the merit of frankness, and has relieved the witnesses from the *Mona* from coming into court to tell a story which could hardly be accurate, and therefore I have no word of criticism of the course which has been adopted in this particular case.

I have now to turn to the question of the degree of blame. The offending of the *Mona* must not be in any way overlooked. It is glaring, and it is high. Counsel for the plaintiffs stated it as being in effect a bad look-out. He argued that the court must not allow itself to be led away by the eloquence of the other side in enumerating or tabulating the number of regulations which have in fact been broken; they could be condensed, he said, into a simple phrase of bad look-out. I do not think that it makes any difference whether one looks at it in the compendious phrase of bad look-out or in the expanded view of the various articles of the Collision Regulations which were undoubtedly broken in consequence of the bad look-out. The culpability is the same however it may be viewed. But it is a striking and useful illustration of the consequences of this particularly bad look-out that it should have resulted in a vessel which has the imperative duty of giving way doing nothing in discharge of that duty and breaking at least two further regulations as well. The *Mona* crossed ahead when she had a duty not to cross ahead; she did not put her engines astern or reduce her way when she had a duty to do that; so it is, I think, useful to expand that compendious phrase of bad look-out by examining what exactly are in this case the results of that bad look-out. For the *Mona* no shadow of excuse is offered. She saw nothing; she did nothing—that is what I am to infer from the fact that she had no witnesses here—and she came into collision with a vessel as to whom she had the clear duty to give way and keep out of the way.

As regards the *Lady Belle* the position is very different. She is a very small ship, and the *Mona* very little larger. The evidence from the *Lady Belle* is clear, and has placed beyond question the fact that she also did exactly nothing towards avoiding this collision other than the observation of her first duty, which was to keep her course and speed and keeping—and I have borne this in mind—a good look-out in contradistinction to the bad look-out which was being kept on the *Mona*.

The whole matter really lies in the small compass of art. 21 and the note to art. 21. The duty on the *Lady Belle* of keeping her course and speed has been laid down in that article, and no court has ever departed in any way from the standard that is set by these very simple words. In fact, everything that I have ever read as falling from the Bench in this matter has only emphasised the importance of this duty. But the note puts on her a second duty, and that is that when she finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision.

It is not surprising that that note has given rise to a vast amount of argument in a large number of cases. It is obvious that it is difficult to say with any precision what is the moment at which the stand-on vessel, having this imperative duty of keeping her course and speed, is to depart from her course and speed and take the best action to avert collision. It has been said, with great justice and propriety, that she is to be judged very leniently in this matter in fixing the moment at which, having one duty, she should depart from it to another. Obviously it would be most unfair to judge her too harshly by saying that she failed by a fraction of a second to judge correctly the point at which she should make this departure. It is much easier after the event to say with accuracy what is the right time, and one has to bear in mind that, for a variety of reasons, to a person on the bridge the point may seem very different, and certainly much more difficult. But, so far as I am aware, there is no case in which, without any extraneous circumstances to mitigate the fact, a stand-on vessel, which in clear weather has done nothing at all to avoid a collision which she saw becoming more and more imminent, has been wholly excused. Indeed, to excuse her in those circumstances is to my mind to make nugatory the provisions of the note to art. 21. LORD GORELL, in *The Ranza* (2), in saying, as I have been saying to-day, that the second duty is not to be severely pressed, winds up his helpful and clear exposition in the matter in these words:

> "Therefore it resolves itself into this: that he must wait until the other ship cannot avoid the collision, and then he must act."

That, I think, is the plain meaning of the note. He must do something. The duty of the stand-on ship is not to keep standing on until she is actually in collision and say, "I obeyed art. 21." That is obeying art. 21 and disobeying the note. Mr. Flynn has come here, and with exemplary candour has not attempted to suggest that he did, or that he even considered doing, anything else. He has read art. 21 as if there were no note to it at all: as if there never was a duty on a stand-on vessel in any circumstances to take any kind of action except that laid down by the first part of the rule. That puts it beyond dispute that the *Lady Belle* must bear some portion of the blame for the collision.

Counsel for the plaintiffs urged on me that one part of the offending of the *Lady Belle* was that she did not blow any form of warning signal—either a long blast or short toots as we have often heard of in this court as being blown to draw the attention of a vessel that is apparently neglecting her duty. I wish to say nothing at all against the propriety of so doing in a number of circumstances—and even in this case I think it would have been a wise thing for the *Lady Belle* to have blown a whistle signal at one period or another to try to awaken those on board the *Mona* to a proper sense of their duty. But at counsel's invitation I have put the matter to the Elder Brethren, and I have asked them whether they feel that this is a case in which they would condemn the *Lady Belle* for not blowing a signal either of a prolonged blast or a series of short blasts, and whether they would put it as high as counsel for the plaintiffs wishes to put it, that it is unseamanlike not to do it. Counsel put it on the ground that it is the ordinary practice of seamen to do this. I have put all these matters to the Elder Brethren, and they do not agree with counsel for the plaintiffs. They do not agree that it is the ordinary practice of seamen to blow either long blasts or short blasts, or toots, or any other form of blast to waken apparently sleeping souls upon the other vessel. In certain circumstances it may be a wise thing to do, and they agree with me that in the

A circumstances of this particular case, it certainly would not have been an unwise thing to do, but they tell me that there are many seamen who hold strongly to the view that the blowing of a long blast in unauthorised circumstances is a most unwise thing to do. It cannot, therefore, be said that it is the ordinary practice of seamen to do anything such as that for which counsel for the plaintiffs contended. Therefore, I want it to be quite clear that I am not condemning the *Lady Belle* for B any form of negligence in not blowing a signal which is not prescribed in any of the regulations. What I am condemning her for is that she stood on into apparent, imminent visible danger and did nothing at all to help to avoid it. Counsel for the defendants satisfied me that the time at which the circumstances detailed in the note to art. 21 had arisen must have been very late, and counsel for the plaintiffs, with his usual candour, did not attempt to dispute that clear fact. I think it C would have come too late. These were small vessels, and quite a small action on the part of the giving-way vessel at a comparatively late stage—comparatively when we think of ships of a larger size—would have avoided this collision. Equally, quite a small action—and particularly the action of taking off her way—on the part of the stand-on vessel, though coming at a late stage, would have had that effect. One cannot be blind to the fact that those on the *Lady Belle* had their eyes open D to what was going on, whereas those on board the *Mona* had certainly not got their attention fixed upon what was happening; but the *Lady Belle*, with every opportunity of taking some action and every knowledge that some action was urgently required, did nothing at all.

Counsel for the defendants argued that a vessel of this size cannot be blamed for not taking engine action in an emergency, because she has not got an engineer E standing by to take that action. There must, however, be on every vessel some proper method of calling the engineer's attention, and, as counsel for the plaintiffs pointed out, they had ample leisure in which to call the engineer's attention to the fact that some kind of action might soon be called for. In these circumstances the *Lady Belle* is clearly to blame. She is not to blame to anything like the degree the *Mona* is in fault, but she is definitely to blame and must pay her proportion of F the damage, and the proportions at which I have arrived is the *Mona* three-fourths and the *Lady Belle* one-fourth. The defendants will have costs down to July 17, when the offer of the *Mona* was made; no costs after that date.

Solicitors: *Thomas Cooper & Co.*; *W. & W. Stocken.*

[*Reported by* GEOFFREY HUTCHINSON, ESQ., *Barrister-at-Law.*]

THE NAPIER STAR

[Probate, Divorce and Admiralty Division (Langton, J.), January 31, February 7, March 3, 1933]

[Reported [1933] P. 136; 102 L.J.P. 57; 149 L.T. 359;
49 T.L.R. 342; 18 Asp.M.L.C. 400]

Shipping—Collision—Damages—Interest—Interest on estimated sums for repairs not actually carried out and on demurrage.

Practice—Slip rule—Admiralty registrar's report—Items stated to be due with interest—Interest not due on all the items—Application of rule—R.S.C., Ord. XXVIII, r. 11.

In assessing damages in a collision claim, items in respect of prospective repairs and similar estimated items of expenditure which have not actually been incurred at the date of the reference, and estimated demurrage during such period of repairs, are not included in the sum on which interest by way of damages is allowed.

The Kong Magnus (1), [1891] P. 223, *The Northumbria* (2) (1869), 21 L.T. 681, and *The Joannis Vatis* (*No. 2*) (3), [1922] P. 213, distinguished.

Per Langton, J.: I am inclined to think I could have acted (i.e., amended the registrar's report by adding after the reference to interest from the appropriate date "save items 27 to 31 inclusive," which were the items in respect of prospective repairs, etc.) under the slip rule (R.S.C., Ord. 28, r. 11), although I have preferred to deal with the matter as a question of principle raised on a motion in objection to the report.

Notes. As to the registrar's report on Admiralty references, see now R.S.C., Ord. 56, r. 8, r. 9.

As to cost of repairs and interest as part of the damages for collision, see 30 Halsbury's Laws (2nd Edn.) 859 and 863, and for cases on the subject see 41 Digest 806–807, *6666–6678* and 812–813, *6737–6745*. As to the slip rule, see 22 Halsbury's Laws (3rd Edn.) 786, and as to the registrar's report as to payment of interest, see 1 Halsbury's Laws (3rd Edn.) 110.

Cases referred to:

(1) *The Kong Magnus*, [1891] P. 223; 65 L.T. 231; 7 Asp.M.L.C. 64; 41 Digest 812, *6740*.

(2) *The Northumbria* (1869), L.R. 3 A. & E. 6; 39 L.J.Adm. 3; 21 L.T. 681; 18 W.R. 188; 3 Mar.L.C. 314; subsequent proceedings, L.R. 3 A. & E. 24; 41 Digest 915, *8059*.

(3) *The Joannis Vatis* (*No. 2*), [1922] P. 213; 91 L.J.P. 196; 127 L.T. 494; 38 T.L.R. 566; 16 Asp.M.L.C. 13; 41 Digest 813, *6742*.

(4) *The Dundee* (1827), 2 Hag. Adm. 137; 41 Digest 801, *6613*.

(5) *The Gazelle* (1844), 2 Wm. Rob. 279; 41 Digest 707, *5423*.

(6) *The Hebe* (1847), 2 Wm. Rob. 530; 5 Notes of Cases 176; 5 L.T. 121; 166 E.R. 855; 41 Digest 804, *6643*.

(7) *The Rosalind* (1920), 90 L.J.P. 126; 37 T.L.R. 116; 41 Digest 813, *6743*.

(8) *London, Chatham & Dover Rail. Co.* v. *South Eastern Rail. Co.*, [1893] A.C. 429, H.L.; 69 L.T. 637; 20 Digest 249, *133*.

(9) *The Crispin* (1929), 34 Ll.L.Rep. 400; 35 Ll.L.Rep. 107.

(10) *Re Swire, Mellor* v. *Swire* (1885), 30 Ch.D. 239; 53 L.T. 205.

(11) *Shipwright* v. *Clements* (1890), 63 L.T. 160.

(12) *E.* v. *E.* (*otherwise T.*), [1903] P. 88; 88 L.T. 570; 27 Digest (Repl.) 277, *2217*.

Motion in objection to the report of the registrar on a reference to assess damages in a collision action.

The defendants, owners of the steamship *Napier Star*, moved to vary or amend the report of the Admiralty Registrar (Mr. E. S. Roscoe) in a reference to assess damages in an action arising out of a collision between the *Napier Star* and the plaintiff's steamship *Leeds City*, which took place in Buenos Aires Roads in February, 1931. The defendants admitted liability for the collision, and the damages were referred for assessment to the registrar.

In his report the registrar allowed the cost of temporary repairs, and also the estimated cost of permanent repairs, demurrage and various items for coal and stores during the period of permanent repairs, survey fees, pilotage, &c. These estimated items, which were numbered 27 to 31 in the plaintiffs' claim, amounted to £1,400.

At the conclusion of the report the registrar reported that he found that

> "there is due to the plaintiffs in respect of their claim the sum and interest as stated in the schedule hereto annexed together with the cost of proving their claim."

The sum as interest stated in the schedule to be due to the plaintiffs was £3,493 14s. 9d. "with interest at 5 per cent. from Feb. 22, 1931, until paid."

February 22, 1931, was the date on which the plaintiffs had paid the bill for temporary repairs.

The defendants moved to amend the report under R.S.C., Ord. XXVIII, r. 11, by adding the words "save items 27 to 31 inclusive" after the words "until paid," but leave was given to extend the time for objection to the registrar's report so as to raise directly the question of the defendant's liability to pay interest.

Brightman for the defendants.

Noad, K.C., for the plaintiffs.

[Reference was made to the following cases: *The Dundee* (4), *The Gazelle* (5), *The Hebe* (6), *The Rosalind* (7), *London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.* (8), *The Crispin* (9), and *Re Swire* (10).]

Cur. adv. vult.

March 3. **LANGTON, J.**, read the following judgment.—This motion concerns five items in a report of the late Mr. Registrar Roscoe, dated July 29, 1932. The question at issue is whether or no interest is payable under the report on the items numbered therein as 27, 28, 29, 30 and 31. It was originally brought before me on a motion by the defendants to add certain words to the report on the ground that these words had been omitted from the report of the learned registrar through a clerical mistake or accidental slip. As a result of the first hearing, however, counsel for the defendants elected to avail himself of leave from me to reconstitute his motion upon a broader ground.

As it now stands, the motion raises the point whether interest is payable or ought to be ordered to be paid on items of estimated repairs and estimated demurrage, in circumstances where ex concessis no expenditure of any kind has been incurred at the date of the report.

Two main questions were argued and one subsidiary point. The main questions were: First, what does the report as it stands mean—a question of construction; secondly, how ought the registrar to deal with interest in these circumstances—a question upon the merits? The subsidiary point—a question of practice only—was whether this particular matter could and ought to be dealt with as the defendants had sought to deal with it under Order XXVIII, r. 11.

First, on the question of construction. The report is couched in these terms:

> "I find that there is due to the plaintiffs in respect of their claim, the sum and interest as stated in the schedule hereto annexed, together with the costs of proving their claim."

The schedule is then set out, and at the end of the schedule there are these words: "With interest at 5 per cent. from Feb. 22, 1931, until paid."

It is not in dispute that the date of Feb. 22, 1931, was the date on which the plaintiffs paid the bill for temporary repairs effected immediately after the collision.

The collision occurred on Feb. 3, 1931. The claim in the schedule was put forward on a familiar and well-recognised basis wherein all items of expenditure actually incurred were first set out, and estimated items were then added in respect of expenses which would have to be incurred for final repairs and the loss by detention which would be occasioned thereby. There is not, I think, much to be gained from a consideration of the form of words used by the registrar. The actual expressions which I have quoted as immediately preceding and succeeding the schedule are both matters of common form in reports of this character. As counsel for the plaintiffs pointed out, the final words do not in terms exclude any of the items set out in the schedule. But does it follow that one must therefore apply the expression to every one of them? To my mind there is significance in the date selected as the date from which interest is to begin to run. Everyone who is familiar with this class of legal work knows that it is customary to take the date of the payment of the repair bill as the date to commence the computation of interest, for the very simple and obvious reason that this is the date from which the plaintiff has been out of pocket in respect of the main portion of his expenses. Similarly, where the only expenses which have been actually incurred are of the nature of a temporary repair, the date of the payment of the principal temporary repair bill is selected as the interest date for the same reason.

Now, still confining the matter to one of pure construction, what possible significance has the date, Feb. 22, 1931, in connection with estimates of repair and detention which are delayed to an indefinite future? From this aspect alone, I think the registrar's report is, at least, ambiguous. The defendants seek to clarify it by adding the words "save items 27 to 31 inclusive"; but although, for reasons which I will give, I am wholly in sympathy with this emendation, I am doubtful whether they could succeed, as a mere matter of construction, in demanding that the report could be read in the sense it would clearly have after such an emendation had been made.

I accordingly welcomed the broadening of the basis of the motion which counsel for the defendants elected to make, to enable what is, after all, a point of frequent occurrence to be considered on its merits.

Owing to the deeply lamented death of Mr. Registrar Roscoe it was not possible to make any inquiry of him as to the practice in this class of case; but Mr. Registrar Darby has come to my assistance, and informs me that a fairly exhaustive study of the registrar's reports over a period of about thirty years shows that in no instance has interest been actually and specifically allowed in the case of repairs to be effected or detention to be incurred in futuro, and in some cases interest on such items has been definitely excluded. The weight of practice, therefore, seems to be definitely against the plaintiffs.

By way of authority counsel for the plaintiffs cited *The Kong Magnus* (1), *The Joannis Vatis (No. 2)* (3), and *The Northumbria* (2). These cases, he contended, showed that so far as Admiralty law was concerned, in contradistinction to the common law, liability attaches in respect of the full amount of the loss from the moment of the collision. It is for this reason that interest is given in Admiralty cases as part of the damages in order to effect a true restitutio in integrum. As to the cases cited in support of this wide proposition it is noteworthy that two are concerned with limitation of liability for ships totally lost, and the third—*The Joannis Vatis (No. 2)* (3) had reference also to a limitation fund which represented a value according to French law. In *The Kong Magnus* (1) the President, Sir Charles Butt, contrasts the common law rule with that prevailing in Admiralty. If he is right in the explanation which he puts forward, somewhat conjecturally, as the basis of the Admiralty rule, it seems to me that there would be something to be said for a contention that the now well-established practice of taking the date of payment of the principal repair bill as the date from which to commence the computation of interest is wrong, and that the proper date to take would be the actual date of the collision. I am at a loss to see, however, how this dictum of Sir Charles Butt can assist the plaintiffs in the present case. They make no complaint of the date chosen by the registrar, namely, Feb. 22, but contend that items as to which admittedly the plaintiffs have not suffered any loss of use of money, since no money has yet been or perhaps ever will be expended, should be held to carry interest from the same date and in the same way as items in respect of which they have equally clearly and admittedly been deprived of the use of their funds. In the report of *The Kong Magnus* (1) there is to be found in a note a concise and admirably clear passage from the reasons of the late Mr. Registrar Roscoe in the case. The case was one of total loss, and the report concludes with these words:

> "The plaintiffs had for a number of years been deprived of the capital sum, and equally also of the profit derivable from it; I therefore saw no reason to depart from the constant and long practice of the court in this case. The merchants agreed in my view of the matter."

I read this as meaning that the registrar and merchants, who are pre-eminently a business tribunal, had on this occasion, as on all other occasions, asked themselves the simple questions whether, and for how long, the wronged party had actually been deprived of money on which profit or interest might have been earned, and awarded, in the very words of this report,

> "as part of the damages to represent the amount of profit arising from the use of the capital sum,"

an amount stated by way of interest.

It is obvious that in any reckoning of this kind, where the ship has been totally lost, the date from which interest must be taken to run is the date of the loss of the vessel. Hence the decision in *The Northumbria* (2) and in many other total loss cases. *The Joannis Vatis* (*No. 2*) (3) rests on quite special facts, but it assists neither side in the present controversy.

I am, however, quite unable to see how the fact that it has been the practice—and to my mind a quite comprehensible and correct practice—to allow interest from the date of the loss in total loss cases can be any warrant for saying that in a case of partial loss, such as in the present case, the tribunal ought to award interest on money which has not been expended from the date at which certain money by way of temporary repairs has been expended.

To sum up, therefore, neither upon legal precedent nor upon practice, nor, so far as I can see, on any known legal or business principles, should any allowance for interest be made on items in respect of which no money has been expended.

There remains only the subsidiary point, as to whether this matter could have been dealt with, as counsel for the defendants originally contended, under Order XXVIII, r. 11. In view of the fact that I have, on his invitation, dealt with the subject as a question of principle, this point as to the meaning and scope of the rule becomes almost academic, or at the most a question which may have some bearing upon the costs. I am bound to admit that the two cases cited by counsel for the defendants have rather shaken my original view that the so-called "slip" order was not intended to cover a dispute of this class. In *Shipwright* v. *Clements* (11) the defendant in an action in which an injunction had been pronounced against him, on service of notice of motion to commit him for breach of the injunction, served a cross-notice of motion under the "slip" order to amend the decree by the insertion of certain words which he alleged were accidentally omitted from the decree of injunction. North, J., held that he had a power to act in such a case under this order, and amended the decree as prayed by the defendant. In the second case—*E.* v. *E.* (*otherwise T.*) (12)—Lord St. Helier, in spite of strong representations that the application was much too late, held that he had power to rectify, and in fact rectified, an order in which, as he said, a mistake had been made partly by the registrar and partly by himself in omitting to state a date at which certain payments were to begin. In this case he did not purport to act under the order in question, and indeed no reference to Order XXVIII, r. 11, appears anywhere in the report of the case, but the case is cited in the practice books as an example of the scope of this order, and it is difficult to believe that no reference was ever in fact made to this order. On the whole, therefore, I am inclined to think that I could have acted under this order, although I have preferred to deal with the matter as a question of principle raised by special leave after the expiry of the time allowed for objection to the registrar's report. Therefore, it follows that the motion succeeds, and that the words prayed for by the motion will be inserted in the report. I propose to give the defendants the costs of the motion except the costs of the first hearing.

Report varied.
Leave to appeal granted.

Solicitors: *Wm. A. Crump & Son*; *Thomas Cooper & Co.*

[*Reported by* GEOFFREY HUTCHINSON, ESQ., *Barrister-at-Law.*]

INTRACT *v.* INTRACT (OTHERWISE JACOBS)

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), May 1, 10, 1933]

[Reported [1933] P. 190; 102 L.J.P. 65; 149 L.T. 334; 49 T.L.R. 456; 77 Sol. Jo. 404]

Nullity—Incapacity—Medical inspection—Woman respondent of unsound mind—Power of court to dispense with order for inspection—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *ss.* 32, 103 (1).

In suits for nullity of marriage on the ground of incapacity the court has power to dispense with the usual medical inspection of a party by an examiner appointed by the court, but the court will not exercise this power lightly.

The wife respondent to a suit for nullity on the ground of her incapacity, which was alleged to be due to invincible repugnance, cross-prayed for a decree of nullity on the ground of the husband petitioner's incapacity. The respondent's mental state was such that she was not able to undergo the usual medical inspection with safety, and there was no hope of her being able to do so within a reasonable time. In October, 1930, the respondent's own medical adviser had made a complete examination of her of the same character as is normally made by the examiner appointed by the court, and both parties were willing that the results of this examination should be used in evidence.

Held: the court could, and should, dispense with medical inspection of the respondent.

Notes. As to the power of the court to dispense with medical inspection, see 12 HALSBURY'S LAWS (3rd Edn.) 364, para. 785, text and note (e), and for cases on the subject see 27 DIGEST (Repl.) 513, *4552.*

For the Judicature (Consolidation) Act, 1925, s. 32, see 5 HALSBURY'S STATUTES (2nd Edn.) 361, and for s. 103 (1), see 18 ibid. 516.

Cases referred to:

(1) *Pollard* v. *Wybourn* (1828), 1 Hag. Ecc. 725; 162 E.R. 732; 27 Digest (Repl.) 277, *2222.*

(2) *Briggs* v. *Morgan* (1820), 2 Hag. Con. 324; 3 Phillim. 325; 161 E.R. 758; 27 Digest (Repl.) 280, *2249.*

(3) *Sparrow* (*falsely called Harrison*) v. *Harrison* (1841), 3 Curt. 16; 163 E.R. 638; affirmed sub nom. *Harrison* v. *Harrison* (1842), 4 Moo.P.C.C. 96, P.C.; 27 Digest (Repl.) 278, *2224*.

(4) *Serrell* v. *Serrell and Bamford* (1862), 2 Sw. and Tr. 422; 31 L.J.P.M. & A. 55; 5 L.T. 691; 164 E.R. 1060; 27 Digest (Repl.) 513, *4555*.

(5) *Norton* v. *Seton* (*falsely called Norton*) (1819), 3 Phillim. 147; 161 E.R. 1283; 27 Digest (Repl.) 271, *2173*.

(6) *Castleden* v. *Castleden* (1861), 9 H.L.Cas. 186; 5 L.T. 164; 11 E.R. 701; sub nom. *Hall* v. *Castleden*, 8 Jur.N.S.I., sub nom. *H.* (*falsely called C.*) v. *C.*, 31 L.J.P.M. & A. 103, H.L.; 27 Digest (Repl.) 418, *3468*.

(7) *Aleson* v. *Aleson* (1728), 2 Lee 576; 161 E.R. 445; 27 Digest (Repl.) 278, *2229*.

(8) *Welde* (*alias Aston*) v. *Welde* (1731), 2 Lee, 580; 161 E.R. 447; 27 Digest (Repl.) 278, *2230*.

(9) *Harris* (*alias Ball*) v. *Ball* (1790), cited 3 Phillim. 155; 161 E.R. 1286; 27 Digest (Repl.) 271, *2172*.

(10) *Anon.* (1857), Dea. & Sw. 295; 5 W.R. 750; 164 E.R. 581; 27 Digest (Repl.) 441, *3715*.

(11) *C.* v. *C.* (1862), 32 L.J.P.M. & A. 12; 27 Digest (Repl.) 513, *4561*.

(12) *B.* v. *L.* (*falsely called B.*) (1869), L.R. 1 P. & D. 639; 38 L.J.P. & M. 35, 20 L.T. 280; 27 Digest (Repl.) 513, *4560*.

(13) *T.* v. *M.* (*falsely called T.*) (1865), L.R. 1 P. & D. 31; 35 L.J.P. & M. 10; 13 L.T. 644; 27 Digest (Repl.) 513, *4550*.

Summons, adjourned into open court, for an order for medical inspection of the parties on cross-petitions for nullity of marriage on the ground of incapacity the petitioner sought a declaration of nullity of marriage on the ground of the respondent's alleged incapacity, which was said to take the form of invincible repugnance. By her answer, the respondent, defending through her guardian ad litem, denied incapacity and alleged that the petitioner was incapable and herself prayed for a decree of nullity. On the usual summons being served for an order for the medical inspection of the parties, the respondent's medical advisers expressed the opinion that the respondent was not now in a fit mental condition to undergo inspection, and that there was no hope that she would be fit within a reasonable time. In October, 1930, the respondent's own medical adviser had made a complete examination of her of the type usually made by the court medical inspector, and both parties agreed to the use of his report in evidence. The summons was adjourned into court.

F. Howard Collier for the petitioner, the husband.—In nullity suits based on an allegation of incapacity the practice of the ecclesiastical courts requiring inspection of the person has always been followed. In *H.* (*falsely called C.*) v. *C.* (6) Dr. Deane, in reply to the court, admitted that there was no case in the ecclesiastical courts where such a suit had been maintained without a monition upon the party proceeded against to submit to personal medical inspection. Inspection was considered an essential part of the evidence, as explained, in arguendo, in *Harrison* v. *Harrison* (3), mainly to avoid the evils suggested in the 105th canon, which ran:

> "Forasmuch as matrimonial causes have been always reckoned and reputed among the weightiest, and therefore require the greater caution when they come to be handled and debated in judgment, especially in causes wherein matrimony, having been in the Church duly solemnised, is required, upon any suggestion or protest whatsoever, to be dissolved or annulled: we do strictly charge and enjoin, that in all proceedings to divorce and nullities of matrimony, good circumspection and advice be used, and that the truth may (as far as possible) be sifted by the depositions of witnesses, and other lawful proofs and evictions, and that credit be not given to the sole confession of the parties themselves, however taken on oath either within or without court."

In *Aleson* v. *Aleson* (7) an order for inspection was only refused on the ground of the absence of the then requirement of triennial cohabitation. In *Welde*, (*alias Aston*) v. *Welde* (8) it was decided that there must be either triennial cohabitation or inspection, a decision confirmed by the delegates in 1733. The authorities show that an order for inspection is an indispensable part of the procedure in this class of nullity case.

Noel Middleton for the respondent, the wife.—Inspection is not obligatory, and, indeed, in the present case it would be embarrassing, as the guardian ad litem might be liable to penalties in contempt and costs if an order were made and not complied with. In *Briggs* v. *Morgan* (2) Lord Stowell, it is true, expressed the view that inspection was the usual mode of proof, but inspection was dispensed with. In the unreported case of *Harris* v. *Ball* (9) in the Court of Arches, cited in *Briggs* v. *Morgan* (2), the delegates adopted the same view, but the judge had allowed the case to proceed on affidavit evidence, which seems to suggest that the court had a discretion whether or not to order personal inspection. In *Pollard* v. *Wybourn* (1) a decree of nullity was pronounced where the male respondent had not complied with an order for medical inspection, and in the report there was to be found a declaration by Sanchez, the well-known authority on Matrimonial law (De Matrimonio, Lib. VII, disp. 108, No. 6) as follows:

> "Quamvis utroque conjuge fatenta impedimentum, ac triennis lapso, sanum consilium sit facere conjuges inspici; at id non est necessarium."

Sanchez obviously laid it down that inspection might be dispensed with, and Dr. Lushington said that the law never imposed such difficulties (that is, that the case could not proceed without an answer or submission to inspection) on the court. His other statement, that the court always required a certificate of medical persons as to the condition of the party impugned, was too sweeping. The rule as to inspection was laid down in Oughton's Ordo Judiciorum, de Causis Matrimonialibus, Tit. 217, as follows:

> "Adprobandum defectus judex ad petitionem partis allegantis impedimenta (si talia sint quae ex corporis inspectione judicari possunt) compellere potest virum ad exhibendam presentiam suam et ad ostendendum (in loco aliquo secreto, per judicem assignando) pudenda sua, seu illos corporis defectus quos mulier objicit (si ex inspectione corporis apparere possint) medicis, et chirurgis peritis, prius judicialiter, in praesentia partis adversae, de diligentia inspiciendo virum, et de referendo in scriptis eorum judicium, juratis."

In *Norton* v. *Seton* (5) (3 Phillim. at p. 149) Sir W. Wynne also expressed an opinion that medical inspection was indispensable, but that was also too sweeping, and the word "always" exaggerated. As regards *Sparrow* (*falsely called Harrison*) v. *Harrison* (3) a monition was decreed for inspection of the man. He did not attend, was declared in contempt, and a writ de contumace capiendo issued for his attachment. There was no inspection, however, in his case, and a decree of nullity was made in favour of the woman petitioner notwithstanding. Later, when he appealed to the Privy Council from the decree of the Consistory Court of London, Lord Brougham's judgment on the question of adminicular proof indicated that medical inspection was not an essential; and the decree was confirmed (*Harrison* v. *Harrison* (3), 4 Moo.P.C. at p. 103). In *Anon* (10) Dr. Lushington said he would certainly make no order for inspection of the woman except ex debito justitiæ.

As to cases after the Matrimonial Causes Act, 1857, in *Serrell* v. *Serrell and Bamford* (4), Sir Cresswell Cresswell heard the case of nullity which was set up in the answer without an order for inspection, and despite the fact that an objection was taken to independent medical evidence being tendered at all. *C.* v. *C.* (11) showed that parties could choose medical inspectors themselves subject to the approval of the court. In *B.* v. *L.* (12) the woman refused to obey an order for inspection, and a motion for her attachment stood over until after the hearing of the petition. There was no medical inspection possible in *T.* v. *M., falsely called T.* (13), because the woman, who, it was said, was malformed, could not be found. A decree was suspended pending examination, but the learned judge ordinary, SIR JAMES WILDE, was merely saying that the petitioner had not satisfied him of the incapacity of the respondent. SIR J. WILDE's statement that medical inspection was "invariably" required was an exaggeration. I agree that the court will always require medical inspection if it is possible, but it is not obligatory. There is no absolute necessity for an order for medical inspection, and here it would inflict a hardship on the respondent. No order ought to be made in her case, and the case should be set down for hearing without.

Cur. adv. vult.

May 10. **LANGTON, J.,** read the following judgment.—This is a summons adjourned into court for argument on a point of practice and procedure. It is a point that is difficult and unusual rather than a point of great general importance. The petitioner in the case is the husband who seeks a decree of nullity, and the effective ground of his case stated in his particulars is that of invincible repugnance. The answer is a denial, and the counter-allegation of incapacity. By the present summons the petitioner asks for the appointment of medical inspectors to make the customary examination. The respondent wife is represented in the litigation by her guardian ad litem on the ground that she is a person of unsound mind, though not so found by inquisition. Two joint affidavits have been filed on behalf of the respondent by her medical advisers, and these affidavits prove that the respondent is not at present in a mental state to allow of the desired inspection and that the medical gentlemen who made the affidavit hold out no hope that an examination of this kind could be safely conducted, that is, safely in consequence of the health of the respondent, within any reasonable time. The point therefore arises whether any such inspection is a necessary part of the procedure of the court, or whether, on the other hand, the court has the discretion in a proper case to dispense with this customary, and no doubt most useful, step in the procedure.

Before considering the authorities in the matter I may say that in the present case it certainly appeared to me that no injustice could really be done by the omission of this examination for two reasons. First of all, there is no actual effective claim in respect of malformation and obviously the claim as to repugnance would depend more on evidence that is not strictly medical than on any question of medical inspection. Secondly, because as late as October, 1930, one of the said two medical advisers who made the affidavits to which I have referred made a complete examination of the same character as that which would be conducted by the inspectors appointed by the court, and both sides are willing that the results of this examination should be utilised in evidence, if necessary. It really amounts to this, that to begin with, I very much doubt whether from the point of view of justice between the parties it will ever be necessary to have an inspection at all, and, if the decision of any question to be served by inspection did become necessary between the parties, there is already available evidence which could be used, and which both sides are willing should be used. The matter, of course, does not end there, because medical inspection by the officers of the court is made for the purpose of the court's own protection. It is a most valuable safeguard against collusion in cases of this class, and I hope that nothing I am saying to-day will diminish the importance attached to this kind of inspection, or make it, in any way, simple for people to avoid this customary step.

The circumstances in the particular case are unusual, and what is done in an unusual case is not to be taken as being a precedent for ordinary and customary cases where a long-established procedure has been quite rightly followed. Now the statutory powers of the court have been examined here in argument, and they really throw very little light upon the matter. I may say, before passing to the consideration of the authorities and the law on the matter, that the court is very much indebted to Mr. Noel Middleton, for the respondent, for his most careful review of what I believe to be the whole of the relevant matter in the way of authorities, and his industry and learning, put generously at my disposal, have very much lightened my task.

The statutory powers of the court are in the Supreme Court of Judicature (Consolidation) Act, 1925, ss. 32 and 103 (1), which are in far too general terms to throw any particular light on this special problem. One has to pass then, in order to get light upon the matter, to the older authorities and obtain, as far as one can, the ecclesiastical view. For that purpose counsel called my attention to a great number of authorities, but I gather that his view was, and certainly my view is, that the matter is really summed up in two and a half lines of not very classical Latin in SANCHEZ DE MATRIMONIO, cited as a note in *Pollard* v. *Wybourn* (1) (1 Hag. Ecc. at p. 729). The note is in these words:

> "Quamvis utroque conjuge fatenta impedimentum, ac triennis lapso, sanum consilium sit facere conjuges inspici; at id non est necessarium."

Giving those words perhaps a free, but I hope sufficiently exact, interpretation, that would seem to show that an inspection is a prudent procedure, shall I say "sanum consilium"; or perhaps a wise course of action. But the words "at id non est necessarium" make it quite clear that in the author's view it is not necessarily a step in the procedure. Now that is, so far as the Ecclesiastical Courts are concerned, I understand, both the law and the prophets combined, because SANCHEZ is undoubtedly a first-rate authority on a matter of this kind. I turn then to OUGHTON'S ORDO JUDICIORUM, Tit. 217, and there it is clear from the expressions used that the court has power to order an inspection. "Compellere potest virum," for example, are words used and stress is laid upon the power of ordering inspection of the man, and the value of the inspection, particularly of the man. But most of that title really deals with defects of the male. Again it does not say, even there, where the inspection is considered a valuable part of the procedure, that it is an absolutely necessary part of the procedure; it shows power, but makes no suggestion of obligation on the part of the court.

Now as to expressions from people of eminence on this matter, we have, on the one hand, a case tried by SIR WILLIAM SCOTT, *Briggs* v. *Morgan* (2), in which it is quite clear that although the pleadings are in the terms of incurable natural malformation and bodily defects in the person of the woman, the case proceeded on quite different lines from what would be the ordinary line to-day, without any inspection at all. SIR WILLIAM SCOTT considered the case on the evidence and on the probabilities, and he was quite content to decide the case upon the evidence and the probabilities without subjecting the lady in the case to any inspection at all. That, to my mind, is a very strong authority in favour of the line contended for here, namely, that there is no necessity for an inspection of this kind if the court thinks (as it would not think lightly) that this is a case for this concession.

Another quite strong case in the same line is *Harrison* v. *Harrison* (3), in which LORD BROUGHAM gave judgment. LORD BROUGHAM says this (4 Moo.P.C. at p. 103):

> "It has been insisted by the counsel for the appellant that the confession of non-consummation is not sufficient to satisfy the 105th Canon, and that there must be some extrinsic proof, and for this purpose, proof by inspection is said to be essential."

The point was quite clearly and distinctly raised. "Their Lordships," LORD BROUGHAM continued,

> "give no opinion on this construction of the canon; for if adminicular proof is requisite, they think that the circumstance of the appellant's having taken a legal opinion on the validity of the marriage, which he admits in his answer, coupled with the confession of non-consummation, and his refusal in the first instance to undergo inspection is sufficient extrinsic proof; and being satisfied that there is no collusion between the parties, they affirmed the decree of nullity, causa impotentiae."

From that counsel for the respondent derives, and I think rightly, two things. First of all that this class of evidence is only adminicular and, secondly, that certainly it was not considered by LORD BROUGHAM (and the point was directly raised before him) as being an essential requisite to the decree. That is even stronger, I think, than *Briggs* v. *Morgan* (2).

Another case that throws light upon the matter at a later date is *Serrell* v. *Serrell and Bamford* (4). Its importance is that in that case, as late as 1862, there was no examination by medical men appointed by the court. There again the point was in a sense distinctly raised, because the parties sought to put in evidence medical opinions from their own sides and objection was taken to this. So that again the point was raised, even if not directly. Is this, or is this not necessary? It was inferentially raised when it was sought to use medical evidence adduced by the parties as against the customary practice of medical evidence given by persons who had made an inspection under the order of the court.

So that, tracing the matter in that way (I am taking a selection of the cases put before me as being the more convincing and clearer of the cases), there seems to be very strong authority in favour of the proposition, for which counsel for the respondent contends that there is at least a dispensing power and no necessity for this step in the procedure in order to make the matter regular. Against that there are certain dicta from people as eminent as DR. LUSHINGTON and SIR WILLIAM WYNNE; but the dicta in each case—I have looked carefully at those cases—are of a wide character. For example, SIR WILLIAM WYNNE says in *Norton* v. *Seton* (5): "which is the method of proof upon which these cases always proceed." But that is quite obviously the class of observation which any judge might make without attempting to decide the point one way or another. It is quite true to say that cases do always proceed in that way, but the fact that there is a dispensing power is not in any way negatived by the fact that the usual method of proceeding is something else; similarly with DR. LUSHINGTON. His opinion, in which he referred to the usual method in which these proceed, is much too wide in my view if it is to be taken as laying down an exact doctrine. In neither case are the dicta of SIR WILLIAM WYNNE or DR. LUSHINGTON really intended, I think, to be a statement of a canon or principle; they are merely passing references to what is the customary practice, and therefore they ought not to be weighed—and I have no doubt that the authors of the expressions would not wish them to be weighed—against the quite clear expressions of LORD BROUGHAM and SIR WILLIAM SCOTT, backed, as they are, by the old ecclesiastical authorities.

For those reasons I have come to the conclusion that in this case this step could and ought to be dispensed with. The position is that counsel for the petitioner was asking that medical inspectors should be appointed. Counsel for the respondent was not in any sense objecting to that, but it was felt advisable that the matter should be dealt with by the court in order that the officials should be fully instructed as to whether it would be in order to proceed without this well-known and customary step of inspection in the case of the respondent. I think that in the circumstances I can say that such inspection can be dispensed with in her case.

His Lordship decided that the case should proceed with an order for medical inspection in the case of the petitioner only, the respondent's guardian ad litem undertaking to exhibit to the petitioner such medical reports as were available.

Order for medical inspection of petitioner only.

Solicitors: *Needham & Barrow*, for *Walker & Milburn*, Sunderland; *Robinson & Bradley*, for *Smith & Thompson*, Newcastle-on-Tyne.

[*Reported by* WILLIAM LATEY, ESQ., *Barrister-at-Law.*]

A

OGDEN *v.* LONDON ELECTRIC RAIL. CO.

[COURT OF APPEAL (Scrutton, Greer and Romer), June 13, 1933]

[Reported 149 L.T. 476; 49 T.L.R. 542]

B

Discovery—Privilege—Production of documents—Reports of defendants' servants as to accident—Defendants' intention to settle without recourse to solicitor if possible.

Information obtained for a solicitor as material upon which professional advice should be taken in proceedings pending or threatened or anticipated is none the less protected from discovery because the party obtaining it intended, if he could, to settle the matter without resort to a solicitor.

C

On Nov. 25, 1931, a railway passenger fell through the door of a train to the platform and was injured; on the same day the guard and other members of the railway company's staff, in accordance with the regular practice of the company, made reports of the accident to the company on a form headed: "For the information of the company's solicitors only." The company required and used reports of this sort to instruct its solicitors if and when necessary, and also to help the company to avoid future accidents. On Nov. 27, 1931, the passenger's solicitors wrote to the company that the passenger intended to claim damages. The matter was dealt with by a department of the company until May, 1932, when the passenger issued a writ claiming damages for the accident, whereupon the company instructed its solicitors. On appeal against an order that the company should give discovery of the reports mentioned and of "any communications passing between the company and their officers and servants prior to" the company's solicitors being instructed in the action on the company's behalf,

D

E

Held: the reports were privileged from discovery, and the order should be discharged, because

F

(i) information obtained for the purpose of defending an anticipated action even before the writ is issued or the defendants' solicitor instructed may be privileged;

(ii) even if the information was not obtained solely or merely or primarily for the solicitors, it was privileged because it had been procured as material upon which their advice should be taken in proceedings which were anticipated, and was none the less privileged because the company intended, if it could, to settle the matter without resort to a solicitor at all. Dictum of BUCKLEY, L.J., in *Birmingham and Midland Motor Omnibus Co.* v. *L. & N.W. Ry. Co., Ltd.* (1), [1913] 3 K.B. at p. 856, approved and applied: Dicta in *Anderson* v. *Bank of British Columbia* (2) (1876), 2 Ch.D. 644, and of LORD ESHER in *Southwark and Vauxhall Water Co.* v. *Quick* (3) (1878), 3 Q.B.D. 315, disapproved.

G

H

Cook v. *North Metropolitan Tramway Co.* (4) (1889), 54 J.P. 263; stated to have been wrongly decided.

Notes. As to privilege from discovery of documents prepared in anticipation of proceedings threatened or anticipated, see 12 HALSBURY'S LAWS (3rd Edn.) 46, and for cases on the subject see 18 DIGEST 138–142, *880–906*.

I

Cases referred to:

(1) *Birmingham and Midland Motor Omnibus Co., Ltd.* v. *London and North Western Rail. Co.*, [1913] 3 K.B. 850; 83 L.J.K.B. 474; 109 L.T. 64; 57 Sol. Jo. 752, C.A.; 18 Digest 88, *394*.

(2) *Anderson* v. *Bank of British Columbia* (1876), 2 Ch.D. 644; 45 L.J.Ch. 449; 35 L.T. 76; 24 W.R. 624, 724; 3 Char. Pr. Cas. 212, C.A.; 18 Digest 132, *823*.

(3) *Southwark and Vauxhall Water Co.* v. *Quick* (1878), 3 Q.B.D. 315; 47 L.J.Q.B. 258; 38 L.T. 28; 26 W.R. 341, C.A.; 18 Digest 122, *714*.

(4) *Cook* v. *North Metropolitan Tramway Co.* (1889), 54 J.P. 263; 6 T.L.R. 22, D.C.; 18 Digest 141, *904*.

Interlocutory Appeal from an order of GODDARD, J., ordering the defendant railway company to produce certain documents for the inspection of the plaintiff.

The plaintiff incurred personal injury by falling through a door of one of the defendants' electric trains on to a railway platform on Nov. 25, 1931, and on the same date the guard of that train and other servants of the defendants made reports of the accident on a form headed: "For the information of the company's solicitors only." On Nov. 27, 1931, the plaintiff's solicitors wrote to the defendant company stating that the plaintiff proposed to make a claim for damages. From an affidavit filed on behalf of the defendant company it appeared that the Underground group of transport undertakings had one common department, with a practising solicitor in control, which dealt with all accident claims made against those responsible for the undertakings, and that it was the regular practice of the department

> "to require reports of any accidents in which any person is injured or any property damaged in connection with the operations of any of the undertakings."

The plaintiff issued a writ claiming damages in May, 1932—about six months after the accident. The defendant company then instructed their regular solicitors in the action. There were no affidavits of documents, but in August, 1932, "Lists of Documents" were exchanged. In the defendants' list was this claim:

> "Documents for which privilege from production is claimed: Reports by servants of the defendants made for the information of the company's solicitors only, and in anticipation of litigation."

On April 7, 1933, the plaintiff applied for an order that:

> "(i) Notwithstanding the claim for privilege of the reports by the servants of the defendant company dated Nov. 25, 1931, the defendants may be ordered to produce for the inspection of the plaintiff: (a) The report of the accident to the plaintiff which it was the duty of the guard of the train to make to the company on the date of the accident and the reports of the accident of any other servant of the company made on the same date; (b) notwithstanding any such claim to privilege, any communications passing between the company and their officers and servants prior to the defendants' solicitors being instructed on behalf of the defendants in this action; and (c) the General Rules and Regulations of the defendant company for the guidance of the officers and men of the railway."

On May 11, 1933, the Master refused to make an order for the production of these documents, holding that they were privileged from inspection. On May 23, 1933, the Judge in Chambers, GODDARD, J., reversed the Master's decision, ordering the production of the documents for inspection. The defendant railway company appealed.

Hilbery, K.C., and *Russell Vick* for the defendants.

T. Eastham, K.C., and *Tristram Beresford* for the plaintiff.

SCRUTTON, L.J.—The appeal here is in a class of case which I have long thought had been laid to rest, because the law had been settled, but apparently this may not be a case of the class which I had thought was settled.

The plaintiff, a lady travelling by an electric train met with an accident by falling through a door on to the platform. I intentionally state the facts vaguely, because the plaintiff herself does not know exactly what happened. The accident was on Nov. 25, 1931. On Nov. 27, 1931, the solicitors for the plaintiff intimated to the railway company, the defendants, that a claim for compensation would be made. Meanwhile the guard and other persons connected with the train had made reports. The writ in the action was issued in May, 1932, about six months after the accident. When the writ was issued the defendants engaged their regular solicitors. The matter proceeded and in course of time there was made not an affidavit of documents but a list of documents.

Lists are very convenient to avoid expense when there is likely to be no question of privilege, but lists, of course, do not contain the statement on oath of a claim to privilege, and lists are not made with the great care that an affidavit claiming privilege usually displays. The list contained this claim:

> "Documents for which privilege from production is claimed: Reports by servants of the defendants made for the information of the company's solicitors only, and in anticipation of litigation."

The phrase "made for the information of the company's solicitors only" is based on the fact that the company's servants do, on the occurrence of an accident, give information on a form which is headed: "For the information of the company's solicitors only." The phrase "and in anticipation of litigation" was an intelligent anticipation of what would happen, because the reports were made two days before the solicitors for the plaintiff said that a claim for compensation would be put forward. That list having been made, no further step was taken for some considerable time by the plaintiff, and it did not occur to her advisers until some time in this year that they might like to see those reports in spite of the language in which the claim for privilege was made. Perhaps it would have been better if they had asked for an affidavit instead of a list, because the affidavit would have required the defendants to take rather more care in exactly framing the grounds on which they claimed privilege, but the plaintiffs' solicitors did not ask for an affidavit. They made an affidavit themselves. Of course, when you have an affidavit made by a defendant it is quite irregular to question it by affidavit, except in the one case provided by the rules where you desire to say: "You have not included at all in your affidavit certain documents. We produce an affidavit showing the reasons why we think that you have such a document, and we call on you to account for it." That particular method of dealing with difficulties on affidavit applies only to one matter which has been raised in this case, because one of the matters dealt with in this case is that the affidavit for the defendant company does not include a book of Rules and Regulations. The plaintiff's solicitors, instead of dealing with that book in the regular way by making an affidavit that they had reason to suppose, for the reasons stated, that there was such a book, dealt with it by mentioning it at the end of their affidavit dealing with the defendants' claim for privilege.

The Master, having listened to the authorities and to counsel, decided that the claim for privilege was good. The learned judge, having listened to the authorities and to counsel, including Mr. Eastham, was induced by the heavier artillery carried by the plaintiff on that occasion to reverse the Master's orders, and he made an order that

> "the defendants produce to and for the inspection of the plaintiff (a) the report of the accident to the plaintiff which it was the duty of the guard of the train to make to the company on the date of the accident and the reports of the accident of any other servant of the company made on the same date; (b) notwithstanding any such claim to privilege any communications passing between the company and their officers and servants prior to the defendants' solicitors being instructed on behalf of the defendants in this action; and (c) the General Rules and Regulations of the defendant company for the guidance of the officers and men of the railway referred to in the defendants' solicitors' letter to the plaintiff's solicitors of April 6, 1933."

I do not think it is seriously contested by counsel for the plaintiff that the second head of that order is justified. The second head assumes that there can be no privilege before you have instructed a solicitor to act for you. I think on the authorities that that is clearly inaccurate. You may anticipate litigation, and, having a claim made on you without a writ being issued, obtain information for the purpose of defending the action when the writ is issued and when you instruct your solicitor. I am quite clear that head (b) is erroneous and should be struck out.

That leaves the important question whether the reports made on the day of the accident in respect of an accident, for which, two days afterwards, the solicitors for the plaintiff said that they were going to claim, are or are not privileged. I do not wish, and I have no intention if I can help it, to add to what has been stated in the cases which, I think, have settled this matter, an explanation, in different words, of the principle on which I understand that the claim for privilege in such cases should proceed. Some trouble was caused about fifty years ago by *Anderson* v. *Bank of British Columbia* (2), in which case a principal writing to his agent, not a solicitor, said: "Tell me what has happened"—with no statement at all by either side—"this is for the purpose of consulting my solicitors." The facts are quite simple, but, unfortunately, in the judgments, language was used which went far beyond those facts.

The difficulty occasioned by *Anderson* v. *Bank of British Columbia* (2) was met by the judgments in *Southwark and Vauxhall Water Co.* v. *Quick* (3), which dealt with statements taken for the purpose of submission to a party's own solicitor, before a writ has been issued. Even that case raised some difficulties, because while the judgment of Cotton, L.J., showed that it was not necessary that the only purpose of taking the statements should be for submission to the solicitor, Lord Esher, in at least three sentences, said that the statements should be taken merely for the purpose of submission to the solicitor. That difficulty was resolved and settled in *Birmingham and Midland Motor Omnibus Co.* v. *London and North-Western Rail. Co.* (1), where Buckley, L.J.—in whose judgment Vaughan Williams, L.J., concurred, preferring Buckley, L.J.'s, way of expressing the matter to that of Hamilton, L.J., who concurred in the result—said ([1913] 3 K.B. at p. 856):

> "It is not, I think, necessary that the affidavit should state that the information was obtained solely or merely or primarily for the solicitor, if it was obtained for the solicitor, in the sense of being procured as materials upon which professional advice should be taken in proceedings pending, or threatened, or anticipated. If it was obtained for the solicitor, as above stated, it is none the less protected because the party who has obtained it intended if he could to settle the matter without resort to a solicitor at all."

In the present case, there having originally been no affidavit, the claim for privilege was not repeated in an affidavit when the plaintiff raised the question, but a Mr. Newman made an affidavit from which it appeared that the Underground group of transport undertakings had one common department, with a practising solicitor at the head, which dealt with all accident claims made against any of the undertakings, including the present defendants, and the affidavit went on to say that it was the regular practice of the department

> "to require reports of any accident in which any person is injured or any property damaged in connection with the operations of any of the said undertakings."

and that it was essential to have such documents in order that the solicitors, if a writ was issued, should be able to have before them information to enable them to advise with regard to the litigation.

It will be seen that that is almost exactly the case that Buckley, L.J., described in *Birmingham and Midland Motor Omnibus Co.* v. *London and North-Western Rail. Co.* (1). A department of the defendants, headed by a solicitor, gets the information for the purpose of dealing with the claim, and is ready to settle it itself if it can, but if the writ is issued and it cannot settle it, it then hands on the information to the solicitor then appointed—in this case Messrs. Bircham & Co. It appears to me that the facts in this case are exactly the facts that come within the rule laid down by Buckley, L.J.

Counsel for the plaintiff argues that the facts here should be distinguished, because these reports are made to a company to enable it to conduct its own business, namely, to carry on its business without accidents, without any regard to litigation. That may be so. It may be that that is part of the purpose of making the reports, but there is also the substantial purpose that if a writ is issued these are the materials that will be wanted by the solicitor conducting the litigation, and they are obtained for that purpose, among others, and as appears from the form at which we look—because the judge below has looked at these documents—the reports are made on a form headed: "For the information of the company's solicitors only." That is a most important heading, because if a man knows that he is making a confidential report to the solicitor he is much more likely to state accurately what has happened than if he is afraid that somebody presently seeing that report may take proceedings against him in respect of the statements that he has made, which may be defamatory.

In my view, this case comes exactly within the principles stated by Buckley, L.J., in *Birmingham and Midland Motor Omnibus Co.* v. *London and North-Western Rail. Co.* (1). Consequently, it being agreed that the claim for privilege under heading (b) goes too far, in my opinion the first heading, heading (a), requiring the reports of the accident to the plaintiff to be produced, was erroneous, and the order of the Master should be restored also on that issue.

Then there is the last, and rather puzzling heading (c) as to which I am disposed not to be too much puzzled, because I do not think there is really any relevance in it at all. That is the question whether these General Rules and Regulations of the defendant company should be produced. First of all, they have not been included in the list at all. If they have not been included in an affidavit the plaintiff is bound by the affidavit, unless he can show that they must be relevant. There is no affidavit about them, but when I look at the pleadings I am unable to see any allegation which turns on failure to give instructions to any officer of the company, or any allegation which suggests that some rule or regulation of the company has been broken. Counsel for the plaintiff proposes to amend. In those circumstances I think that the court should make no order about those documents until it has seen exactly what amendment counsel makes in the pleading to show the relevance of these rules and regulations. We propose to reverse the order that the documents be produced, without prejudice to any application which may be made when the statement of claim has been amended, and the proper procedure taken under the rules to bring this particular document before the court.

GREER, L.J.—I agree. I have listened to the judgment that has just been delivered by Scrutton, L.J., and I find it unnecessary to put in my own words the same conclusion, supported by words perhaps not so well chosen. It sometimes adds to the difficulties in these cases that three judgments are delivered in three different sets of words, and sometimes inadvertently, if the matter has not been fully considered, expressions are used by some of the members of the court that may give opportunity for further arguments. I am not going to take that risk in this case. I agree with the judgment which Scrutton, L.J., has given.

ROMER, L.J.—I agree, and have nothing to add.

SCRUTTON, L.J.—I ought to have said, and I meant to say, that I have been of the opinion for a long time that *Cook* v. *North Metropolitan Tramway Co.* (4) was wrongly decided.

Appeal allowed.

Solicitors: *Bircham & Co.*; *Gresham, Davies, & Dallas.*

[*Reported by* C. G. Moran, Esq., *Barrister-at-Law.*]

THE ST. JOSEPH

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bateson, J.), February 10, 13, 28, 1933]

[Reported [1933] P. 119; 102 L.J.P. 49; 149 L.T. 352; 49 T.L.R. 367; 18 Asp. 375]

Shipping—Carriage by sea—Bill of lading issued in Belgium to shippers—No express reference to Hague Rules—Bill of lading made out to consignee—Incorporation of Hague Rules.

The plaintiff cargo-owners, the government of Guatemala, purchased certain aeroplanes and other goods from French sellers. By the terms of the contract of sale the purchase price was to be paid as to 34 per cent. cash with order, and as to 66 per cent. by an irrevocable bank credit to be opened within five days of signing the contract, one-half of which was to be released on taking away the goods against a certificate of acceptance, and one-half payable at Guatemala city against shipping documents not later than eight days after the arrival of the goods. It was further agreed that the French sellers should pack and insure the goods, discharge them at Puerto Barrios, and arrange for their conveyance to Guatemala city.

In pursuance of these arrangements the French sellers by their agents at Antwerp entered into a charterparty at Antwerp for the carriage of the cargo-owners' goods to Puerto Barrios in the Norwegian steamship *St. J.* The goods were duly shipped at Antwerp and bills of lading issued in which the goods were consigned to the cargo-owners at Puerto Barrios. Before shipment it was arranged between the cargo-owners and the sellers that bills of lading covering the shipment should be made out direct to the order of the cargo-owners, and that one set of documents should be sent to the bank in Paris, and a second set, including the bill of lading, entrusted to the master of the *St. J.*, to be delivered by him to the branch of the bank at Guatemala city on arrival of the vessel at Puerto Barrios, so as to enable the bank to hand them to the cargo-owners. The bills of lading did not contain any declaration as to the value of the goods, nor did they contain the statement, required by Belgian law in the case of bills of lading issued under the Hague Rules, that the bill was governed by those rules, nor any other reference to those rules or to Belgian law. The only bill of lading before the court was marked: "Copy, not negotiable." In due course the bills of lading were presented by the cargo-owners at Puerto Barrios. On delivery it was found that the goods had been damaged on the voyage.

The defendant shipowners admitted liability for the damage, but contended that the contract of affreightment was to be construed in accordance with the Belgian law, and that the liability of the defendants was limited in accordance with art. 91 of the Belgian Code de Commerce, which provided that a negotiable bill of lading issued for the transport of goods by any ship of any nationality departing from a Belgian port should be subject to certain rules (i.e., the Hague Rules), namely, that neither the ship nor the carrier should be liable beyond a specified sum unless the nature and value of the goods was declared before shipment and inserted in the bill of lading.

Held: the liability of the shipowners was not limited by art. 91 because

(i) the cargo-owners were owners of the goods by virtue of having accepted them and paid the French sellers for them; the property in the goods, therefore, did not pass to the cargo-owners upon or by reason of consignment under the bill of lading; and so the only contract between the cargo-owners and the shipowners was that made in Guatemala by the presentation there of the bill of lading by the cargo-owners to the shipowners.

(ii) the cargo-owners were, therefore, bound by the terms of the bill of lading and no more: *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Co.* (1), [1924] 1 K.B. 575, applied; and, as the bill of lading contained no reference to Belgian law, and there was nothing to show that either party intended or contemplated that Belgian law had anything to do with the contract, Belgian law did not apply to it: *The Torni* (2), [1932] P. 78, distinguished.

(iii) the contract between the maker of the bill of lading and the shipper was contained in the charterparty, to which Belgian law did not apply, and not in the bill of lading, and, even if the cargo-owners by taking delivery incurred the same liabilities as the shipper who took the bills of lading, Belgian law still did not apply.

(iv) even if Belgian law did apply, art. 91 did not apply because the only bill of lading before the court was marked "Not negotiable" and had never been negotiated, and so was not shown to be a negotiable bill of lading;

(v) apart from this art. 91 did not apply to incorporate the rules in the bill of lading because the bill of lading did not contain the statement that the rules applied required by art. 91.

Notes. As to the contractual rights of the holder of a list of lading who obtains delivery of the goods, see 30 HALSBURY'S LAWS (2nd Edn.) para. 550, note (u). As to the Hague Rules, see ibid. 609, para. 769, and the Schedule to the Carriage of Goods by Sea Act, 1924, 23 HALSBURY'S STATUTES (2nd Edn.) 886. For the Bills of Lading Act, 1855, s. 1, see ibid. 383.

Cases referred to:

(1) *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Co., Ltd.*, [1924] 1 K.B. 575; 93 L.J.K.B. 646; 130 L.T. 392; 16 Asp.M.L.C. 262; 29 Com. Cas. 57, C.A.; 41 Digest 380, *2257*.

(2) *The Torni*, [1932] P. 27; 48 T.L.R. 195; reversed [1932] P. 78; 101 L.J.P. 44; 147 L.T. 208; 48 T.L.R. 471; 18 Asp.M.L.C. 315, C.A.; Digest Supp.

(3) *The Kronprinsessan Margareta, The Parana*, [1921] 1 A.C. 486; 90 L.J.P. 145; 124 L.T. 609; 15 Asp.M.L.C. 170; sub nom. *The Hilding (Part Cargoes Ex.)*, 37 T.L.R. 199, P.C.; 37 Digest 636, *866*.

(4) *The Annie Johnson, The Kronprinsessan Margareta*, [1918] P. 154; 87 L.J.P. 127; 118 L.T. 721; 14 Asp.M.L.C. 301; 37 Digest 589, *252*.

Admiralty Action by cargo-owners against shipowners for damage to cargo. The plaintiffs, "the cargo-owners," the Government of the Republic Guatemala, claimed for damage sustained by a cargo consisting of aeroplanes and munitions of war carried by the Norwegian steamship *St. Joseph*, belonging to the defendants, from Antwerp to Puerto Barrios. The case was tried on the following agreed statement of facts:

The cargo-owners, the Government of the Republic of Guatemala, by a contract dated Jan. 15, 1929, and made between the cargo-owners and a French firm of aeroplane and munition manufacturers, styled the Office General de l'Air, agreed to buy, and the latter agreed to sell, certain aeroplanes, equipment and munitions of war. By a supplemental contract dated Feb. 26, 1929, the Office General de l'Air undertook, in consideration of the payment by the cargo-owners of a lump sum over and above the contract price, to pack and insure the goods, to obtain the necessary permits from interested Governments, and to carry out all the operations of loading, discharging at Puerto Barrios and conveyance to Guatemala City.

On April 3, 1929, a charterparty was entered into at Antwerp between the defendants, the owners of the steamship *St. Joseph*, and the Agence Maritime Jean Smeets, of Antwerp, as agents for the sellers, for the conveyance of the aeroplanes,

&c., by the *St. Joseph* from Antwerp to Puerto Barrios. The cargo-owners' goods were duly shipped at Antwerp by the sellers' agents under a bill of lading issued at Antwerp, dated May 19, 1929, and consigned to the cargo-owners at Puerto Barrios. The bill of lading gave particulars of the contents of the cases loaded but did not specify their value, nor was such value declared by the shippers to the shipowners before shipment.

The *St. Joseph* left Antwerp on May 19 and, after loading patent fuel at Swansea, reached Puerto Barrios on July 2, 1929. The discharge of the cargo-owners' goods was completed on July 5, and on examination by the cargo-owners' agents the goods were found to be seriously damaged owing to the bad stowage of the part cargo of patent fuel at Swansea.

Before the goods were shipped on board the *St. Joseph* it was agreed between the sellers, the Anglo-South American Bank, and the Minister for Guatemala in Paris, as agent for the cargo-owners, that the bills of lading covering the shipment should be made out direct to the order of the cargo-owners. Three sets of shipping documents were made out, and two of them were forwarded by the sellers to the Paris branch of the Anglo-South American Bank with instructions that on the arrival of the *St. Joseph* at Puerto Barrios one set should be handed to the cargo-owners. A third set was handed on behalf of the sellers to the master of the *St. Joseph* in a sealed envelope addressed to the Guatemala City Branch of the Anglo-South American Bank, with instructions to forward it to the addressees as soon as the *St. Joseph* arrived at Puerto Barrios. The object of this arrangement was to ensure that the bank, with whom the cargo-owners had opened a credit to provide payment for the goods, might be in a position, on the arrival of the *St. Joseph*, to hand one complete set of documents to the cargo-owners. It was further arranged between the sellers and the bank that, on delivery of the goods to the cargo-owners at Puerto Barrios, the bank should, out of the credit opened by the cargo-owners with them, pay to the sellers the balance of the sum due for the goods under the contracts less a sum of $550, the estimated cost of forwarding the goods from Puerto Barrios to Guatemala City. On arrival of the *St. Joseph* at Puerto Barrios the bank handed to the cargo-owners one set of the shipping documents, including the bill of lading. The cargo-owners presented the bill of lading at Puerto Barrios and took delivery of the goods at Puerto Barrios thereunder.

The shipowners admitted liability for the damage, but contended that the amount of their liability was limited by Belgian law, which embodied the Hague Rules in art. 91 of the Code de Commerce, an article of Aug. 21, 1879, replaced by the following provisions made on Nov. 28, 1928:

> "(A) A negotiable bill of lading issued for the transport of goods by any ship of any nationality soever departing from or destined to a port of the Kingdom or the Colony is governed by the following rules: Article IV (5) Neither the carrier nor the ship shall in any event be held responsible for loss or damage caused to or in connection with goods for a sum exceeding 3,500 belgas or 17,500 francs per package or unit unless the nature and the value of such goods has been declared by the shipper before shipment and this declaration has been inserted in the bill of lading."

Article I (B) provided that

> "contract of carriage applies only to a contract of carriage evidenced by a bill of lading or by any similar document of title for the carriage of goods by sea; it applies also to a bill of lading or similar document issued by virtue of a charterparty from the moment when this document governs the relations between the carrier and the holder of the bill of lading."

Under (B) it is provided that

> "any bill of lading issued under the above conditions shall contain a statement that it is governed by the Rules of art. 91."

On behalf of the shipowners it was contended that Belgian law applied, and that the liability of the shipowners was limited in accordance with the above-mentioned articles.

Sir Robert Aske for the shipowners.
Raeburn, *K.C.*, and *Pilcher* for the cargo-owners.

[Reference was made to the following authorities: *The Torni* (2), *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Co.* (1), *The Kronprinsessan Margareta* (3), and *The Annie Johnson* (4).

Cur. adv. vult.

Feb. 28. **BATESON, J.**, read the following judgment.—In my judgment the plaintiff cargo-owners are right in this case. The cargo-owners are the Government of Guatemala. The defendants are Norwegian shipowners. The action is brought by the cargo-owners to recover for damage done to certain cargo carried by the shipowners in the steamship *St. Joseph*. The shipowners admit liability, but say that their liability is limited by Belgian law to some £100 a package. The only questions are (i) what was the contract between the cargo-owners and the shipowners? (ii) Does Belgian law apply to it?

The facts are set out in an agreed statement of fact, and I need not repeat them in detail. Shortly, they are that on Jan. 15, 1929, the cargo-owners, through their Minister in Paris, bought certain aeroplane goods from the French suppliers in Paris under a contract of sale which was entered into between them. Under s. 1 (b) of the contract the goods were to be accepted by the cargo-owners before departure from the sellers' works after being passed by Bureau Veritas or an expert. Under s. 1 (c) of the contract payment was to be made as to 34 per cent. cash with the order and the balance, 66 per cent., by a confirmed irrevocable credit with a first-class bank within five days of the signing of the contract.

The 66 per cent. was releasable to sellers as to 33 per cent. on taking away the goods against a certificate of acceptance and the other 33 per cent. was payable at Guatemala City by the bank's correspondents against the shipping documents not later than eight days after the arrival of the goods at Guatemala City. The Anglo-South American Bank was the bank with which the credit was opened.

The sellers undertook the transport by rail and the affreightment to Guatemala City via Puerto Barrios. They also undertook to contract for the account of the cargo-owners the insurance against all risks. The transport and insurance was the subject of a supplemental contract of Feb. 26, 1929. By this latter contract the insurance was to be from eight days after the acceptance of the goods in the works until eight days after arrival at Guatemala City. The transport was to be effected by the sellers, who had to arrange for the loading of the goods, the discharge at Puerto Barrios, and the forwarding to Guatemala City. From a perusal of the chart and map Puerto Barrios is some 100 miles or so from Guatemala City.

The sellers also undertook to send a specially qualified representative who should receive the goods at Puerto Barrios, forward them to Guatemala City, and effect delivery to the cargo-owners.

The cargo-owners for these transport services agreed to pay a lump sum of $80,520 in four sums, two of 30 per cent. and two of 20 per cent., the last payment being after forwarding the remainder of the supply.

The French sellers, by their agents in Antwerp, chartered the *St. Joseph* from her owners in Oslo through the owners' agents in Antwerp, for the transport of a part of the goods. The charter was dated April 30, 1929, it was in English, and under it the vessel was to load these goods at Antwerp. The freight of £800 was payable in advance, and the goods were to be delivered to Puerto Barrios in Guatemala. The ship loaded the goods at Antwerp and sailed on May 19, 1929. Bills of lading dated May 19, 1929, were made out mostly in English, except that the description of the goods and details of them were in French. The shippers were Messrs. Valcke & Co., a French firm in Paris, according to a stamp on the bill of lading. The goods were to be delivered unto the Government of Guatemala (the cargo-owners) and the words "Gouvernement de Guatemala" are in French—"or to his/their assigns"—"paying freight for the said goods as per charterparty dated Antwerp, April 30, 1929." The bill of lading was initialed "J.C.," which I understand are the initials of the master, and the only bill of lading that I have seen has printed on it in large type "Copy, not negotiable." The bill of lading ends with

> "In witness whereof the undersigned master or agents of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which being accomplished, the others to stand void."

The bill of lading, which is with the agreed statement of facts, is not endorsed. The purchaser's name was inserted in the bill of lading as being the consignee. The making out of the bill of lading direct to the order of the cargo-owners was done in accordance with an arrangement between the Minister of Guatemala, the sellers and the bank. This arrangement is referred to in a letter dated May 24, 1929, from the sellers to the bank, and says that on arrival of the goods at Puerto Barrios the bank should remit them to the cargo-owners and should pay over the balance due less a sum for transport to Guatemala City as soon as the goods were delivered at Guatemala City.

The sentence in that letter:

> "It is understood that immediately after the arrival of the goods at Puerto Barrios you will remit these to the Government of Guatemala"

means "You, the bank, will remit these goods," the gender of the French words in the original making it clear that the word "these" refers to goods, and not to the bill of lading.

The documents consisting of detailed lists of the consignment, the invoice relating to the goods loaded, the certificate of insurance, and the bills of lading were made out in triplicate.

On May 24, two complete sets were sent by the sellers to the Paris branch of the bank with instructions to forward the documents to the Guatemala branch urgently to avoid delay in delivery of goods. One set was handed to the master of the *St. Joseph* in a sealed envelope addressed to the bank at Guatemala City, the master being directed to get it to the bank as soon as he arrived at Puerto Barrios, so that the bank might remit the goods to the cargo-owners, stopping out of the credit $550 in order to pay the cost of the railway freight from Puerto Barrios to Guatemala City.

The bill of lading contained no reference to the Hague Rules or to art. 91 of the Belgian Code which embodies those rules.

The ship after leaving Antwerp went to Swansea and loaded the remainder of her space with patent fuel. She then went to La Guaira, delivered the patent fuel, and thence to Puerto Barrios, where she arrived on July 2, and delivered the cargo loaded at Antwerp. This cargo was found to be damaged by the bad stowage of the patent fuel to the extent of some £5,000.

The cargo-owners, who had been given a bill of lading by the bank at Guatemala City, obtained the goods from the ship, and they were sent by rail to Guatemala City. The agreed statement says that the bank handed to the cargo-owners one complete set of documents including a bill of lading. The cargo-owners presented the bill of lading to the ship and obtained delivery of the goods thereunder. The bill of lading has no endorsement on it.

The main question debated before me was whether Belgian law applies to the relations between the cargo-owners, the Government of Guatemala and the Norwegian shipowner.

Counsel for the cargo-owners says "No." Counsel for the shipowners says "Yes." I agree with counsel for the cargo-owners.

Counsel for the shipowners says the property in the goods passed to the cargo-owners under the bill of lading by reason of the consignment; that the bill of lading

was made in Belgium by a Belgian shipper under a charterparty between Belgians A
and, therefore, the place where the contract by bill of lading was made was Belgium and Belgian law governs it. Under Belgian law, which includes the Hague Rules, the shipowners' liability is limited.

Counsel for the cargo-owners says the property did not pass by reason of the consignment. It was the cargo-owners' property before it was shipped. The cargo-owners' only contract with the shipowners was in the express terms of the B
bill of lading which they got in Guatemala and contains nothing about Belgian law. The law of that country has nothing to do with it. Neither charterparty or bill of lading was made by Belgians, nor were the shippers Belgians.

The first question to be considered seems to me to be what is the contract between the cargo-owners and shipowners. It is made by the cargo-owners offering the bill of lading to the shipowners and getting delivery of the goods covered by the C
bill of lading. That is the only contract. It is a contract between the Government of Guatemala, cargo-owners, and the Norwegian shipowner, made in Guatemala. No Belgian had anything to do with the business except as agents. The charterparty was between a Frenchman and a Norwegian; the bill of lading related to a shipment by a Paris firm as agents for a Frenchman and was initialed by the master of the Norwegian ship. The only thing Belgian about it was the word D
"Anvers" and the shipment in Antwerp. The cargo-owners are not consignees or endorsees within the Bills of Lading Act because they got no property by the consignment or by any endorsement. The goods were their property by reason of their contract with the French sellers; the sellers had to deliver the goods at Guatemala City. The cargo-owners merely presented the bill of lading and got delivery, and by it are bound by the terms contained in it, and no more: (*Brandt* v. E
Liverpool, Brazil and River Plate Steam Navigation Co. (1)). I do not think you can import a term of Belgian law into such a contract between such parties in a case where no reference is made to Belgian law in the contract, and where there is nothing to show that either party intended or contemplated that Belgian law had anything to do with the contract.

The cargo-owners never agreed to the Belgian law being a term. It cannot be F
implied in Guatemala. It will not do to say that the bill of lading in its inception was governed by Belgian law. In its inception it was not a contract, it was a mere receipt. The contract of carriage was contained in the charterparty made between a Frenchman and a Norwegian in which Belgian law is not a term. So even if the cargo-owners were bound by the bill of lading at its inception by reason of asking for delivery, the shipowner cannot import Belgian law into it. I know of G
no authority for saying that you can insert a term of some foreign law into the contract (by bill of lading) which, if it is to govern the rights of the parties, when first issued contains no such term, and if, at some later period, it contains no such term either.

How can it be said that the cargo-owners made any contract which is governed by Belgian law? The only way it can be said is to say that the contract was the H
bill of lading under which the property passed by consignment under the Bills of Lading Act, 1855, s. 1, and that that bill of lading was governed by Belgian law. The Bills of Lading Act only makes the cargo-owners a party to such a contract if they are a consignee to whom the property in the goods passed upon or by reason of such consignment. In this case the cargo-owners were owners of the goods by virtue of having accepted and paid their sellers for them, and not by virtue of the I
bill of lading. They did not buy the bill of lading. The bill of lading was only a receipt.

It would be strange if a foreign shipowner who fails to comply with the foreign law supposed to govern his bill of lading can say that the foreign law is an implied term in it, and take advantage of this when he omits any reference to this law from his bill of lading.

The real position is this, that the cargo-owners say, "Give me my goods and I will be bound by the terms of the document I am presenting to you and no more," as was the case in *Brandt* v. *Liverpool, Brazil and River Plate Co.* (1). The important passages in that case are in the judgments of BANKES, L.J. ([1924] 1 K.B. at p. 589) and SCRUTTON, L.J. ([1924] 1 K.B. at pp. 595, 596). ATKIN, L.J., sums up this point ([1924] 1 K.B. 600):

> "It follows that the contract to be inferred in cases such as this is that the holder of the bill of lading and the shipowner make a contract for the delivery and acceptance of the goods on the terms of the bill of lading, so far as they are applicable to discharge at the port of discharge."

Counsel for the shipowners argues that the cargo-owners took the bill of lading, which was a Belgian bill of lading, made out in Belgium, and, that although at the time it was made out it was only a receipt, nevertheless as soon as it changed hands it became the operative document in regard to the goods and was governed by Belgian law, and was subject, therefore, to the Hague Rules. The answer to this is that at the time it was handed to the shippers it was only a receipt, and s. 91 of the Belgian Code has no application to it. The maker of the bill of lading had no intention otherwise; and he never said a word about Belgian law and it could not be implied. The person he handed it to was the charterer and the contract with him was in the charterparty. The place where the contract was made was Guatemala City. Further, the argument based on the transfer of the bill of lading presupposes that the Belgian law applies.

Even if the cargo-owners by taking delivery incurred the same liabilities as the shipper who took it, they only incurred a liability to which s. 91 of the Belgian Code had no application. So whether one regards the contract between cargo-owners and shipowners as that made at Puerto Barrios, which in my opinion is the right view, or as that made in Antwerp, the result is the same. It cannot be that a document which in its inception had nothing to do with and was not subject to Belgian law could afterwards become subject to it.

In my judgment Belgian law had nothing to do with this case. The argument for the cargo-owners was, however, based on it and I must deal with it.

First of all, what is the Belgian law? It is contained in art. 91 of the code which was intended to bring into force the Hague Rules.

These rules are the outcome of a convention by some of the maritime powers held in 1923 at Brussels: (see TEMPERLEY'S CARRIAGE OF GOODS BY SEA ACT, 1924, 3rd Edn., p. 99). The English Carriage of Goods by Sea Act, 1924, embodied the rules in a schedule to the Act and by Order in Council of Oct. 9, 1924, the rules were applied as from Jan. 1, 1925. It is to be noted that the English Act confines its application to outward bills of lading only. Other foreign countries, including Belgium and France, signed the convention on Aug. 25, 1924. Guatemala was not a party to the convention and never signed it. The Scandinavian countries were not parties to the convention and did not sign it, but by 1932 Norway appeared to be contemplating legislation on these lines: (see TEMPERLEY, 3rd Edn., p. 99, and 4th Edn., p. 105). No foreign country brought the rules into force by enactment except Belgium and possibly to some extent the Netherlands. The Belgian Code is different to the British Act notably in that the code applies to both outward and inward bills of lading.

The operative words in the English Act are that the rules "are to have effect" in relation to carriage under bills of lading to which the rules apply. Every such bill of lading is to contain an express statement that it is to have effect subject to the rules.

The operative part of the Belgian Code in art. 91 says:

> "(A) A negotiable bill of lading is governed by the following rules. (B) Any bill of lading (issued under the rules) shall contain a statement that it is governed by the rules."

One of the rules, s. 1 (b), says that the rules apply to a bill of lading issued by virtue of a charterparty from the moment when the document governs the relations between the carrier and the holder of the bill of lading. In the English Rules the word "regulates" is used instead of the word "govern." Monsieur Frank, who gave evidence before me, says that by Belgian law this means from the moment the bill of lading is remitted to a third party who is not a party to the charterparty. He says that the provisions apply by reason of the fact that the bill of lading is remitted and that the rules apply retroactively from the time of shipment. He further says that if the shipper is the charterer and he sends the bill of lading to an agent, and the agent presents himself as agent, art. 91 does not apply. He says that if the bill of lading is negotiated the third person is bound, for art. 91 applies as soon as the bill of lading gets into the hands of a person who is not a party to the charterparty.

I understand this evidence (as to the getting into the hands of a third party and so forth) to mean that when the bill gets into the hands of a third party by negotiation on a transfer of property the rules come into operation and that they do not do so when there is a mere handing of the bill to someone to collect the goods for him.

It seems to me that if the argument of counsel for the shipowners is to succeed he must satisfy me: (i) That the bill of lading was a negotiable bill and was negotiated. (ii) That a bill of lading which leaves out any statement that it is governed by the rules as required by the code has such a term implied in it.

Counsel for the shipowners has not succeeded in satisfying me on those points. The only bill of lading in the agreed statement of facts says in terms that it is not negotiable. In this case the shipper took good care never to let the bill of lading out of his hands and control except for the purpose of getting the goods from the port of discharge to their final destination, namely, Guatemala City, which work he had undertaken to do under his contract. It is true that he allowed the representative of the cargo-owners to get the goods from the ship, but only for the shipper's purpose of forwarding them to their final destination. There is no evidence that the bill of lading was negotiated or of any payment for it or of any endorsement of it.

The goods did not pass to the cargo-owners by reason of the consignment.

Further, it seems to me that a bill of lading which by the law of Belgium must contain a statement that it is governed by the rules and does not, cannot be held to have the same effect as if it had. What, then, is the position of the parties? The cargo-owners are the owners of goods by reason of their contract with the French sellers from the time of acceptance at the sellers' works. They do not come within s. 1 of the Bills of Lading Act: SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING, 13th Edn., p. 476, especially note (b) and art. 18, p. 53, and art. 3, p. 10. The bill of lading is a mere receipt. The bank held the documents all the time for the shipper, and till the goods got to Guatemala City, not later than eight days after arrival at Guatemala City, they were not free to pay over the balance of the money to the shippers. The clause as to payment of the last 33 per cent. at Guatemala City against shipping documents could not apply to a bill of lading which had to be presented to the ship at Puerto Barrios. The cargo-owners never bought or paid for the documents. The goods became theirs by acceptance after inspection at the works in France. It was not a c.i.f. contract. The sellers undertook to get the goods transported and to see to the insurance to Guatemala City, the latter running from the date of acceptance of the goods till eight days after arrival at Guatemala City. The sellers having undertaken to do the whole transport to Guatemala City had originally intended their representative to go to Puerto Barrios to receive the goods and rail them to Guatemala City. Later it was arranged that the bank or the cargo-owners should do it for them.

It is said that *The Torni* (2) governs this case. If I thought the facts were the same I should hesitate long before differing from it, but the facts in that case are quite different. In that case the endorsees of the bills of lading, which were the only contracts of carriage—there being no charterparty—presented the bills of lading to the ship. They took the bills of lading as to which the Palestine Ordinance was deemed to apply, whether so stated in the bills of lading or not.

A In their inception they were deemed to have the ordinance included as a term, and the endorsees who took the bills of lading issued in those circumstances were held by the terms of the ordinance. The position of the other people in that case, who merely presented the bills of lading, the circumstances as to their position not being clear on the evidence before the court, was left undetermined. It is true that LANGTON, J., held them equally bound, but that is not this case, and the B Court of Appeal said that without further facts it could not be determined. This case which I am deciding illustrates the wisdom of the Court of Appeal in so doing. Moreover, in that case carrier and shipper knew all about the Palestine Ordinance. The judgment of LANGTON, J. ([1932] P. at p. 43), in dealing with the persons who are not the endorsees of the bills of lading says this:

> C "In other words, when once they present the bills of lading and it has been ascertained what was the original contract between the shipowners and the shippers, it is for the shipowners to show that something has occurred to alter that original contract in the hands of the new holder. In the present state of commerce it is not difficult to conceive a case in which the shipowner could show such circumstances. Having arrived at the port of discharge an insolvent consignee or assignee is unable to pay the freight and take delivery of D the goods. A new bargain is thereupon entered into by the shipowners with a person who is neither consignee nor assignee. The contract in the bill of lading might then become of no importance, although the goods had been shipped and carried under the contract contained therein. But, in the absence of any evidence of circumstances which would or might change the original terms of the bills of lading, I do not think that upon any known principle the E shipowner can be heard to say that a contract which meant one thing in its inception meant something else when it had passed into the hands of a fresh holder."

Here the shipowner either knew of the Belgian law, and as his country had not agreed to the convention or adopted its provisions, chose to disregard it, or he did F not know of the Belgian law and never gave it a thought and had no regard to it. He does not prove which of these positions he occupied, and he cannot now turn round and say that it was an implied term of the contract. The nations have not adopted a uniform system of applying the Hague Rules. Most nations have not embodied them in their law at all, others differ in the way they have adopted them. The Belgian Code, in adopting the convention, enacts that the rules should apply G to both inward and outward bills of lading. The English Act applies the rules to outward bills of lading only. The Belgian law says that bills of lading are "governed by" the rules; the law in force in Palestine says that the rules are to be deemed to be inserted. It is somewhat alarming to contemplate how many doors to confusion in mercantile business are opened by these attempts to legislate for the whole world.

H In my view these rules cannot be considered to be a part of the contract contained in the bill of lading unless the parties to it have clearly agreed that they shall apply, and if it is desired to make the rules part of the contract contained in the bill of lading, that intention should be expressed in clear terms.

The result is that the cargo-owners' right to recover damages is not limited to the sum of 3,500 belgas per package. The cargo-owners, therefore, succeed and are entitled to their costs subject to the usual reference.

I *Judgment for the cargo-owners.*

Solicitors: *Wm. A. Crump & Son*; *Ince, Roscoe, Wilson, & Glover.*

[*Reported by* GEOFFREY HUTCHINSON, ESQ., *Barrister-at-Law.*]

LYKIARDOPULO *v.* BUNGE Y BORN, LTD.

[KING'S BENCH DIVISION (Acton, J.), March 1, 1933]

[Reported [1934] 1 K.B. 680; 103 L.J.K.B. 277; 149 L.T. 46;
49 T.L.R. 294; 18 Asp.M.L.C. 399]

Shipping—Charterparty—Expenses of discharging cargo—Expenses exceeding those of discharging heavy grain for charterer's account—No importation of rye at port of discharge—Relevance of expense of discharging rye.

A charterparty provided that the expenses of discharging cargo in excess of the expenses of discharging heavy grain should be for the charterer's account. "Heavy grain" is a term used commercially to denote wheat, maize, and rye and no other form of cereal. It was proved that at the port of discharge no rye had been imported for a number of years, substantially no rye was handled there, and rye was more expensive to discharge than either wheat or maize. The shipowner contended that for the purpose of construing this clause regard must be had to the habitual trade of the port of discharge, and that, therefore, the expense of discharging rye should be disregarded and he was entitled to the amount by which the expenses actually incurred exceeded the expense of discharging wheat or maize.

Held: the expense of discharging rye could not be disregarded and, therefore, the shipowner was only entitled to recover from the charterer the amount by which the expenses actually incurred exceeded the expense of discharging wheat or maize or rye, whichever was the highest.

Hain S.S. Co., Ltd. v. *Louis Dreyfus & Co., Ltd.* (1) (1930), 37 Ll.L.R. 101, and *Atlantic Shipping and Trading Co.* v. *Bunge y Born* (2) (1931), 39 Ll.L.R. 292, followed.

Notes. As to special stipulations as to delivery, see 30 HALSBURY'S LAWS (2nd Edn.) 532, para. 684, and for cases on the subject see 41 DIGEST 535–536, *3625–3634*.

Cases referred to:

(1) *Hain S.S. Co., Ltd.* v. *Louis Dreyfus & Co., Ltd.* (1930), 37 Ll.L.R. 101.
(2) *Atlantic Shipping and Trading Co., Ltd.* v. *Bunge y Born* (1931), 39 Ll.L.R. 292.

Special Case stated by an umpire.

A charterparty provided for the carriage by a ship of a cargo of wheat and/or maize and/or rye from the River Plate to the French port of St. Nazaire, and further provided that the charterers could ship a different form of cargo at their option on the terms that

> "all extra expenses incurred in discharging such merchandise over heavy grain [was] to be paid by the charterers."

In exercise of this option the charterers shipped a cargo of other merchandise and the expenses incurred in discharging it exceeded those which would have been incurred in discharging either wheat, or maize, or rye. "Heavy grain" is a term used commercially to denote wheat, maize, and rye, and no other form of cereal.

The umpire found that the expense of discharging rye exceeded that of discharging either of the other descriptions of heavy grain, and he further found that substantially no rye had been shipped to St. Nazaire during a period of five years preceding the date of the charterparty. He held, however, that this fact was immaterial, and that the expense of discharging rye must be taken into consideration. The charterers had already paid all that was due from them on that footing, and he accordingly made an award in their favour.

Sir Robert Aske for the shipowners.—The charterparty must be construed with reference to the actual conditions prevailing at St. Nazaire. Rye must therefore

A be left out of account, and we are entitled to recover from the charterers the difference between the expenses actually incurred and those which would have been incurred in discharging a cargo of wheat or maize.

Willink for the charterers.—We are entitled to compare the actual cost of discharging the optional cargo with that of discharging rye, and therefore less is due than if the standard of comparison were limited to wheat and maize. The ship was B bound to carry rye to St. Nazaire if ordered to do so. The test is what expense the ship could have been made to bear at St. Nazaire apart from any question of optional cargo. Clearly that would include the expense of discharging rye. This follows from ROWLATT, J.'s decision in *Hain S.S. Co., Ltd.* v. *Louis Dreyfus & Co., Ltd.* (1).

Sir Robert Aske replied.

C

ACTON, J.—I am of opinion that this award is correct and can be upheld. The point which arises upon the award, stated in the form of a Special Case, is upon cl. 6 of the charterparty, which is in these terms:

> "Charterers have the option of shipping other lawful merchandise [certain articles being expressly excluded] in which case freight is to be paid on D steamer's dead weight capacity for wheat in bags on this voyage at the rate above agreed on . . . all extra expenses in discharging such merchandise over heavy grain to be paid by the charterers."

In the circumstances of this particular case the umpire was invited to attend to and to find certain facts which he accordingly has found in the special case, E saying that although he has done so at the request of the owners, he finds that those matters have no relevance in deciding the questions at issue between the parties.

In this proposition I find myself entirely in accord with him. The clause in question has been construed by ROWLATT, J., and the construction which he adopted in the case of *Hain S.S. Co., Ltd.* v. *Louis Dreyfus & Co., Ltd.* (1) has been adopted and followed by ROCHE, J., in *Atlantic Shipping and Trading Co., Ltd.* v. F *Bunge y Born* (2). The way ROWLATT, J., construed it is expressed in these words:

> "In my judgment the arbitrator has come to a correct decision here, because I think the clause simply means this, that the charterer is to relieve the ship of all the expenses of discharging incurred by the ship in excess of the expenses which the charterer could have caused the ship to have incurred by shipping heavy grain."

G The port to which this particular vessel was directed was the French port of St. Nazaire, and it appears that there is, in fact, very little import from overseas of rye into French ports, and that in fact for a period of a considerable number of years no rye, so far as is known, has been imported from overseas into the port of St. Nazaire, and therefore that substantially this is a port which does not deal with cargoes of rye shipped from overseas. It is said, there- H fore, that an implication arises and must be read into the contract, and into the clause in question of this contract, that for the purpose of estimating extra expenses of discharging over the expenses of discharging heavy grain, which admittedly includes rye as well as wheat and maize, regard must be had to what is the regular or habitual trade of the particular port to which the charterers directed the ship, or, at all events, if it be the fact that there is no trade for a I considerable number of years in a particular kind of grain, that kind of grain is to be excluded from consideration by virtue of this implication.

On the other hand, it is said that the ship was a ship which was prepared to carry cargoes consisting either wholly or in part of wheat or maize or rye, and accordingly under the contract was bound to discharge rye, if loaded, at any port within the prescribed limits indicated by the charterers to which they might direct the vessel. The charterers, it is said, are then given the option of taking cargoes of different kinds of merchandise—that is to say, other than maize or wheat or rye, on terms, the terms being that the charterers have to pay any extra expenses incurred by the shipment in excess of the primary obligation, which is an obligation to carry cargoes of heavy grain, which includes rye as well as wheat and maize. Therefore, it is said, and to my mind quite correctly said, that, having regard to the construction put on this clause by ROWLATT, J., and adopted by ROCHE, J., in order that the argument of Sir Robert Aske may prevail, it would be necessary to read in place of the words in the sentence I have read, "Expenses incurred in discharging such merchandise over heavy grain," the words, "Expenses which it would be likely might have been incurred by the ship having to carry heavy grain to the particular port to which it happens that the vessel is directed." It is conceded, and indeed it appears in the special case, that the shipowner has received all the excess of expenses over and above what would have been the expenses of discharging rye at the port of St. Nazaire, and it is therefore said that the umpire was perfectly right in saying that he has received all that he is entitled to.

In my view that opinion expressed by the umpire in the Special Case is quite correct. I think he was quite right also in saying that the facts to which his attention was drawn had no relevance in the construction of this contract, and therefore that the award must stand.

Solicitors: *Holman, Fenwick, & Willan*; *Richards & Butler.*

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

THE HUMOROUS. THE MABEL VERA

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bateson, J.), January 24, 25, 1933]

[Reported [1933] P. 109; 102 L.J.P. 45; 148 L.T. 501; 49 T.L.R. 259; 18 Asp.M.L.C. 373]

Ship—Mortgage—Extent of security—Fishing vessel—Nets on board and in store at time of mortgage and when mortgagee took possession—Nets taken on board after date of mortgage, but before mortgagee's possession.

The owners of the steam drifters *H.* and *M.V.* mortgaged the *H.* and her appurtenances in the statutory form in February, 1926, and on April 7, 1928, they mortgaged the *M.V.* and her appurtenances to the same mortgagees, also in the statutory form. In December, 1931, the mortgagees took possession of both vessels.

At the time of the mortgage, there were on board the *M.V.* a number of nets which had been bought for her use. At the time when the mortgagees took possession the nets on board were not identical with the nets which had been on board at the time of the mortgage. At the time of the mortgage, no nets were on board the *H.*, but nets were subsequently brought on board and were on board at the time when the mortgagees took possession. In both cases there were in store on shore nets marked with the appropriate numeral of each drifter, but these nets were available for use by the owners on whichever drifter they chose, or for hiring to other drifters.

Held: the nets on board at the time when the mortgagees took possession had been substituted for those on board at the time of the mortgage, and they, therefore, formed part of the mortgagee's security; the nets brought on board the *H.* after the mortgage did not form part of the mortgagee's security; and the fact that the stored nets were marked with the numeral of a particular drifter was not sufficient to show that they were appropriated thereto.

Notes. As to property included in a mortgage of a ship, see 23 HALSBURY'S LAWS (2nd Edn.) 295, para. 443, text and note (h); as to mortgage of a ship, see 30 ibid. 186, para. 327; and for cases on these subjects see 41 DIGEST 180, *203*, and ibid. 177 et seq., *169* et seq., respectively.

Cases referred to:

(1) *The Dundee* (1823), 1 Hag. Adm. 109; 166 E.R. 39; subsequent proceedings, sub nom. *Gale* v. *Laurie* (1826), 5 B. & C. 156; 41 Digest 162, *28*.

(2) *Armstrong & Co.* v. *McGregor & Co.*, 1875, 2 R. (Ct. of Sess.) 339; 12 Sc.L.R. 243; 41 Digest 171, *118 ii b*.

(3) *Re Salmon and Woods, Ex parte Gould* (1885), 2 Morr. 137; 41 Digest 180, *203*.

(4) *Hull Rope Co., Ltd.* v. *Adams* (1895), 65 L.J.Q.B. 114; 73 L.T. 446; 44 W.R. 108; 40 Sol. Jo. 69, D.C.; 41 Digest 185, *251*.

(5) *Coltman* v. *Chamberlain* (1890), 25 Q.B.D. 328; 59 L.J.Q.B. 563; 39 W.R. 12; 6 T.L.R. 359, D.C.; 41 Digest 181, *204*.

Mortgage Actions.

The plaintiffs, Messrs. Peacock & Co. (Lowestoft), Ltd., claimed under mortgages on the defendants' steam drifters *Humorous* and *Mabel Vera* declarations pronouncing for the validity of the mortgages, repayment of the sums advanced with arrears of interest, and a declaration that certain nets and fishing gear were comprised in the mortgage security. The actions were defended by the liquidator of the Hollinghurst Fishing Co., Ltd., the owners of the *Mabel Vera* and *Humorous*.

The Hollinghurst Fishing Co., Ltd., was formed in 1926, when they mortgaged the *Humorous* to the plaintiffs. At that time the company did not own any nets, and there were none belonging to them on board the *Humorous*. In 1928 they mortgaged the *Mabel Vera* to the plaintiffs. There were at that time certain nets on board the *Mabel Vera*. Subsequently the mortgagees took possession of the drifters. There were then certain nets on board the *Mabel Vera*, but these nets were not identical with those which were on board when the vessel was mortgaged. There were also at that time certain other nets and gear in store on shore which were marked with the port numbers of the *Mabel Vera* and the *Humorous*.

It was admitted that nets and fishing gear might form part of the appurtenances so as to be comprised in the mortgage security, but it was contended that in the circumstances the nets and gear in question were not so appropriated to the two drifters as to make them part of the mortgagee's security.

Bucknill, K.C., and *Willmer* for the plaintiffs, the mortgagees.

Raeburn, K.C., and *Holman* for the defendant, the liquidator of the mortgagor company.

BATESON, J.—These two cases have been tried together and the facts seem to me to be these. The company which owned the two vessels—the *Humorous* and the *Mabel Vera*—was formed in January, 1926, by Mr. George Breach, whose son, Mr. George A. Breach, gave evidence before me. Mr. Breach, the father, has died since the purchase of these vessels, but he apparently owned some fishing vessel, or vessels, and a quantity of nets. The father—Mr. Breach, senior—bought the *Humorous* in 1925. She was a drifter trawler, and had her trawl gear upon her, but no fishing nets for drifting purposes. She cost £2,240, and her number was L.T. 691. The company, when it was formed, owned no nets for drift fishing at all. The vessel was bought with the intention of turning her over to the company which was formed later—in January, 1926, and, in fact, very soon after she was purchased—namely, in February—she was mortgaged to the plaintiffs.

There has been a good deal of discussion as to whether, at the time of the mortgage, the vessel had any nets on board her at all, and whether such nets as she had were appropriated to her. She may have had some on board which belonged to Mr. Breach, the father, who had lent them, or hired them, to her for a possible net drift voyage about that time, but I am satisfied that she had no nets at all on her which belonged, or were appropriated, to the vessel. Therefore, the mortgage to the plaintiffs of the *Humorous* was only a mortgage which covered the vessel herself and her trawl gear, which was undoubtedly on board her, and I think that if the mortgagees had wanted to cover any nets at all they would have ascertained the facts before advancing their money—which they did not do.

The books have been referred to in the course of the case, and, as far as the evidence goes, the first nets that were bought by the company were bought on March 6, 1928. On March 14, 1928, the *Mabel Vera* was bought, and she was only a drifter. She was not a trawler drifter.

She was bought at auction for £1,600, without nets. On April 5 the company bought nets—some 220 secondhand nets—at a cost of £870, and they were marked, for some reason, "G.B.," the initials of Mr. Breach, the father. Of those nets 120 were stored and 100 were put on board the *Mabel Vera*, and I think that those nets were appropriated to the *Mabel Vera*. On April 7—that is, two days after Mr. Breach's nets were transferred—the mortgage for the *Mabel Vera* was made—the mortgages for both ships were in statutory form and covered 64/64th shares in the ship and her appurtenances, and I am satisfied that the *Mabel Vera* had 100 nets appropriated to her at the time of the mortgage.

Various nets were bought from time to time—new nets—as appears from the accounts that have been put in, and the number bought varied in the different years. In December, 1931, a liquidator for the company was appointed, on Dec. 14 the mortgagees took possession of the *Mabel Vera* and on Dec. 15 of the *Humorous*: they took possession of both vessels under their mortgages and they took the gear that they found on both of them and stored it in their store.

The gear that was found on board the two ships is set out in an inventory. In the case of the *Mabel Vera* (whose number was 1185) there were found ninety-three nets marked with the number 1185 with other gear attached to the vessel, including ropes and trunks—the latter marked with the number 1185—and also a number of warps. The buoys which she had on board were a miscellaneous lot, the most of them marked "H," which, I understand, represents the name of the company, because the company's name is the Hollinghurst Fishing Co., Ltd., and the few different odd ones had different marks, only one having the figure 1185 on it. It seems to be pretty clear that the *Mabel Vera* had her own nets and the company's buoys and trunks, and the other gear obviously appropriated to her.

The *Humorous*, on the other hand, had a miscellaneous lot. Her number was 691. She only had thirty-four nets with that number; she had twenty-four nets with the mark "G.B." (which indicated Mr. George Breach). Some were probably those which were purchased in April, 1928. There were twelve with the *Mabel Vera's* mark 1185. There were fourteen of another vessel called the *Kipper*, which belonged to Mr. George Breach, marked 1111; there was no mark on one. It seems to me pretty clear that the *Humorous* was furnished from the store which contained some of Mr. Breach's property and some of the Hollinghurst Co.'s property (Mr. Breach's property being realised after his death for the benefit of his estate), and her buoys bore the company's mark "H" mostly, but some were without any marks at all. Of course, there were the necessary warps and ropes which could not be marked. That supports the view that the *Humorous* was supplied from store with what she might want for any particular voyage, and that she had not any gear at all really appropriated to her. The mortgagees took possession of the two vessels: the *Mabel Vera* on the 14th and the *Humorous* on the 15th. Writs were issued on April 6, 1932, and the lists were obtained, which appear in the correspondence. Since then the gear has all been sold and has realised £162 in the case of the *Humorous* and £170 in the case of the *Mabel Vera*—these are round figures. In addition to this gear that was taken off the ship, there was a good deal of gear in the store—gear I gathered with all sorts of marks on it, and counsel for the mortgagees claims all gear that was on the ships when they were seized, as well as all gear with the specific mark of the particular ships which was in the store. I think he is entitled to the ships, and the gear that was on board in substitution of the gear that was there originally when the vessel was mortgaged.

A There is no doubt about the law in this case, because counsel on both sides have agreed that the real result of the cases is that the nets which can be said to be appropriated, and anything substituted and appropriated for maintaining the position of the original gear, passed under the mortgage as "ship or appurtenances." The cases that have been cited were *The Dundee* (1), *Gale* v. *Laurie* (1), *Armstrong* v. *McGregor* (2), and *Salmon and Woods* (3); I have been furnished with a
B transcript of the judgments, which is more extensive than the actual report, in *Hull Rope Co.* v. *Adams* (4) and *Coltman* v. *Chamberlain* (5).

Although the marking of a lot of this gear has the same number as have the ships, I think that the real effect of the evidence is that they marked indiscriminately when they were renewing some gear on one ship or some gear on another ship the number of that particular ship with the gear attached. It did
C not necessarily mean that that gear was to go to that ship, because very often one ship wants particular gear and another ship wants other gear, and it does not follow in the least that that gear is earmarked specially to that ship.

In the case of the *Humorous* I am satisfied that she took what she got out of the general store from time to time—that is to say, she was given out of the general store from time to time what she required, without anything really being appro-
D priated specially to her. I think in the case of the *Mabel Vera* it was rather different. She had a better master, who looked after things better; and, I dare say, the master kept his eye on his own particular gear; but, inasmuch as in the case of the *Humorous* she never had any nets appropriated to her at the time when the mortgage was entered into, I do not see, even if there was any appropriation of any special gear to her, how that would pass under a mortgage made before the
E gear was ever allotted to her; nor do I see how you can mortgage property which does not belong to you or that you have not got. So that that disposes of the claim with regard to the *Humorous*.

With regard to the *Mabel Vera*, I think things are quite different. She had, at the time of the mortgage, a set of nets of 100 on board her which were meant for her—which had been bought for her. What she had when she was taken possession
F of by the mortgagees were merely nets in substitution for those nets, and, therefore, they pass under the mortgage. What was in the store I think did not belong to any particular ship and could be given out to whichever ship the mortgagors chose or could be hired out to any other ship. What the quantity was in the store I am not so sure about, but it is said that there were 252 nets belonging to, or marked for, the *Mabel Vera*, and 102 for the *Humorous*—again pointing to the fact that the
G *Humorous* was not by any means a fully-equipped drifter vessel even if they all were appropriated to her—but I do not think that they were.

In addition to those nets there were a good many others with altogether different marks, so that it is quite obvious the company had a great deal more gear than was necessary for two ships. The truth is the company owned ships and they owned nets and gear, and what they mortgaged were the ships, and only such
H appurtenances as were actually appropriated to the ships.

That leaves this position, that anything in store did not belong specially, i.e., was not appropriated, to any particular vessel, and, therefore, the mortgagees fail upon that point.

I *Judgment for the plaintiffs pronouncing for the validity of the mortgages on the* Mabel Vera *and the* Humorous *for the sum of £2,706, and for appraisement and sale, and for the further sum of £177 18s. 6d. under the mortgage on the* Mabel Vera *in respect of the value of her gear on board, which had already been sold.*

Solicitors: *Botterell & Roche*, for *Norton, Peskett, & Forward*, Lowestoft; *Pritchard & Sons*, for *Wiltshire, Sons, & Jordan*, Lowestoft.

[*Reported by* GEOFFREY HUTCHINSON, ESQ., *Barrister-at-Law.*]

SOUTHERN (INSPECTOR OF TAXES) *v.* A.B.
SOUTHERN (INSPECTOR OF TAXES) *v.* A.B., LTD.

[KING'S BENCH DIVISION (Finlay, J.), February 1, 1933]

[Reported [1933] 1 K.B. 713; 102 L.J.K.B. 294; 149 L.T. 22;
49 T.L.R. 222; 77 Sol. Jo. 139; 18 Tax Cas. 59]

Income Tax—Bookmaker—Illegal betting—Liability of profits to tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sched. D, Case I.*

For many years A.B. had carried on a bookmaking business, but from 1926 he restricted his personal business to street betting. From 1926 ready money betting was carried on by A.B., Ltd. Both A.B. and A.B., Ltd., made large profits and were assessed to income tax under the Income Tax Act, 1918, Sched. D. Both appealed against the assessments, and the question of liability was argued on the footing that no part of the business done by either was lawful. Thirty-five convictions of unlawful betting had been recorded against A.B. and his employees.

Held: the profits both of A.B. and A.B., Ltd., were liable to assessment to income tax because they were annual profits or gains arising or accruing from a trade within Case I of Sched. D, and the illegality of the trade did not preclude such assessment.

Mann v. *Nash* (1), [1932] 1 K.B. 752, applied.

Notes. Schedule D to the Income Tax Act, 1918, was replaced by Part 5 of the Income Tax Act, 1952.

As to income tax in respect of illegal and gambling transactions, see 20 HALSBURY'S LAWS (3rd Edn.) 121, para. 214; and for cases on the subject see DIGEST Supp., tit. Income Tax. For the Income Tax Act, 1952, Part 5, see 31 HALSBURY'S STATUTES (2nd Edn.) 112.

Cases referred to:

(1) *Mann* v. *Nash*, [1932] 1 K.B. 752; 101 L.J.K.B. 270; 147 L.T. 154; 48 T.L.R. 287; 76 Sol. Jo. 201; 16 Tax Cas. 523; Digest Supp.

(2) *Lindsay* v. *I.R. Comrs.*, 1933 S.C. 33; 18 Tax Cas. 43; Digest Supp.

(3) *Hayes* v. *Duggan*, [1929] I.R. 406; Digest Supp.

(4) *Minister of Finance* v. *Smith*, [1927] A.C. 193; 95 L.J.P.C. 193; sub nom. *Canadian Minister of Finance* v. *Smith*, 136 L.T. 175; 42 T.L.R. 734; 70 Sol. Jo. 941, P.C.; Digest Supp.

Case Stated by the Special Commissioners of Income Tax under the Income Tax Act, 1918, s. 149, for the opinion of the King's Bench Division of the High Court of Justice.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, held at York House, Kingsway, London, on Feb. 18, 1932, A.B. appealed against assessments made on him under Sched. D of the Income Tax Acts in the sums set out below for the years stated:

For the year ended April 5, 1928, in the sum of £8,831
,, ,, ,, ,, ,, 1930, ,, ,, ,, ,, ,, £3,087
,, ,, ,, ,, ,, 1931, ,, ,, ,, ,, ,, £900
,, ,, ,, ,, ,, 1932, ,, ,, ,, ,, ,, £1,000

Before 1926 A.B. had carried on a business as a bookmaker for many years. His business consisted of credit betting, ready money betting and street betting. In that year the company of A.B., Ltd., was formed, and it had since carried on the ready money betting. Similarly, since that year the credit bookmaking (which was on a large scale) had been carried on by another company which was also formed at the same time under the name of A., Ltd. The street betting, however, had continued to be carried on by A.B. personally, and this was the only kind of betting carried on by him since 1926.

The following information was given to the commissioners as to the course of the street betting, which consisted of betting on horses. Betting touts were employed, and they had pitches in the streets, where they received slips and money. Just before the races, a runner fetched the money and the slips to an office, where the winners' names were made out and the amounts won. The winnings were then duly distributed. Many agents were employed by A.B. A ledger account was kept against each agent, and the method of keeping this account was explained to the commissioners. No credit betting was allowed or was done. Any fines imposed on agents were paid for them by A.B. It was necessary constantly to change the office at which the books were made up in order to prevent interference by the police. Everybody connected with the business was liable to be fined and a schedule showing some thirty-five convictions of A.B. and his employees in divers courts of the realm was put in evidence before the commissioners.

At the same meeting of the commissioners, A.B., Ltd. (hereinafter called the company), appealed against an assessment made on them under Sched. D of the Income Tax Acts in the sum of £25,000 for the year ending April 5, 1932, as "turf commission agents." The following information was given to the commissioners as to the course of the company's business: (i) In response to any inquiries a letter in the following terms was usually issued:

> "A.B., Ltd.—Dear Sir,—We have to thank you for your inquiry, and have pleasure in enclosing herewith coupons, &c., for your perusal. The outstanding feature of our business is daily settlement and winnings by return of post. Commissions are accepted from 1s. up to any amount. Credit business can only be accepted after we have received and approved your references. Trusting to be favoured with your business, and assuring you of our best attention at all times.—Yours faithfully, for and on behalf of A.B., Ltd.—A.B., governing director."

As a matter of fact, the whole of the betting carried on by the company was that of ready money betting, and a considerable part of it was concerned with football matches. Letters from persons who applied to the company desiring to carry on credit betting were referred to be dealt with by A., Ltd. The accounts of the company for the year ending Oct. 31, 1930, were produced to the commissioners and showed a profit of £10,522 19s. 2d.

On behalf of A.B. and the company it was contended that the activities hereinbefore described did not constitute a trade carried on in the United Kingdom within the meaning of the Income Tax Acts, that the balance of receipts over outgoings therefrom were not profits or gains within the said Acts, and that the assessment should be discharged.

It was contended on behalf of the inspector of taxes:

1. That the activities of A.B. and the company hereinbefore described constituted the carrying on of a trade, adventure, or concern of the nature of trade.

2. That the surplus of the receipts of A.B. and the company from the said activities over the expenses incurred in earning those receipts were profits or gains assessable to income tax.

3. That the company having been registered under the Companies Acts could not be heard to say that it was formed to carry on, or that it was in fact carrying on, an activity which was criminal.

4. That the fact (if it were the fact) that the activities carried on by A.B. and the company were a breach of the criminal law, or were otherwise unlawful, did not prevent those activities being a trade, or the surplus arising therefrom being profits or gains assessable to income tax.

5. That the assessment was correct in principle and, subject to any necessary adjustment of figures, should be confirmed.

The commissioners who heard the appeal decided to discharge the assessments. They gave their reasons as follows:

> "In previous cases which had been brought before the Special Commissioners, a lawful business had been mixed up with an unlawful one, and the Special Commissioners had not felt called on to disentangle from assessment so much as might be unlawful and criminal. The present case, however, was conducted before us on the footing that no part of the business done by A.B. and the company was lawful betting, and that, in fact, his activities were, in the eye of the law, criminal. This was not disputed by the representative of the Crown, and we are bound to record it as a fact, even if under the rules of pleading A.B. and the company are unable to plead it. Whilst it was not for us to comment on the effect of non-enforcement of the laws relating to betting by the proper authorities, we did not consider that the Revenue could lawfully claim income tax on the profits made as a result of such non-enforcement. We did not accordingly attempt to lay down any rule as to how the expenses of the business in employing runners and agents and paying the fines imposed on them should be dealt with. We accordingly discharged the assessments. This decision was given on the day of the hearing."

Immediately the commissioners so determining the appeal, the inspector of taxes expressed to them his dissatisfaction therewith as being erroneous in point of law, and in due course required them to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 149.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *Reginald P. Hills* for the Crown.

A. M. Latter, K.C., *A. Anderson*, and *C. L. King* for the taxpayers.

FINLAY, J.—These two cases, which have been argued together, raise questions no doubt of much importance, and questions which must be regarded as questions of some difficulty, as is shown by the fact that there has been considerable difference of opinion expressed by various judges before whom these matters have come. But, so far as I am concerned, I am prepared to give judgment at once, and I think I am relieved from making any very detailed examination of the matters by reason of the circumstances that there is a decision of ROWLATT, J., in *Mann* v. *Nash* (1), which shows quite clearly that ROWLATT, J., would have decided the present case in favour of the Crown. I say that because, while the facts in that case were very different from those in the present cases, the principles which ROWLATT, J., there lays down quite indubitably cover the present cases. I should not think it right to depart from a judgment of ROWLATT, J., expressed obviously with fullness and with care; in any event I should follow it; but I agree with it. While I myself shall discuss the cases shortly, I am relieved at least from any review of the authorities by reason of the fact that ROWLATT, J., in *Mann* v. *Nash* (1) discussed the various cases up to that date. The Scottish case *Lindsay* v. *I.R. Comrs.* (2) appears to me to support the conclusion at which I have arrived, viz., that in these two cases the decisions arrived at by the Special Commissioners are wrong and that the appeals of the Crown accordingly succeed.

The matter arises on two Cases Stated. In the first Case the appellant is an inspector of taxes, and the respondent is an individual called A.B. In the second Case the inspector of taxes is the appellant and a company called A.B., Ltd., is the respondent. The names have, in this case, not been disclosed, because an order was made by a judge of the High Court saying that the names need not be disclosed.

A.B., Ltd., appealed against an assessment in the sum of £25,000 made on them as turf commission agents. The company was formed in 1926. Before that date A.B., an individual, had carried on for many years a business as a bookmaker, and his business consisted of credit betting, ready money betting, and street betting. Since the company's formation, it has carried on the ready money betting; the street betting has continued to be carried on by A.B. personally, and another company has carried on the credit bookmaking. Both the street betting—that is the part carried on by A.B.—and the ready money betting—that is the part carried on by A.B., Ltd.—are on a large scale, and it appears, though it does not in the least matter, that a good deal of the betting is on football matches. There is set out in the case a good deal of detail with reference to the manner in which the company carries on the business. I do not think it is material to go into detail. The accounts of the company for the year ended Oct. 31, 1930, were produced, and a précis of them is included in the case; they show a large business carried on, and large profits. Again I think it is unnecessary to go into details, but a net profit balance, carried to balance-sheet, is shown of £10,522 19s. 2d.

The evidence does not appear to be of very great importance. The only point is that the company kept no books at all for credit betting, and had never accepted a credit bet except, they say, on one or two occasions, when it was supposed that a bet was being made by a police officer, for detection purposes. The various provisions of the legislation with reference to betting—difficult and confusing legislation it often is—are referred to in para. 6. It is sufficient to say that it was not questioned, and the case was on both sides argued before me as it obviously had been argued before the commissioners, on the basis that ready money betting and, therefore, the business carried on by this company, was unlawful. That is the position with regard to the case of A.B., Ltd. It is desirable to refer, quite briefly, to the case as to A.B., though the point is really the same there. A.B. was an individual, and he had for a long time carried on a large business as a bookmaker. Then, in 1926, A.B., Ltd., was formed, and also another company, A., Ltd., which took over the credit bookmaking. There was, therefore, A.B., Ltd., doing the ready money betting, illegally; A., Ltd., doing the credit bookmaking, which I assume to be legal; and there remained A.B. himself, who personally continued in business and who did the street betting. A certain amount of information with regard to street betting is set out in para. 2 of the Case; it is explained that "betting touts were employed, and they had pitches in the streets where they received slips and money. Just before the races, a runner fetched the money and the slips to an office, where the winners' names were made out and the amounts won. The winnings were then duly distributed. Many agents were employed by A.B. A ledger account was kept against each agent, and the method of keeping the account was explained to the commissioners. No credit betting was allowed or was done. Any fines imposed on agents were paid for them by A.B. It was necessary constantly to change the office at which the books were made up in order to prevent interference by the police. Everybody connected with the business was liable to be fined, and a schedule showing some thirty-five convictions of A.B. and his employees in divers courts of the realm was put in evidence before the commissioners." There is the same summary of the law as in the case of A.B., Ltd., and the contentions of the parties are set out.

The commissioners in both these cases arrived at a conclusion in favour of the taxpayer. They discharged the assessments, and it is desirable to read what they said:

> "In previous cases which had been brought before the Special Commissioners a lawful business had been mixed up with an unlawful one, and the Special Commissioners had not felt called on to disentangle from assessment so much as might be unlawful and criminal. The present case, however, was conducted before us on the footing that no part of the business done by the company was lawful betting, and that, in fact, its activities were, in the eye of the law, criminal. This was not disputed by the representative of the Crown, and we are bound to record it as a fact, even if under the rules of pleading the company is unable to plead it. Whilst it was not for us to comment on the effect of non-enforcement of the laws relating to betting by the proper

> authorities, we did not consider that the revenue could lawfully claim income tax on the profits made as the result of such non-enforcement. We did not, accordingly, attempt to lay down any rules as to how the expenses of the business in keeping an office and advertising should be dealt with. We accordingly discharged the assessment.' ' A

The question is whether that is right, and it depends, to my mind, simply on whether on the facts here there are annual profits or gains arising or accruing to B any person residing in the United Kingdom from any trade, profession, employment or vocation. That is the question, and if once one finds a trade, profession, employment or vocation, and finds profits derived from that, then, at once, the tax is leviable, unless, of course, the taxpayer brings himself within some special exception which the legislature may have made. The question here, therefore, is, are there profits derived from a trade? I refrain from reviewing the cases prior C to the decision given by ROWLATT, J., in *Mann* v. *Nash* (1). I have already said that I agree with the view which ROWLATT, J., took of this matter in *Mann* v. *Nash* (1). With regard to the Irish case, *Hayes* v. *Duggan* (3), no doubt that decision was, as ROWLATT, J., pointed out, inconsistent with the view which ROWLATT, J., took. While one looks with respect at the view of the Irish court, I am not bound, as ROWLATT, J., was not bound, by it. I prefer the view adopted by D ROWLATT, J., and I do not follow the decision in the Irish court. My view is that ROWLATT, J., was right, and was right in dissenting, as he did dissent, from the reasoning of the Irish court.

The only case to which, having regard to what I have said, I need refer, is *Lindsay* v. *I.R. Comrs.* (2), decided by the First Division of the Court of Session on Nov. 18, 1932. In substance there, there was a bootlegging partnership. Three E persons joined together to get whisky into the United States, and to get it in by a breach of the laws both of this country and of the United States. I do not think it is to the point to say, though it is true, that the sale of whisky is a perfectly proper and respectable trade, but the particular trade or adventure on which these men were engaged was undoubtedly illegal, because it involved the introduction, by illegal means, of whisky into the United States. In these circumstances it was F held that an assessment could properly be made on the profits. The Lord President, LORD CLYDE, says, in a passage which was referred to:

> "It is plain enough, I think, that the profits of crime could not be assessable to income tax as the profits of trade. If—to take an example—the mode of living followed by an individual consisted in nothing—or practically nothing—but the commission of the crime of selling stolen goods, it might be difficult G to say that the profits were assessable to income tax as the profits of 'trade' within the meaning of the Act of 1918. I am offering no opinion on the point. I am only saying that such a case would, in the unlikely event of its occurring, present the difficulty in an acute form."

The illustration of the burglar—which is an extreme illustration, but extreme H illustrations are sometimes useful—was taken. I express no opinion on a case which is quite unlike the case which is before me, but if the burglar does not come within the purview of the Income Tax Acts it is because what he does is not the carrying on a trade within Case I of Sched. D to the Income Tax Act, 1918, and it is not because, carrying on a trade within Case I, he is taken out by some considerations of morals or anything of that sort; the question always is, I think, a I short question of construction: is there a trade—I use "trade" compendiously; trade, or the other words referred to—carried on within the meaning of Case I? LORD SANDS refers to a dictum of LORD HALDANE in *Minister of Finance* v. *Smith* (4) ([1927] A.C. at p. 197). The observations made by LORD HALDANE in delivering the opinion of the Privy Council in *Minister of Finance* v. *Smith* (4) seem to be in accord with the view I am taking. LORD SANDS says:

> "I respectfully adopt the dictum of LORD HALDANE, in delivering the judgment of the Privy Council in the case of Smith, that once the character of a business

has been ascertained as being of the nature of trade, the person who carries it on cannot found upon elements of illegality to avoid the tax."

LORD MORISON's opinion, I think, was substantially to the same effect. He points out:

> "The burglar and the swindler, who carry on a trade or business for profit, are as liable to tax as an honest business man, and, in addition, they get their deserts elsewhere."

That is the position of the authorities. They are not consistent; it is useless to pretend that they are; but I am, in giving my decision, following the decision of ROWLATT, J., in *Mann* v. *Nash* (1). One has then to look at the facts of the case. It was pointed out to me by counsel for the taxpayers that there is no actual finding of the commissioners with regard to trade, and they use the word "business," but I think, when the facts in both cases are looked at, they are all one way, and it seems to me to be perfectly clear—and I think the commissioners must have in effect so found—that there was a business carried on, a systematic business, profits derived from that systematic business, and that the business was a trade, unless it was prevented from being a trade by reason of the fact that it was illegal. That is the proper way to look at the facts of the cases and at the findings of the commissioners on them. If that is right, what one has really to consider is simply whether there is anything to prevent that which appears to be a systematic trade from being a trade. It is said that it is not a trade because of its illegality, and counsel for the taxpayers referred to several other Acts—he did not go into them in detail or look at their precise words—where, in connection with carriages and motor cars and other things of that sort exemptions are given in respect of vehicles used for trade. A great deal of what counsel said with reference to them and with reference to the decisions which will probably arise if the questions which he adumbrated are raised was probably quite right, but I do not think it is necessary to go into those other Acts or to go beyond the Income Tax Act. When one looks at the Income Tax Act, and when one looks at the facts in these cases, I can only say that I think on the facts of these cases, as the First Division in Scotland thought on the facts in *Lindsay* v. *I.R. Comrs.* (2), that here there is both by A.B., Ltd., and by A.B. a carrying on of a trade and profits derived by the carrying on of the trade. I arrive at that conclusion on the construction of the Income Tax Acts, and applying that construction to the facts as they are found in the two cases before me, and I arrive at it following *Mann* v. *Nash* (1).

On these grounds both these appeals will be allowed.

Solicitors: *Solicitor of Inland Revenue*; *Butcher & Simon Burns.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

BRITISH PHOTOMATON TRADING CO., LTD. *v.* HENRY PLAYFAIR, LTD.

[KING'S BENCH DIVISION (MacKinnon, J.), April 5, 6, 1933]

[Reported [1933] 2 K.B. 508; 102 L.J.K.B. 562; 149 L.T. 256; 49 T.L.R. 439]

Income Tax—Deduction of tax—Tax paid by sub-tenant—Rent paid by intermediate landlord to head landlord without deduction of tax—Rent subsequently paid by sub-tenant to intermediate landlord with tax deducted—No further payment of rent by intermediate landlord from which deduction could be made—Right of intermediate landlord against head landlord to repayment of amount deducted by sub-tenant—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 211 (2), *Sched. A*, *No.* 8, *r.* 4 (1).

The right, conferred on an intermediate landlord by Sched. A, No. 8, r. 4, of the Income Tax Act, 1918, to deduct from any annual sum payable to the head landlord the amount deducted by a sub-tenant from his rent in respect of income tax payable under Sched. A, can only be exercised on the occasion of a payment of such annual sum to the head landlord.

Where, therefore, the sub-tenant paid his rent, less the deduction, to the intermediate landlord after the last payment of rent reserved by the head-lease, when, consequently, there was no further annual sum from which the intermediate landlord could make the deduction,

Held: (i) there was no statutory provision by which the intermediate landlord could recover from the head landlord the amount of tax deducted by the sub-tenant.

Hill v. *Kirschenstein* (1), [1920] 3 K.B. 556, applied.

(ii) on the facts and evidence, the amount of the deduction could not be recovered from the head landlord as money paid under a mistake of fact.

Notes. The Income Tax Act, 1918, Sched. A, No. 8, r. 1 and r. 4, were replaced by the Income Tax Act, 1952, s. 173 and s. 174, respectively.

As to deduction of tax from subsequent payments of rent, see 20 HALSBURY'S LAWS (3rd Edn.) 81, para. 135; and for cases on the subject see 31 DIGEST 319, *4550* et seq. For the Income Tax Act, 1952, ss. 173, 174, see 31 HALSBURY'S STATUTES (2nd Edn.) 169, 171.

Case referred to:

(1) *Hill* v. *Kirschenstein*, [1920] 3 K.B. 556; 89 L.J.K.B. 1128; 123 L.T. 766; 36 T.L.R. 716; 64 Sol. Jo. 584, C.A.; 31 Digest (Repl.) 318, *4541*.

Action in which the plaintiffs sought to recover from the defendants £243 9s. in respect of an assessment to income tax, under Sched. A of the Income Tax Act, 1918, of certain premises, No. 39A, Market Street, Manchester. The premises in question had been let by the defendants, by a lease dated Dec. 23, 1924, to one Harry Smith for a term of years ending (in the events which had happened) on Dec. 31, 1931, at a rent of £2,500 a year payable half-yearly in advance.

By an assignment dated April 23, 1925, Harry Smith assigned his interest in the premises to Photomaton Parent Corpn., Ltd., and by an assignment dated Sept. 20, 1928, that company assigned their interest to Photomaton (Lancashire and Midland), Ltd. (hereinafter called the Lancashire company). By a sub-lease dated April 30, 1929, the Lancashire company sub-let part of the premises to one Morris Feather for a term ending on Dec. 23, 1931, at a rent of £1,350 a year payable half-yearly in advance. At all material dates Morris Feather was in occupation of the premises. By an assignment dated April 30, 1930, the Lancashire company assigned their interest to the plaintiffs as from Nov. 1, 1929. On April 10, 1931, the plaintiffs went into voluntary liquidation.

On or about Jan. 1, 1931, an assessment to income tax on the premises for the year ending April 5, 1931, was raised under Sched. A of the Income Tax Act, 1918, in the sum of £243 9s. On June 23, 1931, Morris Feather paid the said sum of £243 9s. to the collector of taxes. On June 24, 1931, the plaintiffs paid to the defendants the half-year's rent then due without deducting anything in respect of income tax. On July 1, 1931, Feather paid to the plaintiffs the half-year's rent due from him, deducting therefrom, as he was entitled to do, the sum of £243 9s. paid by him for income tax. The rent paid by the plaintiffs on June 24, 1931, was the last amount of rent payable under the lease, which ended in December of that year, and the plaintiffs were therefore never in a position to deduct the tax from any payment of rent. In this action they claimed to be repaid the said sum of £243 9s., relying on the Income Tax Act, 1918, s. 211 (2), and the Finance (No. 2) Act, 1931, Sched. III, para. 3, and alternatively they claimed that sum as money paid under a mistake of fact.

The Income Tax Act, 1918, Sched. A, No. 8, r. 1, provides:

> "A tenant occupier of any lands . . . who pays the tax shall be entitled to deduct and retain in respect of the rent payable to the landlord . . . an amount representing the rate . . . of tax in force . . ., the said deduction to be made out of the first payment thereafter made on account of rent . . ."

Schedule A, No. 8, r. 4 (1), provides:

> "Where any lands . . . are subject to the payment of any annual sum . . ., a landlord who has been charged to tax under this schedule or from whom tax is deductible under this rule or r. 1 or r. 3, shall be entitled on making such payment to deduct and retain thereout so much of the said tax as represents the rate of income tax in force during the period through which the said payment was accruing due . . ."

Schedule A, No. 8, r. 4, second proviso, provides:

> "Provided also that no such person as aforesaid who is also a tenant or the occupier of the lands . . . shall be entitled to deduct out of any rent any greater sum than the amount of tax charged in respect of any such property and actually paid by him."

Section 211 (2) provides:

> "Any person liable to pay any rent interest or annuity, or to make any other annual payment, shall be authorised to make any deduction on account of tax for any year of assessment which he has failed to make previously to the passing of the Act imposing the tax for that year, or to make up any deficiency in any such deduction which has been so made, on the occasion of the next payment of the rent, interest or annuity, or making of the other annual payment after the passing of the Act so imposing the tax, in addition to any other deduction which he may be by law authorised to make, and shall also be entitled, if there is no future payment from which the deduction may be made, to recover the sum which might have been deducted as if it were a debt due from the person as against whom the deduction could originally have been made if the Act imposing the tax for the year had been in force."

The Finance (No. 2) Act, 1931, Sched. 3, para. 3, provides:

> ". . . s. 211 of the Income Tax Act, 1918 . . . shall apply as if—(a) this Act were the Act imposing the tax for the year and (b) a reference to Oct. 15, 1931, were, so far as relates to any deficiency in the amount of tax deducted from any payment made after the passing of this Act but before the date aforesaid, substituted for any reference to the passing of the Act imposing the tax for the year: . . ."

Millard Tucker, K.C., and *Wilfrid Price* for the plaintiffs.

Evershed, K.C., and *J. H. Bowe* for the defendants.

MACKINNON, J.—The facts which give rise to this dispute are shortly as follows. In December, 1924, the defendants granted a lease to one Harry Smith of premises called 39A, Market Street, Manchester, at a rental of about £2,500 a year, payable half-yearly in June and December, that lease to expire on Dec. 25, 1931. A In April, 1928, Smith, the lessee, assigned his interest under the lease to a company called the Photomaton Parent Corpn., Ltd. In September, 1928, Photomaton Parent Corpn., Ltd., in turn assigned their interest under the lease to a company called Photomaton (Lancashire and Midland), Ltd., and on April 30, 1929, the Lancashire company sub-let part of the premises to a man named Morris Feather, who was apparently carrying on business as Louis Nicholas. That sub-lease by B the Lancashire company to Feather was, as I understand it, at the same rental and payable at the same times as the lease from the defendants to Smith, and was terminable on Dec. 23, 1931, two days before the expiration of the head-lease.

In April, 1930, the Lancashire company went into voluntary liquidation because the present plaintiff company was formed to take over their business, and as a result of that arrangement on April 30, 1930, the Lancashire company assigned to C the plaintiffs the lease of December, 1924, granted by the defendants to Smith, such assignment being, of course, subject to the sub-lease to Feather. And there was on those premises an assessment to income tax under Sched A. At earlier dates the defendants paid the income tax under Sched. A on those premises, and did not enter on the alternative machinery under the Act of allowing the income tax to be paid by the occupying tenant, who would deduct it from his rent payable D to the defendants, or from his rent payable to his mesne landlord. And, as I understand, at any rate in the earlier times of Feather's tenancy, the defendants were paying this Sched. A income tax. Then, on July 15, 1929, the defendants wrote to the inspector of taxes for the district of Manchester, in regard to 39A, Market Street, Manchester, saying:

> "We are advised that we are entitled to apply to you for the Sched. A tax to E be made upon the occupiers of the premises and not upon us direct, and we shall be glad to hear that for the future it will be possible for you to adopt this procedure."

The inspector of taxes, on Oct. 5, replied to inform the defendants that

> "in future application will be made direct to the occupiers of the above property F for the Sched. A tax."

In January, 1931, as a result of that, application was no doubt made to Feather to pay the Sched. A income tax payable by the defendants, strictly, I suppose, on Jan. 1—or some part of it on Jan. 1. It is possibly material to note that Feather reported that fact not to the plaintiffs, but to one of the Photomaton companies, because on Jan. 12, 1931, Feather wrote to the assistant accountant of Photomaton G Parent Corpn., Ltd., saying:

> "I have been served with a notice by the assessor for two payments of Sched. A. This has previously been paid by the landlord, but for some reason best known to himself, he refuses to deal with it, and insists upon my paying it, and, as the tenant, I have no other course open for me but to do so."

H

Feather apparently paid his rent due in December, 1930, but, of course, he did not deduct any income tax on that occasion because he had not yet paid any. And in January, 1931, as appears from the letter of Jan. 27, 1931, Mr. Shepherd, who was the liquidator of the Lancashire company, sent his cheque to the defendants for the full amount of rent. Now, as I have said, this assessment under Sched. A had been apparently served on Mr. Feather in January, 1931. He did not pay it I then. The whole amount was £243 9s. It appears that on Jan. 27, 1931, he paid £50 on account in respect of income tax for the year ending April 5, 1931; and on May 4, 1931, in respect of that same liability, he paid the balance, £193 9s., in respect of Sched. A income tax from 1930–1931. By May 4, Mr. Feather had paid £243 9s. In June, Mr. Feather was required to pay his half-year's rent of about £1,300, and the plaintiffs were liable under their lease to pay the same sum to the defendants as their rent. Mr. Feather, when he paid his rent, was entitled under the Income Tax Acts to deduct the £243 9s. that he had paid for income tax, and if Mr. Feather paid his rent with that deduction the plaintiffs would have been similarly entitled under the provisions of the Income Tax Acts to make the same deduction of £243 9s. from the amount which they paid to the defendants.

The plaintiffs had gone into liquidation on April 10, 1931, and Mr. Spencer, of Messrs. Price, Waterhouse & Co., had been appointed liquidator. One of the obligations of the company to be discharged by the liquidator was to pay the rent for which they were liable to the defendants under this lease. The liquidator very properly was minded to pay the rent when it was due on June 24. In fact he did not pay it himself. The position was that Mr. Shepherd, as liquidator of the Lancashire company, all of whose assets the plaintiffs were originally entitled to take over, had retained certain moneys in the possession of the Lancashire company, under the view that in respect of certain liabilities, including this one for the rent, he, as liquidator for the Lancashire company, was personally liable; and Mr. Spencer apparently agreed that he should retain those moneys to discharge those liabilities and pay over to him, Mr. Spencer, the balance remaining after he had done so. So far, therefore, as the payment of rent under this lease to the defendants, due in June, 1931, was made, it was paid by Mr. Shepherd, as liquidator of the Lancashire company, either in respect of the liability of the Lancashire company or of himself as liquidator of the Lancashire company or as agent for Mr. Spencer, as liquidator of the plaintiffs. Just before the rent was due on June 24, Mr. Spencer had written to Mr. Shepherd and asked him to pay the rent due for 39A, Market Street. Mr. Feather, of course, was liable to pay his rent to the plaintiffs at the same time, but unfortunately he did not do so. If he had done so he could have deducted the £243 9s., and Mr. Shepherd, or Mr. Spencer, mindful of that fact, would in turn have deducted the £243 9s. from what they paid to the defendants. But on June 23 Mr. Shepherd wrote to the defendants, saying:

> "We thank you for your letter of the 18th inst., enclosing debit note for rent of premises 39A and 41A, Market Street, Manchester. We enclose cheque value £1,297 10s. to cover the rent due, and will arrange to let you have a further remittance to cover the moiety of insurance when Mr. Shepherd returns from his vacation."

That balance was paid.

On July 10, 1931, Mr. Feather paid his rent to the plaintiffs, and he, as he was entitled to do, deducted the £243 9s. Thereupon, Mr. Shepherd wrote to the defendants:

> "I have received the enclosed papers respecting income tax Sched. A on the above premises from the liquidator of the British Photomaton Trading Co. Ltd., who points out that the sub-tenant to the trading company [Mr. Feather] has paid income tax Sched. A in respect of the year 1930–1931 amounting to £243 9s., which amount has been deducted from the rent paid. As this would appear to be your liability as superior landlord, and as I have paid the full amount of rent due on the 23rd ult., I shall be obliged if you will kindly let me have your remittance to cover in due course."

To that the defendants replied:

> "We note the deduction by Messrs. Russell Bros. [i.e., Mr. Feather] of the amount of £243 9s. . . . which it will be in order for you to deduct from the next payment of rent due."

And, of course, if this lease had extended beyond the date when it was to expire in December, 1931, so that there would be a next payment of rent, that answer was perfectly accurate, and would have met the situation. But, as Mr. Shepherd pointed out in his reply of July 13:

> "I am afraid I do not understand this, inasmuch as the final payment of rent was made to you on June 23, 1931. Under the circumstances, I shall be pleased if you will forward to me (acting on behalf of the British Photomaton Trading Co., Ltd.) your cheque to cover this amount of £243 9s."

Then the defendants handed that letter to their solicitors, who replied:

> "In reply to your second paragraph, Sched. A tax is only recoverable from a landlord by deduction on making payment of rent after payment or allowance of the tax. If there is no more rent to pay there is nothing from which to deduct the tax. It is well settled that a tenant who pays rent without making the deduction cannot afterwards recover back the money from the landlord."

An effort was then made on the part of the liquidator to represent that the defendants were taking advantage of an extreme technicality, that this money had been paid when it was not owing, and they ought to pay back the money. On Aug. 6 the solicitors for the plaintiffs, or for the liquidator, wrote:

> "We shall be glad to hear that your clients are refunding the £243 9s. which was obviously paid to them in error and which has resulted in their receiving £243 9s. more than the amount to which they are entitled, or to put it another way, in our client's paying a tax which is the responsibility of your clients."

That was declined, and as a result this action was brought to recover £243 9s. I perhaps ought to say that counsel for the defendants agrees as between ordinary people, if everybody was solvent, this would be a rather scandalous defence. But he says that by reason of the loss that the defendants have sustained, and by reason of the bankruptcy of these various Photomaton companies, they feel that they need not behave as perhaps they would with gentlemen who were all solvent, and they proposed to stick to this money if the law allowed them to do so. The result is this: This is a sum of money which represents landlord's property tax under Sched. A, which was paid by the tenant and which they are seeking to recover from their landlords, not being in a position to deduct it from the next payment of rent to their landlords because there is no future payment of rent to arise at all. The question is whether at law there is any right on their part to recover that money.

There is no cause of action in respect of this sum which has been paid by the plaintiffs unless they can discover a section of the Income Tax Acts which gives them such right of action. I ignore for the moment the totally different cause of action which is suggested, namely, that they can recover it as payment made under mistake of fact. There is, I think, only in one place any reference to a right to recover by action and otherwise than by deduction of rent tax which has been paid in respect of landlord's property tax, and that is in s. 211 (2) of the Income Tax Act, 1918. Counsel for the plaintiffs has argued, and it was an argument which is as ingenious as it is clear, that he is entitled by virtue of the provisions of that subsection to maintain this present action. But before referring to that section I think it is necessary to refer to Sched. A and the rules under it, under which the whole of this matter of liability for tax between tenant and landlord, and others interested in the property, arises. Schedule A, No. 8, has rules as to the rights of persons by whom tax is paid to recoupment in certain cases. Rule 1 provides:

> "A tenant occupier of any lands, tenements, hereditaments, or heritages who pays the tax shall be entitled to deduct and retain in respect of the rent payable to the landlord for the time being . . . an amount representing the rate or rates of tax in force during the period through which the said rent was accruing due for every twenty shillings thereof, the said deduction to be made out of the first payment thereafter made on account of rent. . . . Provided also that a tenant or occupier shall not be entitled to deduct out of the rent any greater sum than the amount of tax charged in respect of such property as aforesaid, and actually paid by him."

It was under that rule that Mr. Feather was entitled to, and did, deduct the £243 when he paid his rent on July 1, 1931, to the plaintiffs, because that was the first payment of rent made by him after the payment of the £243. But if he had not done so he would have had no right thereafter either by action or by deduction from further rent payable to recover. It was held in *Hill* v. *Kirschen-*

stein (1) that a tenant who pays a sum in respect of landlord's property tax and omits to deduct it from the next payment of rent has no right to deduct it subsequently. Rule 4 deals with the position where there are intermediate landlords, and this is the rule under which, if any, it is said arises, or would have arisen, the right between the plaintiffs and the defendants. By r. 4 (1): [His Lordship read r. 4 (1), except the provisos, and continued:] That is the rule under which if before paying the defendants the plaintiffs had received Mr. Feather's payment less the £243 they would have been entitled as the persons by whom tax is deductible to have similarly deducted it in making their payment to the defendants. But that rule is subject to two provisos, one applies to Scotland, which is immaterial, and secondly there is this proviso:

> "Provided also that no such person as aforesaid who is also a tenant or the occupier of the lands, tenements, hereditaments, or heritages, shall be entitled to deduct out of any rent any greater sum than the amount of tax charged in respect of any such property and actually paid by him."

Great difficulty arises in this case on these final words. If, as has happened in this case, taking the position between Mr. Feather, the plaintiffs and the defendants, if Mr. Feather delays his payment of rent to the plaintiffs, and the plaintiffs desire to be prompt in discharging their obligation to pay their rent to the defendants on June 24, even though the plaintiffs knew that when Mr. Feather did pay his rent he would be sure to deduct this £243 or whatever the tax was, it would look as though they were not entitled to make that deduction in anticipation without paying the defendants, because they would not in the terms of the proviso have actually paid the sum which was sought to be deducted. And if, as in this case, this was the last payment of any rent which under their lease they were going to pay to the defendants, there would have been no opportunity in strict law of recovering this sum that they knew Mr. Feather was likely to deduct when he paid his rent to them. That is a somewhat ridiculous and absurd position, but, unhappily, if it is the result of the language used by the legislature I cannot help it. Counsel for the defendants says that that is the result of the terms in which this legislation is couched. The real truth is that it does not look as though in framing this part of this legislation the position had been thought of where there is not a future payment of rent from which a tenant can deduct payment made by him. I can conceive cases where it would arise directly between the tenant and the landlord without any intervening intermediate landlord. If the last payment of rent was made by a tenant before he had been called on to pay Sched. A income tax, it might be that he would have no right to recover that from the landlord in the absence of any provision in this Act giving him a right of action in respect of such payment of income tax otherwise than by deduction from the rent that he was liable to pay. Apart from the provisions for the collection of income tax from the point of view of the revenue, in order to secure ultimate justice between the various parties interested in leaseholds of this sort I should have thought that it was desirable to have inserted some sort of provision giving a man who has paid what in effect is another man's income tax a right of recovery of that tax from the person really liable to pay it, in cases where there is no rent payable by that person from which it is possible to deduct it. That is the sort of provision that counsel for the plaintiffs has to look for in these Acts in order to justify his claim in this action. Counsel says that he has found it in s. 211 (2) of the Income Tax Act, 1918. At the same time counsel very frankly says:

> "I fully recognise that this is only an incidental result of that section; it was not passed with any such intention, it was passed only to deal with a limited difficulty arising from the alteration of the rate of income tax, but the language of it is sufficiently wide to give me the cause of action for which I contend in this case."

Section 211 (2) provides: [His Lordship read that subsection and continued:] The relevant year of assessment here is 1931–1932. The Finance Acts of that year were passed—there were two—one on July 31 and the other on Oct. 5, both of which dates are after June 23, when the plaintiffs paid this rent to the defendants without making the deduction. Therefore, in terms, says counsel for the plaintiffs, this is a case of deduction on account of tax for any year of assessment which we have failed to make previously to the passing of the Act imposing the tax for that year. Section 211 (2) says that he may make a deduction, and it goes on:

> "and shall also be entitled, if there is no future payment from which the deduction may be made, to recover the sum which might have been deducted as if it were a debt due from the person as against whom the deduction could originally have been made if the Act imposing tax for the year had been in force."

It looks as if that gives this right of action in respect of this sum, because it is a sum which he failed to deduct before the passing of the Finance Act for this year, and the circumstances are that there is no future payment from which he can make that deduction. If so, it is said, he shall be entitled to recover this sum as a debt. But I am afraid the difficulty in regard to this arises from the words which follow:

> "as if it were a debt due from the person as against whom the deduction should originally have been made if the Act imposing the tax for the year had been in force."

That, I think, refers one back to r. 4 of No. 8 of Sched. A of the Act of 1918, because that would be the Act imposing the tax, or that which refound it and put it into force again by the Finance Act of October, 1932. We therefore come back again to the question whether under that rule the plaintiffs would have been entitled to deduct the sum of £243 at the date when they paid the rent on June 23. It is a result against which I am inclined to struggle, but I think that I must accept the defendants' argument that in strict law and according to the strict wording of this Act, the plaintiffs would not have had a right to make that deduction, and they would not have had a right after June 23 when they paid their rent, because at that date Mr. Feather had not paid his rent to them, and had not deducted the tax as against them. And therefore under the operation of the proviso it could not be said that this £243 had actually been paid by the plaintiffs.

This rather outrages common sense and fairness. But on the construction of these difficult and obscure provisions, this, unfortunately, is the only result at which I can arrive. I think that there was, after this payment, in the absence of any future payment of rent from which the deduction could be made as against the defendants, no cause of action under the Income Tax Acts to recover it.

There remains the alternative cause of action, not originally pleaded by the plaintiffs, but by leave it is raised by way of amendment to the statement of claim during the hearing of the application made yesterday. It is formulated in this way:

> "At the time when the plaintiffs paid such rent the plaintiffs did not know that the said Morris Feather had paid the tax referred to in para. 10 of the statement of claim. Had they known of the said payment of tax they would before payment of rent have deducted from the said rent the tax of £243 9s."

A curious position arises and there is certain difficulty in the way of the plaintiffs arising from these curious interactions between these various Photomaton companies. This rent originally was paid not by Mr. Spencer, the liquidator of the plaintiffs, but at his request by Mr. Shepherd, who was liquidator of the Lancashire company. It is not very clear whether Mr. Shepherd was paying as agent for Mr. Spencer or on his own behalf (as liquidator). There is something in the evidence of Mr. Spencer to suggest that Mr. Shepherd was paying on his own behalf (as liquidator of the Lancashire company). As I understand from Mr. Spencer he retained certain moneys belonging to the Lancashire company which they were liable to hand over after paying rent to the defendants by reason of his independent liability as liquidator of the Lancashire company. It is, therefore, possible that he was paying this rent qua liquidator of the Lancashire company, and not qua agent of the liquidator of the plaintiff company. One difficulty about it is that if he was paying as agent of the plaintiffs there is no evidence at all what was in the mind of Shepherd, or whether he was acting under any mistake, for unfortunately Mr. Shepherd has died since he was concerned in this business. If, on the other hand, he was paying it in respect of his own obligation as a principal, then an alternative difficulty arises because the Lancashire company is not party to this action. And the only ground on which the plaintiffs can seek to recover this money would be because indirectly they were deprived of it through the assets of the Lancashire company being depleted to that extent. But supposing. and accepting without deciding it, the proposition that Mr. Shepherd paid as agent for Mr. Spencer, as agent for the plaintiffs, I am afraid that on the facts and the evidence which I have had I cannot say that this money was paid under a mistake of fact. The real truth is, and Mr. Spencer was perfectly frank about it, that he did not think about income tax at all—and he did not apply his mind to it. If this were a case where up to a certain date they knew perfectly well that the defendants were paying this income tax, and if suddenly, without their knowledge, this alteration had been made whereby Mr. Feather had been made to pay it so as to give him a right to deduct it from them, and they had paid in ignorance of that fact and in reliance of the continuance of the old arrangement, it is possible that some case of payment under mistake of fact might have been made out, and I think it would. But I do not think that there really is any evidence of that. Mr. Spencer's frank attitude in regard to this was that he did not think anything about the income tax at all, it was not present in his mind, and he did not therefore make any stipulation about it.

Judgment for the defendants.

Solicitors: *J. D. Langton & Passmore*; *R. H. Behrend & Co.*

[*Reported by* V. R. Aronson, Esq., *Barrister-at-Law.*]

THE REHEARO

[Probate, Divorce and Admiralty Division (Langton, J.), May 30, June 2, 20, 1933]

[Reported [1933] P. 286; 102 L.J.P. 108; 149 L.T. 570; 49 T.L.R. 559; 18 Asp.M.L.C. 422]

Ship—Repairs—Repairs carried out in public dock—Liability of repairer for safety of ship during repairs—Port custom.

Pursuant to a contract made by correspondence between the owners of the steam trawler *R.* and ship repairers, the *R.* was put into a public graving dock at Grimsby at the instance of the owners; the owners were to pay the first dock dues and the repairers were to pay the subsequent dues. The repairers sent workmen and other servants on board during normal working hours to carry out the repairs, but outside normal working hours the only person on board was a watchman, employed by the owners, who was on board throughout. During the repairs, the repairers removed certain bow plates, and when water was admitted to the dock it became necessary for the *R.* to float on one of her bulkheads. Unknown to the parties there were open rivet holes in the bulkhead through which water entered. The entry of water was not discovered by the watchman from the time when the repairers' workmen left the *R.* after the conclusion of work on Saturday until the following morning when it was too late to prevent the *R.* from falling over and subsequently sinking, in consequence of which she sustained serious damage.

Held: (i) the repairers were not liable to the owners, either in contract or in the tort of negligence, for this damage, because

(a) the owners throughout retained control of the ship, and so there was no implied term in the contract under which the repairs were being executed that the repairers should be answerable for the safety of the *R.* during the repairs.

Re Westlake, Ex parte Willoughby (1) (1881), 16 Ch.D. 604; *Earle's Shipbuilding and Engineering Co., Ltd.* v. *Akt. D/S. Gefion and others* (2) (1922), 10 Ll.L.Rep. 305, distinguished.

(b) there was at Grimsby a custom that whilst repairs to trawlers were being carried out in the manner in question, representatives of the owners should be responsible for inspecting the bulkhead, and, if necessary, watching it during repairs.

(ii) the watchman's failure to perceive that the vessel was altering her trim did not amount to negligence.

Notes. As to liability of ship repairers for damage sustained by a ship lying in public dock, see 23 Halsbury's Laws (2nd Edn.) 647, para. 910, note (p); and as to circumstances in which there is no legal duty of care, see ibid. 569, para. 823, text and note (f); and for cases on the subject see 36 Digest (Repl.) 12 et seq., *34* et seq.

Cases referred to:

(1) *Re Westlake, Ex parte Willoughby* (1881), 16 Ch.D. 604; 44 L.T. 111; 29 W.R. 934; 41 Digest 945, *8367*.

(2) *Earle's Shipbuilding and Engineering Co., Ltd.* v. *Akt. D/S. Gefion and others* (1922), 10 Ll.L.Rep. 305.

(3) *The Creterope* (1921), 9 Ll.L.Rep. 450.

(4) *Grant* v. *Egyptian* (*Owners*), *The Egyptian*, [1910] A.C. 400; 79 L.J.P. 57; 102 L.T. 465; 11 Asp.M.L.C. 388, H.L.; 41 Digest 770, *6253*.

Action by shipowners against ship repairers for negligence and breach of contract.

The plaintiffs were Messrs. George Frederick Sleight and Raymond Laurence Humphrey, trustees of the late Sir George Sleight, and owners of the steam trawler *Rehearo*. The defendants were Messrs. J. S. Doig (Grimsby), Ltd., a firm of ship repairers carrying on business at Grimsby.

The plaintiffs claimed damages for injuries sustained by the *Rehearo* in October, 1932, whilst lying in the London and North-Eastern Rail. Co.'s No. 3 graving dock at Grimsby undergoing repairs.

The facts and contentions of the parties fully appear from the headnote and the judgment of Langton, J.

Somervell, K.C., and *Pilcher* for the plaintiffs, the owners.

Dickinson, K.C., and *Cyril Miller* for the defendants, the repairers.

Cur. adv. vult.

June 20. **LANGTON, J.**, read the following judgment.—The plaintiffs, who are the owners of the trawler *Rehearo*, sue the defendants, Messrs. J. S. Doig (Grimsby), Ltd., who are repairers, for damage sustained to the *Rehearo* whilst lying in No. 3 graving dock at Grimsby. The case is an unusual one, and it is a case not without a good deal of difficulty. It has been excellently argued on both sides, and notwithstanding the difficulty I have felt about it I think it is better I should give judgment now while all the points are present to my mind. The *Rehearo* had suffered some damage to her forward plates, and it became necessary to have this damage repaired. The defendant repairers, Messrs. Doig, undertook the repair after a tender and the contract on which they undertook the repair is contained in certain letters. The final letters are letters of Oct. 25, 1932, from the owners to Messrs. Doig, and on

A Oct. 28 from the plaintiffs to the repairers. The facts are that the *Rehearo* was put into No. 3 graving dock, a public dock owned by the London and North-Eastern Rail. Co. and let to the public at certain rates of hire, and she occupied the dock in common with five other trawlers also under repair. The *Rehearo* was put in the dock at the instance of the owners, and the first dock dues were to be paid by the owners, subsequent dock dues were to be paid by the repairers. On Oct. 29, 1932, B which was a Saturday, the repairers' workmen were working on the *Rehearo* on the morning of that day. At noon they left the *Rehearo*, and the condition in which they left her was that certain of her bow plates had been removed and she was exposed to the necessity of floating on her forward bulkhead when the dock was filled with water. The bulkhead in question was not the foremost bulkhead at all—that is a short bulkhead at the aftermost end of the fore peak—but a water- C tight bulkhead that comes in the way of sixty-one strain plates and just forward of some space devoted to spare gear and the fresh water tank. This bulkhead is a bulkhead extending the full height of the vessel, and it is not denied that it is quite customary for the purpose of repair to float vessels of this class upon that bulkhead. As the case first presented itself to me I saw it in this way. The repairers had taken off the bow plate. They had exposed this forward bulkhead— D an unusual surface when judged generally—to the action of the water, and therefore one would imagine some duty lay on them to examine the bulkhead in question. A great deal of evidence has been called, and the matter has been fully thrashed out before me.

To follow the facts a little more in detail. On the afternoon of Saturday, Oct. 29, the dock was filled with water. The repairers' workmen had, of course, departed, E and there was in charge of the *Rehearo* only one man, a watchman, in the employment of the owners. By an extraordinary mischance, which is quite unexplained in any evidence before me, the bulkhead had three small rivet holes in its surface or face whereby water was able to, and did in fact, enter. So far as can be judged by the appearance of these holes they had originally held in position some form of bar or piece of metal; there are bars of this character in other portions of the F bulkhead but no one has attempted to explain how it came to pass that the holes were in existence at this time. The vessel was classed at Lloyd's, and she had undergone a special survey within some three years of the occurrence. It is inexplicable that she should have had these rivet holes in the bulkhead at the time. She had been exposed to some test since then which would have made it quite impossible that the holes could have been in existence at the time she passed her G survey. The holes being there and the surface being exposed to water, the water entered through the bulkhead, and the vessel, which had been listed to the quay with her starboard side made fast by ropes to the quay, lost her list, fell over to port, and in a very short time sank with water entering the engine room aft over the deck, and thereby sustained very considerable damage. The problem which is presented by these facts is who is responsible for the damage which the vessel H sustained. The owners plead that it was an implied term that the repairers safely keep the *Rehearo* during the execution of the repairs, and obviously she was not so kept because she was damaged, and they lay their case in negligence and in breach of the implied term of this agreement and they say the repairers are liable. The repairers' case is at first sight a little inviting because they say this. They say: "No, by the terms of this agreement we had no duty at all to look after this vessel I while she was in this dock. Furthermore, we say there is a custom of the port of Grimsby that at least so far as this dock is concerned and so far as the repair of trawlers is concerned the duty of looking after the vessels while they were in this dock lies with the owners of the vessels, and any duty there may be for watching the bulkhead when vessels are floated on the bulkhead lies also on the owners of the vessel." Further, it is said in this case, "The vessel was in charge of your watchman. Your duty is to have a watchman who is able to deal with the ordinary and usual occurrences on board a vessel, and your watchman failed in that, because he perceived nothing at all till five or six o'clock in the morning when the vessel had lost her list and was very soon about to sink." That defence struck me as A somewhat unusual. It is not at all willingly that one comes to a conclusion as regards a custom of this character, but I cannot ignore the evidence if sufficiently strong in character to show that the common law is varied by local custom.

First of all considering the case one looks to see whether any light can be obtained from the terms of the contract. However, the terms of the contract are not at all illuminating. It would be perfectly possible to imply by that contract either that B the owner or the repairer had custody and possession of this vessel during repair to be carried out under the contract. But the parties have come forward and given me almost a super-abundance of evidence on this point, and the clear conclusion at which I have arrived after a very full discussion of the case is that in this case there was no surrender by the owners of the *Rehearo* to the repairers for the purpose of repair. One is apt to be misled by thinking of a case in which the repair is in C a private dock. In that case there cannot be a shadow of doubt that the custody and possession of the vessel during the repair is in the hands of the repairer, and I hope that nothing I say in this case will do anything or have any effect in minimising the plain duty which lies on repairers in such cases to exercise proper care of the chattel in their possession. But in this case the evidence was strongly the other way. D

We endeavoured in argument to test the matter by cases dealing with possessory lien. These cases afforded some assistance, but in so far as they afforded me any assistance here I think they favoured the repairers. The cases that were put before me were *Re Westlake, Ex parte Willoughby* (1), and *Earle's Shipbuilding and Engineering Co., Ltd.* v. *Akt. D/S. Gefion and others* (2). In those cases, however, the possessory lien was found in favour of the repairer. The accommodation had E been arranged for and paid for by the repairer and the ship had been entered in the books of the public dock in the repairer's name. In this case the procedure was otherwise, and I am particularly impressed by the fact that everyone on the part of the repairers had left the vessel quite openly and quite ostensibly by noon on Saturday. There is no suggestion that anyone was expected to remain and no question seems to have been raised at the time at all. Mr. Doig went into the box F and gave me most excellent evidence of his view of the contract. He impressed me as a most candid and painstaking witness. He struck me as a man who was giving the very best of his knowledge and belief in the account of what happened in this case. Against that the owners were people who had also had very great experience. They had had in the course of quite a short time over 600 cases of repair and they were quite unaware, as they said, of any custom such as was put G forward on behalf of the repairers. But Mr. Doig's evidence particularly impressed me in that he said that he quite believed that someone ought at least to inspect the bulkhead and indeed in his experience it always was inspected. But so far as he was concerned it never crossed his mind to inspect someone else's bulkhead at all; it seemed perfectly clear to me that Mr. Doig was stating nothing more than the truth in saying that so far as he was concerned he occasionally had a contract H in which the responsibility was expressly and in express terms put upon his shoulders, and in those cases he did inspect the bulkhead if he had any occasion to float the vessel upon the bulkhead, but where there was no such special term he never had taken this view at all. It never occurred to him that he should inspect the bulkhead, for which, as he put it, he was in no way responsible. That is the evidence of one man only. But quite apart from the question of custom I I think it is very useful evidence if one accepts it, as I do, to show what is the state of business between these parties. Mr. Doig's view of the business between the parties was: "I was nothing but the man who was hired to come on this ship and do the exact job I intended to do. What the owners did with their ship in the meantime and how they looked after it had nothing to do with me. The ship was not bailed to me in any sense. I was not responsible for her in any way. I was responsible only for the work I had to do." If that is the right view of the contract between the parties, quite apart from the question of custom, it would be difficult

A to say that the repairers were to blame for the damage which had occurred through a failure either to inspect or watch the bulkhead which admitted the water. If they were in truth and in fact nothing more than repairers who were invited on the premises over which they had no control, I see great difficulty in putting upon them any responsibility. That is the first and I think the strongest ground of defence. I think the matter does not go beyond that if one is satisfied that that B is the position between these parties. To my mind it is quite an unusual position, but I believe it to be the actual position in this case. The facts I have stated all go to show that this was the real agreement in this case. Therefore, I do not imply an agreement such as is pleaded in the statement of claim, and which would be in normal circumstances a proper implication to make, that the repairers should safely keep the vessel during the execution of the repairs.

C That is only one aspect of the case. The main case pleaded, and on which evidence was heard at great length, is the custom which has been set up that at this particular dock with this particular class of vessel there is a custom that the owners' representative, or someone acting on behalf of the owners, shall inspect the bulkhead and, if necessary, and the owners desire it, watch the bulkhead during the material time. I watched the evidence on behalf D of that custom with jealous care, and I paid very great attention to counsel for the owners' analysis of it, in which he pointed out that the cases to which the witnesses were able to speak in fact were not very numerous. No one was able to speak to more than four or five cases in which they had known vessels floated on their bulkheads in this manner. But against that there was evidence of repairers' insurance surveyors, who had acted as owners' surveyors, and these people spoke to a custom E whereby either the owners' representative or the insurance surveyor was the person to whom the duty was entrusted to inspect the bulkhead and make sure that the bulkhead was ready to stand the strain to be imposed upon it in the dock. Counsel for the owners made another excellent point there that the whole matter is obscured by the eruption of the insurance surveyors into this class of case, and counsel for the repairers at one time put forward a difficulty, which did not commend itself F to me, that the repairer was entitled to rely on the fact that the vessel was a classed vessel and had been passed as having watertight bulkheads by the insurance surveyor. That did not commend itself to me. The repairer has to take care or he has not. If he has a duty to take care I cannot see he could excuse himself from that duty by saying: "I believed someone else was taking care." That is not a doctrine to which I personally can feel inclined to accede.

G Counsel for the owners' other point contained a considerable amount of truth, because it may well be that if there is this custom it has grown up by reason of the more prominent part which insurance surveyors take nowadays than they used to take when the business of insurance was much less developed. It seems to me a quite possible theory for the origin of this custom that, in view of the fact that insurance surveyors always as a matter of practice inspect these bulkheads before H repairs are carried out, the owners and repairers neither of them thought that there was any duty lying on them. From that may have developed the practice that the repairer may say to himself: "This is not an expense for which I need budget at all, because this is a matter which is carried out either by the insurance surveyor or someone else and for which I need therefore make no provision." I thoroughly agree that the mere fact that laxity had grown up and that the repairer had chosen I to rely on the insurance surveyor would not be any reason for holding that any custom such as pleaded here was established. I do not think I am much concerned, or should be of any assistance to the parties in endeavouring to discover, what the origin of the custom was. I am not here to conjecture about these matters. However it may have originated, I am of opinion that so far as this dock was concerned and this class of vessel was concerned, and I expressly limit it to that because I have had no real evidence that the custom exists apart from that, there is a custom of the character pleaded in the defence; it is a custom so far as these small vessels are concerned that the owner or insurance surveyor acting for that purpose as a friend or agent of the owner does undertake the duty of either assuring himself before water is poured in that the bulkhead is able to stand the strain, or, if that is not done, that he is present at the actual incursion of the water and satisfies himself there and then that the bulkhead is standing the strain. I do not think that that excludes the possibility that if the owner is a careful man he sees both done.

However it may be, I accept the evidence of the various people who have been called to assure me that, whatever may have been done in the remote past as the duty of the repairer in Grimsby in this respect, it is not a duty which rests upon him to-day in the absence of those express terms which had been pointed to in some of Mr. Doig's contracts. I should not omit to notice that, in contradiction of the evidence of the numerous people who have been called for the repairers, there was one strong witness called on behalf of the owners called a Mr. Oldham, who had an almost unique experience in the matter of employment by various firms, for he had been in the employment of such well-known people as Workman, Clark & Co., Cammell Laird, and others, and was in a responsible position in the employment of those firms. But Mr. Oldham was speaking, as I understood the evidence, quite generally when he said that repairers took the elementary precaution of seeing a bulkhead was doing its duty, and I cannot help thinking that to-day in the vast majority of cases in the contracts which one ordinarily hears of, and certainly in all contracts in which the custody and possession of vessels is handed over to repairers, this duty is undertaken by the repairers. But Mr. Oldham did not purport to speak as a Grimsby man or to deal with any special incidents of the Grimsby dock. Otherwise was the evidence of Mr. Powell. He was an old and tried repairer of Grimsby and engaged for over fifty years in shipbuilding. He said that he was quite familiar with floating ships on their bulkhead, and beyond a doubt in every case he used to instruct his foreman boilermaker to make a thorough examination of the bulkhead. His evidence was, therefore, in strong contrast to all the evidence called on behalf of the repairers. One boiler foreman who was in his employment was called, a Mr. Blakey. He really did little to shake the evidence of Mr. Powell because he said that in the five cases in which he floated vessels on the bulkhead while in Mr. Powell's employment, he had had orders from Mr. Powell to inspect the bulkhead. But he qualified that by saying that the orders were express orders to do it for the owner. I should not take the evidence of Mr. Blakey against that of Mr. Powell if I thought that there was any strong conflict between them. I think that Mr. Powell had always taken this precaution he says he took, and it may well be this custom, spoken to so strongly by all the witnesses for the defendants, was a custom which has grown up without touching Mr. Powell's procedure in the matter, and of which he may personally either be completely ignorant or which he may wish to ignore. As I understood his evidence, he was ignorant of it, and I am mindful of the fact that to establish a custom one must be satisfied that it is universal and it is known. But I do not think I should be justified on Mr. Powell's evidence, as weighing against the very considerable weight on the other side, in saying that a custom is negatived merely because Mr. Powell did not agree with it, and he, being a very old man, did not recognise it or know of it. I have weighed his evidence against the rest of the evidence, and weighing it I think the repairers succeed in this defence.

There is one other matter on which a certain amount of time has been expended, again a not altogether easy point. That is that, even supposing the repairers were responsible for the incursion of water through the bulkhead, the vast majority of this damage would never have occurred had it not been for the negligence of the owners in not themselves taking proper care of the vessel while in the dock. Quite shortly the facts in that connection are that the water was let into the dock commencing in the early part of the afternoon of Saturday, Oct. 29. A watchman was on board while this water was being let in. The dock was about full up about 6.30 p.m. in the evening, and the watchman discovered nothing as to the condition of the vessel until an hour after 5 a.m. on the morning of the 30th. The watchman

A is a former master of some thirty years' experience; on these facts it does not look as if he can have been exercising a very vigilant outlook or care on the vessel to have noticed nothing before that time, because when shortly after the time he noticed she had lost her list the vessel had foundered. But I don't think that that concludes the matter at all.

Counsel for the repairers cited one or two cases to me on this rather difficult B question of the duty of a shipowner to exercise proper care of his vessel while in dock. He cited *The Creterope* (3), decided by HILL, J., in this court, which afterwards went to the Court of Appeal, where the judgment of HILL, J., was affirmed. In that case the vessel was a concrete tug and was holed by a bolt whilst lying in dock in Hull. It was proved that there was no one on board at the time. HILL, J., in that case, with the assistance of the Elder Brethren, took the view that C it was negligence on the part of the tug owner to leave the vessel with no one on board, and I don't suppose that anyone could be astonished at the learned judge and the Elder Brethren arriving at that view. But that is not this case at all, because we have a man on board in this case in charge, and therefore the facts are not so simple. It is not quite easy to state what is the duty of a shipowner in these circumstances. Perhaps one gets some light from the other case which D counsel for the repairers cited: *Grant* v. *Egyptian* (*Owners*), *The Egyptian* (4), in which the watchman in charge of one trawler undertook to bring another trawler into the same dock where the owners' vessel was lying, and in so doing damaged the owners' vessel, made no examination of the damage done, and the trawler sank. The circumstances are not at all parallel. LORD SHAW says there in his speech:

> E "The defendants are liable for the damage which is a natural and direct consequence of their wrongful act; that would cover the slight injury to which I have alluded. The second principle is that the defendants are not liable for any further damage which could have been avoided or minimised from the exercise of reasonable care on the part of the plaintiffs."

If I am right in the conclusion I have arrived at concerning the incidence of the F duty of looking after the trawler in this case, it was a duty which lay on the owners. But I have to remember she was a trawler in a trawler dock, and that the purpose of a watchman as declared by the owners was that they should have someone on board able to do the small amount necessary to tend the ropes and protect the vessel against theft. That they considered in the circumstances sufficient. Seeing how these vessels lie in the dock, and seeing the circumstances generally, I don't G know that I ought to put any higher duty on them than that. I don't think that they have any duty to have on her a person of any high degree of skill, even though in this particular case they happened to have a master mariner in charge. It is a very striking comment that a master mariner should not during all these hours have noticed that the vessel had altered her trim to the extent to which this vessel must have altered her trim, but that seems to me an accident rather than the H substance of the matter. The owners were not bound to have a person on board who could and ought to have taken such care and have such knowledge as to be immediately aware of the fact that the vessel was changing her trim and was thereby in danger. Counsel for the repairers laid great stress on that point, and called certain witnesses to show that the ropes of this vessel were not properly tended. On that I got the ship's husband, Mr. Burgess, and I am satisfied from I what Mr. Burgess and Mr. Hollingworth say as to the necessity of tending these ropes. The way in which these ropes were made fast left quite sufficient play to deal ordinarily with the variation which occurred during the time the dock filled and emptied if there was someone there to tend them. Mr. Hollingworth is the watchman, and his evidence was that he made periodical rounds during the night, and notwithstanding that and the fact that the vessel must have been going down quite steadily by the head during the whole night, he never perceived there was any variation of trim. Counsel for the repairers is on clearly the strongest ground when he says: "I don't think much of that watchman." Mr. Hollingworth is probably telling me a good deal more than the truth when he tells me he made so many periodical rounds and inspected quite so carefully, but I have to bear in mind that he was not a mere nightwatchman but a man who had to keep his watch both day and night. Taking him not as a master mariner, but as an individual who was there to look after what was necessary and nothing more for this ship in ordinary circumstances, I cannot say he was lacking in the performance of his duties. No one imagined for a moment that this bulkhead was going to give way by leaking water. In fact, in the experience of all the people no one seems to know of a case in which a bulkhead has given way. It was a wholly exceptional circumstance. The sinking was of a gradual character which took place during the night, and though a more vigilant man with his experience might have perceived the vessel was altering her trim I don't think I ought to say that a watchman, whom it is incumbent on the owners in this case to have on their vessel, was lacking in his plain duty in failing to perceive in these circumstances a fact that in broad daylight and in other circumstances might have been staring him in the face.

Therefore, on this second defence, I am against the defendant repairers. But on the first two grounds, that the contract did not put the vessel in any way into the hands of the repairers or impose upon them any special duty to take care and on the ground of custom, I have found in their favour. On those two grounds this claim fails, and there must be judgment for the repairers.

Solicitors: *Pritchard & Sons*, for *H. K. & H. S. Bloomer*, Grimsby; *Price, Roscoe, Wilson, & Glover*, for *A. M. Jackson & Co.*, Hull.

[*Reported by* GEOFFREY HUTCHINSON, ESQ., *Barrister-at-Law.*]

Re UNION OF BENEFICES OF THELNETHAM AND HINDERCLAY (ST. EDMUNDSBURY AND IPSWICH)

[PRIVY COUNCIL (Lord Atkin, Lord Tomlin and Lord Thankerton), October 19, November 17, 1933]

[Reported [1934] A.C. 119; 103 L.J.P.C. 32; 150 L.T. 202; 50 T.L.R. 119; 77 Sol. Jo. 852]

Ecclesiastical Law—Union of benefices—Surplus revenue—Disposition—Charge on endowment of united benefice in favour of other benefices—Jurisdiction to make—Union of Benefices Measure, 1923 (14 & 15 *Geo.* 5, *No.* 2), *s.* 15, *s.* 16.

The commission appointed to inquire into the matter of the union of two parishes under the Union of Benefices Measure, 1923, presented a report recommending the union, and that the endowment of the united benefice should not be less than £750 per annum. The scheme prepared by the Ecclesiastical Commissioners differed from the recommendations of the report in that it charged all the endowments of the united benefice, other than glebe, with four several sums of £50 each in favour of four other benefices in the same diocese, pursuant to the power to create a rentcharge given by s. 16 of the Measure and the power to dispose of surplus revenue after a competent provision had been made for the united benefice given by s. 15 of the Measure.

Held: the proposed scheme should be dismissed because (i) it was not justified by s. 15 as its effect might be that in the event of a diminution of the endowments there would not remain competent provision for the united benefice after the rentcharges had been satisfied, (ii) the power given by s. 16

cannot be utilised to alter the character of the operation permitted by s. 15.

Notes. As to the disposal of endowments and property of benefices proposed to be united, see 13 HALSBURY'S LAWS (3rd Edn.) 303, para. 680. For the Union of Benefices Measure, 1923, s. 15, s. 16, see 7 HALSBURY'S STATUTES (2nd Edn.) 512.

Cases referred to:

(1) *Re Gussage All Saints and Gussage St. Michael, Dorset, Parishes* (1925), 69 Sol. Jo. 493, P.C.; Digest Supp.

(2) *Re Union of Benefices of Great Massingham and Little Massingham, Norfolk*, [1931] A.C. 328; 100 L.J.P.C. 93; 144 L.T. 654; 47 T.L.R. 294, P.C.; Digest Supp.

Appeal against a scheme prepared by the Ecclesiastical Commissioners under the Union of Benefices Measure, 1923, for the union of the benefices of Thelnetham and Hinderclay in the diocese of St. Edmundsbury and Ipswich in the county of Suffolk. The scheme was opposed by the patrons and the parishioners of both parishes.

H. V. A. Raikes for the appellants, the objectors.

F. H. L. Errington for the respondents, the Ecclesiastical Commissioners.

Their Lordships took time for consideration.

Nov. 17. **LORD TOMLIN.**—The two benefices in question comprise two adjoining parishes about thirteen miles north of Stowmarket in a remote and thinly populated part of the county of Suffolk. The two churches are about one-and-a-half miles apart.

The net annual incomes of the two benefices (calculated according to the Pluralities Acts) are approximately as follows: Thelnetham, £535; Hinderclay, £389.

There is an active church life in both parishes. On the evidence there is no reason to think that there would be, on a vacancy in either benefice, any difficulty in finding a suitable incumbent therefor.

The commission appointed to inquire into the matter under ss. 2 and 3 of the Union of Benefices Measure, 1923, consisted of four persons, namely, the Archdeacon of Sudbury nominated by the Bishop, a nominee of the patron and parochial church council of each of the benefices, and a chairman nominated by the Ecclesiastical Commissioners.

The commission presented a report which was a majority report in the sense that the nominees of the patrons and parochial church councils voted against any union of benefices, while the chairman and the Archdeacon were in favour of a union of benefices, and the recommendations of the report were carried by the casting vote of the chairman. These recommendations included (inter alia) recommendations (i) for the union of the benefices, but not of the parishes; (ii) for the Thelnetham rectory to become the parsonage house of the united benefices and for the Hinderclay rectory to be sold; and (iii) that the endowment of the incumbent of the united benefices should be not less than £750 per annum and that the balance should be set aside to pay the stipend of a lay reader or deaconess and to defray the cost of clerical assistance at festivals.

The scheme prepared by the Ecclesiastical Commissioners differed from the recommendations of the report in that it affected to charge all the endowments other than glebe belonging to the united benefice with four several sums of £50 each in favour of four other benefices in the same diocese, three of such charges to take effect from the date of union and one to take effect from the first avoidance of the united benefice.

The Rector of Hinderclay and the patrons and the parishioners of both parishes appear to be unanimous in opposing the union. The Rector of Thelnetham supports the union.

Their Lordships are unable to see that in the circumstances of this case there is any benefit accruing to either parish from the proposed scheme.

The only parishes which will benefit if the scheme is approved are those in whose favour parts of the endowments are to be alienated.

In their Lordships' opinion the principles indicated in *Re Gussage All Saints and Gussage St. Michael* (1) and in *Re Union of Benefices of Great Massingham and Little Massingham, Norfolk* (2) apply, and the scheme ought to be dismissed.

A point of importance, however, arises in the present case. The scheme purports to create a charge on the endowments in favour of other benefices, so that if there is any diminution in the future in the endowments the loss will be borne by the united benefice.

In their Lordships' judgment the scheme in this respect is not justified. The power conferred by s. 15 of the Measure is a power to dispose of surplus revenue after competent provision has been made for the united benefice. The effect of the scheme might be that hereafter in the event of a diminution of the endowments there would not remain competent provision for the united benefice after the rentcharges had been satisfied.

It is true that under s. 16 there is power to create a rentcharge, but that power cannot, in their Lordships' judgment, be utilised to alter the character of the operation which is permitted to be carried out under s. 15.

Their Lordships will humbly report to His Majesty in Council that this appeal should be allowed and that the scheme for the union of the two benefices be dismissed.

Appeal allowed.

Solicitors: *Partridge & Wilson*, Bury St. Edmunds; *Milles, Jennings, White, & Foster.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re BEECHAM'S SETTLEMENT. JOHNSON *v.* BEECHAM

[CHANCERY DIVISION (Farwell, J.), July 5, 1933]

[Reported [1934] Ch. 183; 103 L.J.Ch. 33; 150 L.T. 351]

Annuity—Covenant to pay annuity subject to forfeiture on certain events happening—Annuity to be applied for support or benefit of certain persons after forfeiture—Bankruptcy of covenantor—Sum received by trustees of annuity in respect thereof—Application.

B., by deed dated June 2, 1925, covenanted to pay an annuity of £300 to trustees for the benefit of his son, and an additional annuity of £200 so long as he was being educated at a university. In the event of the moneys belonging absolutely to the son under the covenant becoming vested or charged in favour of some other person, it was provided that the trustees should for the remainder of the son's life pay or apply all or part of the covenanted sums to or for the personal support or benefit of any one or more of the following persons, namely, the son and his wife and issue, if any, and any blood relations or connections by marriage in such manner as the trustees in their absolute discretion thought fit. Nothing was done by B. to carry out the contract. On Dec. 9, 1930, a receiving order was made against B., and in August, 1933, the trustees lodged proof for £7,728 16s. 4d., of which £1,630 1s. 4d. represented arrears of annuity and the balance of £6,098 15s. represented the estimated value of the annuity of £300. In accordance with the scheme of arrangement the trustees received a dividend amounting to £2,500.

Held: as the covenant provided for the continuation of the annuity and its application after a forfeiture by the son, the son was entitled absolutely only to that part of the £2,500 which represented the arrears (viz., that proportion of the £2,500 which the sum of £1,630 1s. 4d. bore to £7,728 16s. 4d.) and the balance of the £2,500 should be used to purchase an annuity which should be paid to the son for his life unless and until there was a forfeiture as provided by the terms of the covenant, in which event the annuity should be applied in accordance with the discretionary trust.

Re Sinclair, *Allen* v. *Sinclair* (1), [1897] 1 Ch. 921, distinguished. Explanation thereof given by SARGANT, J., in *Re Dempster*, *Borthwick* v. *Lovell* (2), [1915] 1 Ch. 795, adopted and applied.

Notes. Distinguished: *Re Viscount Rothermere*, *Mellors, Basden & Co.* v. *Coutts & Co.*, [1944] 2 All E.R. 593.

As to cases where the donor of a rentcharge or annuity becomes bankrupt, see 28 HALSBURY'S LAWS (2nd Edn.) 210, para. 378.

Cases referred to:

(1) *Re Sinclair*, *Allen* v. *Sinclair*, *Hodgkins* v. *Sinclair*, [1897] 1 Ch. 921; 66 L.J.Ch. 514; 76 L.T. 452; 45 W.R. 596; 23 Digest (Repl.) 427, *4981*.

(2) *Re Dempster*, *Borthwick* v. *Lovell*, [1915] 1 Ch. 795; 84 L.J.Ch. 597; 112 L.T. 1124; 23 Digest (Repl.) 427, *4982*.

(3) *Carr* v. *Ingleby* (1831), 1 De G. & Sm. 362; 63 E.R. 1105; 23 Digest (Repl.) 426, *4975*.

Adjourned Summons as to the entitlement to £2,500 held by the trustees under a deed.

By the deed made on June 12, 1925, the covenantor, Sir Thomas Beecham, covenanted with certain trustees to pay an annuity of £300 for the benefit of his son, Thomas Beecham, and an additional annuity of £200 for such son so long as he was being educated at a university. The relevant parts of the covenant were as follows:

"2. (a) The trustees shall until the infant attains the age of twenty-three years pay or apply all moneys received by them under the aforesaid covenants (or such parts thereof respectively as they shall from time to time think fit) for or towards the maintenance, education or benefit of the infant in such manner as the trustees shall think best suited to fit the infant for a professional or business career or if the infant shall become a ward of court, then as the court shall direct.

"(b) From and after that date when the infant attains the age of twenty-three years the trustees shall pay all moneys received by them under the aforesaid covenants as and when received to the infant during the remainder of the life or until some event shall happen whereby the said moneys or some part thereof if belonging absolutely to the infant will be or become vested in or charged in favour of some other person or persons or corporation, but so that the trustees shall not be liable for paying the same to him or permitting him to receive the same after the failure or determination of the trust in his favour unless and until they have received express notice of such act or event as aforesaid.

"(c) On the happening of any such event as last mentioned the trustees shall during the remainder of the infant's life, pay or apply all or any part of the said covenanted sums to or for the personal support or benefit of any one or more of the following persons, namely, the infant and his wife and issue (if any) for the time being in existence and any blood relations or connections by marriage of his for the time being in existence in such shares or manner as the trustees shall from time to time in their absolute discretion think fit."

The covenantor never did anything to carry out the covenant, and on Dec. 5, 1930, a receiving order was made against him. In August, 1932, a scheme of arrangement was put forward, and the trustees lodged proof for £7,728 16s. 4d., of which £1,630 1s. 4d. represented the arrears of annuity that had accrued due and had not been paid, and £6,098 15s. represented the capitalised value of the annuity of £300 after the son had attained the age of twenty-one years calculated on the Post Office annuity table. With the consent of the son the proof was admitted for £5,000, and a dividend of 10s. in the pound was declared, with the result that the trustees received the sum of £2,500 on Sept. 30, 1932.

The questions for the determination of the court were: (i) Whether the son was entitled to the whole of the £2,500; (ii) if only entitled to a part, how the balance should be disposed of.

C. R. R. Romer for the plaintiffs, the trustees.

Cleveland Stevens, K.C., and *Hewins* for the covenantor.—The £2,500 should be apportioned rateably between what is due in respect of the arrears of annuity and what is the capital value of the annuity. [They referred to *Carr* v. *Ingleby* (3), *Re Sinclair*, *Allen* v. *Sinclair* (1), *Re Dempster*, *Borthwick* v. *Lovell* (2).]

Morton, K.C., and *G. C. Slade* for the persons who might be entitled in the case of a forfeiture under the covenant, referred to *Re Sinclair*, *Allen* v. *Sinclair* (1).

FARWELL, J.—This summons raises a question as to what, in the events which have happened, is the destination of a sum of £2,500 which the trustees of the settlement in question now have in their hands. The question arises in this way [his Lordship stated the facts and quoted the relevant clauses of the deed and continued:] It must be remembered that of the total sum of £7,728 16s. 4d. for which a proof was lodged £6,098 15s. was the estimated value of an annuity of £300 terminable only on the death of the annuitant and not at any earlier date. Proof having been lodged, the trustee in bankruptcy raised some question of the possible invalidity of the settlement, the grounds of which I need not discuss. The question, however, was raised and a compromise was arrived at between the trustees and the trustee in bankruptcy, under which the proof was admitted at the sum of £5,000. The result of the bankruptcy proceedings was that the creditors were paid 10s. in the pound, and the trustees accordingly received £2,500 in respect of this proof. It is that sum which they now have in their hands; and they ask the court to determine in what way they ought to deal with it. It represents the total amount, in the events which have happened, payable under the covenants of the settlement. In other words the trustees have a capital sum representing partly arrears of the annuity and partly the capital value of the future payments under the covenants, and the question is how ought they to deal with it. On behalf of the son, Mr. Thomas Beecham, it is said that the whole £2,500 is his property, and the money ought to be paid over to him.

On the other hand, it is said that that is not the way to deal with the matter, because the son is not the only person who has any interest under the trusts, since there are persons who might benefit in the event of a forfeiture, and it is pointed out that if a forfeiture did take place the annuity would not cease to be payable, and the covenant would be none the less enforceable; the trustees would have to apply the income which they received if they enforced the covenant in the way directed by the settlement, or, in the event of their not so applying it, there would be, presumably, a resulting trust in favour of the settlor; but, in any case, the annuity would still be payable although there would be persons other than the original annuitant, the son, to whom the annual sums might be paid. In those circumstances, it is said that it would not be right for the trustees to hand over the whole of the £2,500 to the annuitant.

Certain authorities have been referred to, but most of them are cases where annuities are given by will, and it is possible that in those cases somewhat different considerations may apply. The case which is in many ways nearest to the present case is a decision of KEKEWICH, J., *Re Sinclair*, *Allen* v. *Sinclair* (1). In that

A case an annuity was secured to a person for life or until he forfeited it. It was secured by deed. Under the covenants, there was no provision made as to the continuance of the annuity after the forfeiture; accordingly the annuity was not an annuity during the whole life of the annuitant, but was an annuity which might be determined at an earlier period. In that respect it differs entirely from the present case, where there is an annuity given for the whole life of the annuitant, B with a provision that on a forfeiture other persons come in as objects of a discretionary trust. In *Re Sinclair* (1) the estate of the covenantor became insufficient to pay the annuity in full and in an administration action the annuity was valued and was represented by a fund in court. KEKEWICH, J., held that the whole of the fund ought to be paid to the annuitant. I think that the true explanation of that decision is that which was given by SARGANT, J., in *Re Dempster, Borthwick* C v. *Lovell* (2). The learned judge there points out that the annuity in *Re Sinclair, Allen* v. *Sinclair* (1) was an annuity which might be determined earlier than the death of the annuitant, but there being no way of obtaining any appropriate valuation of such an annuity, it was treated and valued as though it were an annuity for the whole life of the annuitant, and on that footing the annuitant was entitled to be paid the capital value since no other person had any interest at all D in the fund.

That does not seem to me to apply in this case, because here the annuity is an annuity for the whole life of Thomas Beecham, the son, but there are other persons who may become interested in it in due course. It seems to me that I have to consider in what way the trustees in this case ought to deal with the money in their hands, having regard to the rights, or the possible rights, of all the persons E who may benefit under the settlement. Here the covenant is with the trustees, and it was the trustees who proved in the bankruptcy; it is the trustees who have the money in hand, and it is for them to apply it in such a way as is right and just, having regard to the considerations which I have mentioned. The annuitant has not received any part of the annual sums which were covenanted to be paid to the trustees up to the present time. He attained the age of twenty-three last F year, but nothing at all was ever paid to the trustees by the covenantor, so that they were not in a position to pay over any sums to him, or to apply any sums for his benefit. If the annuity had been duly paid to the trustees and any part thereof not applied by them for his benefit, the surplus would have been accumulated and have become his property on his attaining twenty-three. It is to be noticed that there is a curious omission in the settlement, inasmuch as whereas the trustees are G directed to maintain the infant out of the annuity until twenty-three and to accumulate any surplus during the minority of the infant, there is no provision for accumulation of any surplus during the period after the infant attains twenty-one and before he attained twenty-three. However, in the events which have happened I think that I am entitled to disregard that in considering how this sum ought to be apportioned.

H I am quite satisfied that it would not be right in this case for me to direct the trustees to pay over the whole £2,500 to the annuitant. To do so would be to disregard some of the trusts which have been created by this document, and in that respect this case seems to me quite different from *Re Sinclair* (1), where there was no one who had any interest in the annuity except the annuitant, although the annuity itself might have been terminated at a time prior to his death. Here there I are other persons who might become interested, and to direct the trustees to hand over the £2,500 to the son would be to defeat altogether the possible benefits which someone or more of the discretionary class might otherwise have obtained, and would entirely prevent the trustees doing what they are directed to do, namely, exercise their discretion in favour of a class in the event of a forfeiture.

That being so, how ought this fund to be dealt with? The annuitant is clearly entitled to be recouped to some extent for the period during which he has not received any of the payments which he ought to have received under this deed. It is said that he ought to be paid in full at the rate of £300 a year for every year until he attained twenty-three, and that the sum of £2,500 should be applied first in paying him such a sum as represents £300 a year from the date of the annuity becoming payable until he attained the age of twenty-three. In my judgment that is not the right course to adopt. I have to see what the sum of £2,500 which has been recovered by the trustees represents. If the whole sum of £7,728, which was the amount for which the proof was lodged, had been paid, of that sum £1,630 1s. 4d., the amount of the arrears, would have been payable to the son; but, instead of the £7,728 being paid, the sum of £2,500 was paid, and accordingly it appears to me that the sum which the son is entitled now to receive is that proportion of the £2,500 which the sum of £1,630 1s. 4d. bears to £7,728 16s. 4d.

With regard to the balance of the £2,500, in my judgment the proper course for the trustees to adopt is to purchase an annuity with that amount, and during the remainder of the life of the son pay to him the annuity unless and until there is a forfeiture, and if and when there is a forfeiture, then to apply the annuity under the discretionary trust given to the trustees in the settlement. In that way effect will be given, as nearly as it can be, having regard to all the circumstances, to the trusts which have been declared. If I were to adopt any other course I should be giving the go-by to the express provisions of the settlement.

Solicitors: *A. C. Warwick & Co.*; *Nicholson, Graham, & Jones*; *W. R. Bennett & Co.*

[*Reported by* J. H. G. Buller, Esq., *Barrister-at-Law.*]

MATTHEWS *v.* KING AND OTHERS

[King's Bench Division (Lord Hewart, C.J., Avory and Lawrence, JJ.), October 24, 25, 31, 1933]

[Reported [1934] 1 K.B. 505; 103 L.J.K.B. 509; 150 L.T. 133]

Ecclesiastical Law—Public worship—Disturbance—"Divine service"—Inclusion of celebration of Sacrament—Alleged irregularities with regard to ornaments and ritual—Materiality—Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 *Vict.*, *c.* 32), *s.* 2.

By s. 2 of the Ecclesiastical Courts Jurisdiction Act, 1860, any person who disturbs a clergyman in holy orders ministering or celebrating "divine service" in a church is guilty of an offence.

The words "divine service" in the above section include the celebration of a Sacrament. Whether the clergyman alleged to have been disturbed has complied with the ceremonial law of the Church of England is immaterial for the purpose of deciding whether an offence under the section has been committed.

Notes. As to disturbance of a clergyman ministering in a church, see 13 Halsbury's Laws (3rd Edn.) 330, para. 751, text and notes (h) and (i); and for cases on the subject see 15 Digest (Repl.) 803–804, *7632–7644*. For the Ecclesiastical Courts Jurisdiction Act, 1860, s. 2, see 7 Halsbury's Statutes (2nd Edn.) 213.

Case referred to:

(1) *Newbery* v. *Goodwin* (1811), 1 Phillim. 282; 161 E.R. 985; 19 Digest 434, *2744*.

Case Stated by Cornwall justices.

Informations under s. 2 of the Ecclesiastical Jurisdiction Act, 1860, were preferred by the appellant Matthews, a superintendent of the Cornwall police ("the prosecutor"), against Anna Maria King and eleven other persons ("the defendants''), alleging that on Sunday, Dec. 11, 1932, in the parish church of St. Hilary, they disturbed Canon Carr, a clergyman in holy orders, ministering or celebrating Divine Service in that church, contrary to the statute.

On the hearing of the informations the following facts were proved or admitted: The defendants on Sunday, Dec. 11, 1932, did disturb Canon Carr while ministering or celebrating service in the church. Canon Carr entered the church at about 11 a.m. and proceeded to perform the ceremony of the Asperges with the use of lighted candles (which is not prescribed or ordered by the Book of Common Prayer). Subsequently Canon Carr proceeded to celebrate the Holy Communion service, omitting the Commandments and the lengthy Exhortation, but in other respects in the language and manner prescribed by the Book of Common Prayer. At the time of the service the church contained articles, namely, a Sanctus bell, a statue of the Madonna and Child, and a blue votive lamp, which had been ordered to be removed by an order of the Consistory Court. Canon Carr was not the incumbent of the church, but was conducting a service on Dec. 11, 1932, in the absence, through illness, of the incumbent.

Throughout the ceremony or service, or some parts thereof, Canon Carr was wearing the following garments, the wearing of which by a clergyman of the Church of England the defendants contended was illegal, namely: amice, alb, maniple, stole, cope, biretta.

During the conduct of the service incense was used ceremonially and the Sanctus bell was rung before, during, and at the end of the Consecration Prayer, and also during the Consecration Prayer one of the church bells was rung. During the service Canon Carr elevated the Elements from the altar after consecration. He stated that there was no public adoration by him, but that as a fact he did in his private devotions privately adore. There was, however, a public adoration by some members of the congregation, but that was not observed by Canon Carr, whose back was turned to the congregation.

There was no evidence of any order having been made by lawful authority for the use of any form of Public Prayer or administration of the Sacraments other than that prescribed by the Book of Common Prayer, but it was stated by Canon Carr that the ceremony carried out by him had the sanction of the bishop.

The disturbance, which consisted mainly of the organised loud singing of hymns which were not the hymns ordered for the day, and which began immediately Canon Carr made his appearance from the vestry, lasted throughout the whole of the service, that was, not only during the Asperges, but also during the Nicene Creed, the sermon, and the whole of the Communion Service so as to make the officiating clergyman's voice inaudible.

Apart from singing, when Canon Carr entered the pulpit and attempted to deliver his sermon, the defendant, Anna Maria King, shouted: "Get out of the pulpit with those Popish garments on," and all the defendants proceeded to sing so loudly that the sermon was absolutely inaudible.

For the prosecutor it was contended that the disturbance of Canon Carr in those circumstances constituted an offence under s. 2 of the Ecclesiastical Courts Jurisdiction Act, 1860, on the ground that the disturbance occurred while Canon Carr was celebrating a Divine Service in the parish church of St. Hilary within the meaning of the section; that the words "any Divine Service" in that section meant any service reverently directed to the worship or praise or service of God; that the object of the section was to prohibit the disturbance of a clergyman in holy orders who was ministering or celebrating any such service in a church; that it was not necessary, to constitute the offence, that the service disturbed should be a service in accordance with the Book of Common Prayer, and that the irregularities alleged did not prevent the service from being nevertheless a Divine Service within the meaning of the section.

For the defendants it was contended: (a) That in order to establish that the ceremony or service disturbed was "Divine Service" within the meaning of the section it was necessary to prove that such service was prescribed by and was being celebrated according to the Book of Common Prayer or otherwise as ordered by lawful authority; (b) that in view of the various facts, practices, and alleged irregularities the service described was not a "Divine Service" within the meaning of the section; (c) that the sermon was not part of Divine Service within the meaning of the section; (d) that Canon Carr was purporting to celebrate a Sacrament, and that a Sacrament was distinct from, and was not, a Divine Service within the meaning of the section.

The justices, by a majority, were of opinion that, in view of the matters indicated or of some of them, the service conducted by Canon Carr was not "Divine Service" within the meaning of the section, and dismissed the informations.

The question for the court was whether, on the above statement of facts, the justices came to a correct determination and decision in law.

By the Ecclesiastical Courts Jurisdiction Act, 1860, s. 2:

> "Any person who shall be guilty of riotous, violent, or indecent behaviour . . . in any cathedral church, parish or district church or chapel of the Church of England . . . or in any chapel of any religious denomination, or . . . in any place of religious worship duly certified under the provisions of [the Places of Worship Registration Act, 1855], whether during the celebration of Divine Service or at any other time, or in any churchyard or burial ground, or who shall molest, let, disturb, vex, or trouble, or by any other unlawful means disquiet or misuse any preacher duly authorised to preach therein, or any clergyman in holy orders, ministering or celebrating any Sacrament, or any Divine Service, rite, or office in any cathedral, church or chapel"

shall be liable to a penalty not exceeding £5 or to imprisonment for not more than two months.

H. B. Vaisey, K.C., and *Harold Murphy* for the appellant, the prosecutor.

F. J. Tucker, K.C., and *Wilfrid Lewis* for nine of the twelve defendants, respondents.

Cur. adv. vult.

Oct. 31. The judgment of the court was read by

LAWRENCE, J.—The judgment that I am about to deliver is the unanimous judgment of the court.

This is an appeal from a decision of justices sitting at Penzance dismissing an information against the defendants for that they did disturb Canon Carr, a clergyman in holy orders, celebrating Divine Service in the parish church of St. Hilary, on Dec. 11, 1932, contrary to s. 2 of the Ecclesiastical Courts Jurisdiction Act, 1860, on the ground that the service which Canon Carr was conducting in the said church was not a Divine Service within the meaning of the said section because it was the celebration of a Sacrament, and because it included in the said celebration the ceremony of the Asperges, the tolling of a Sanctus bell, the use of certain vestments and ornaments alleged to be illegal, the use of incense and the elevation of the Elements from the altar after consecration, and omitted the reading of the Ten Commandments and the Exhortation. The disturbance, which consisted of loud singing of hymns by the defendants throughout the whole of the service so as to make the officiating clergyman's voice inaudible, was admitted.

It was contended before us on behalf of the defendants, first, that the service which Canon Carr was conducting was the celebration of a Sacrament and not Divine Service within the meaning of s. 2 of the Act of 1860, and, secondly, that, even if the celebration of a Sacrament can be Divine Service within that section, yet the above-mentioned alleged departures from the laws of the Church of England entitled the justices to hold that it was not a Divine Service within that section.

It was argued that the words "Sacrament" and "Divine Service" are contrasted in the statutes which precede the Act of 1860, in the rubrics of the Church of England, and in the canons of 1603, and that, therefore, the words "any Sacrament or any Divine Service, rite, or office in any cathedral church or chapel" in s. 2

of the Act of 1860 ought to be read as applying to different categories of ceremony, and that an information for disturbing the celebration of Divine Service cannot be supported by evidence of disturbing the celebration of a Sacrament.

In spite of the able argument of Mr. Tucker for the defendants, we are unable to accept these contentions. The words "Divine Service" are used in the earlier part of s. 2 in their widest sense; and we think that the words in the latter part of the section, "any Divine Service, rite, or office in any cathedral, church or chapel," were used to cover all the services in the Church of England including the celebration of the Sacraments, and that the special mention of "any Sacrament" immediately preceding these words in that section refers to the celebration of any Sacrament outside a cathedral, church, or chapel. The use of the second word "any" appears to us grammatically to support this view, and we do not think that the contrast in the statutes, canons and rubrics, to which we were referred, is sufficiently uniform to lead to the interpretation of s. 2 for which the defendants contend (see especially 1, Mar. Sess. 2, c. 3, s. 1 (1553), the penultimate rubric at the end of the Communion Service and Canons 18 and 19).

On the second head of the defendants' argument, we are of opinion that it cannot have been intended that an Act providing for summary conviction for brawling should depend for its application on the difficult questions which have often arisen on the ceremonial law of the Church of England. The Act was designed to protect the clergyman from disturbance in the performance of his duties and to preserve order, decency, and reverence in the church during the performance of those duties; it has no reference to whether he performs them properly, a subject which has always been within the jurisdiction of the Ecclesiastical Courts (see *Newbery* v. *Goodwin* (1), and on which even the archdeacon of the archdeaconry or the churchwardens of the parish can only proceed by the method prescribed by ss. 8 and 9 of the Public Worship Regulation Act, 1874.

We are of opinion, therefore, that upon the statement of facts contained in the case the justices ought to have convicted the defendants, and we accordingly allow the appeal with costs.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, for *Vivian Thomas & Son*, Penzance; *Robbins, Olivey, & Lake*, for *Coulter, Hancock, & Thrall*, Truro.

[*Reported by* T. R. F. BUTLER, ESQ., *Barrister-at-Law.*]

Re CHOWOOD, LTD.'S, REGISTERED LAND

[CHANCERY DIVISION (Clauson, J.), February 17, 20, 27, 1933]

[Reported [1933] Ch. 574; 102 L.J.Ch. 289; 149 L.T. 70; 49 T.L.R. 320]

Land Registration—Rectification of register—"Loss by reason of any rectification"—Title to part of A.'s registered land acquired by B. under Limitation Acts—B.'s title already acquired at time of A.'s purchase and registration—Title subsequently established by action—Consequent rectification of register—Claim to indemnity by A.—Land Registration Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 69 (1), *s.* 70 (1) (*f*), *s.* 83.

Under s. 69 (1) and s. 70 (1) (f) of the Land Registration Act, 1925, one of the overriding interests to which an absolute title by registration is subject are rights acquired or in the course of being acquired under the Limitation Acts.

On April 2, 1925, C., Ltd., having purchased certain freehold lands including certain strips of woodland, registered them with an absolute title, but before this date L. had acquired a title by possession to the strips of woodland under the Limitation Acts. In 1930 L. obtained an order from the court for the rectification of the register by the removal therefrom of the said strips of woodland. On an application under the provisions of s. 83 of the Land Registration Act, 1925, by C., Ltd., to be indemnified in respect of the loss they alleged they had suffered by reason of the rectification,

Held: C., Ltd., suffered no loss by reason of the rectification, and were, therefore, not entitled to indemnity under s. 83, because C., Ltd.'s title was all along subject to the rights of L., and the rectification merely recognised the existing position and put C., Ltd., in no worse a position than they were in before.

Notes. The acquisition and extinction of title to land by adverse possession is now provided for by the Limitation Act, 1939, s. 4 (3), s. 5 (i), s. 16.

As to the right to indemnity for loss suffered by rectification of the register, see 19 HALSBURY'S LAWS (2nd Edn.) 462, para. 980; as to application for such indemnity under s. 83, see 20 ibid. 608, para. 763, text and notes (h) and (i); and as to the extinction of title to land under the Limitation Acts, see ibid. 740, para. 1009. For the Land Registration Act, 1925, s. 69 (i), s. 70 (i) (f), s. 83, see 20 HALSBURY'S STATUTES (2nd Edn.) 1000, 1002, 1015. For the Limitation Act, 1939, s. 4 (3), s. 5 (i), s. 16, see 13 ibid. 1164, 1165 and 1175.

Case referred to:

(1) *Chowood, Ltd.* v. *Lyall* (2), [1930] 2 Ch. 156; 99 L.J.Ch. 405; 143 L.T. 546, C.A.; Digest Supp.

Application for an indemnity under s. 83 of the Land Registration Act, 1925.

On April 20, 1925, Chowood, Ltd., were registered with an absolute title to certain freehold lands, including strips of woodland. On Jan. 1, 1926, the Land Registration Act, 1925, came into operation. By s. 69 (1) of that Act the proprietor of land (whether he was registered before or after the commencement of the Act) shall be deemed to have vested in him without any conveyance, where the registered land is freehold, the legal estate in fee simple in possession, but subject to the overriding interests as therein mentioned. Section 69 (1) provides as follows:

> "(1) The proprietor of land (whether he was registered before or after the commencement of this Act) shall be deemed to have vested in him without any conveyance, where the registered land is freehold, the legal estate in fee simple in possession, and where the registered land is leasehold the legal term created by the registered lease, but subject to the overriding interests, if any, including any mortgage term or charge by way of legal mortgage created by or under the Law of Property Act, 1925, or this Act or otherwise, which has priority to the registered estate."

A One of such overriding interests is described in s. 70 (1) (f), namely:

> "Subject to the provisions of the Act rights acquired or in course of being acquired under the Limitation Acts."

In the action of *Chowood, Ltd.* v. *Lyall* (1), brought against Mrs. Lyall for trespass on the strips of woodland, it was ordered that the register of the title of B Chowood, Ltd., be rectified by the removal therefrom of the said strips of woodland on the ground that Mrs. Lyall had acquired a title by possession to the strips of land under the Limitation Acts before the date of the registration. Chowood, Ltd., now brought an application against the Attorney-General (on behalf of the official trustees of the insurance fund constituted under the Land Transfer Act, 1897, and the Land Registration Act, 1925) that their claims to be indemnified under the C provisions of s. 83 of the Act of 1925 in respect of the loss they alleged to have suffered by reason of the rectification might be determined by the court. The claim had been referred to the court by the Chief Land Registrar.

Section 83 of the Land Registration Act, 1925, provides as follows:

> "(1) Subject to the provisions of this Act to the contrary, any person suffering loss by reason of any rectification of the register under this Act shall D be entitled to be indemnified. . . . (6) Where an indemnity is paid in respect of the loss of an estate or interest in or charge on land the amount so paid shall not exceed . . . (b) where the register is rectified, the value (if there had been no rectification) of the estate, interest or charge, immediately before the time of rectification. (7) The registrar may, if the applicant so desires it, and subject to an appeal to the court, determine whether a right to indemnity has E arisen under this section, and if so, award indemnity. In the event of an appeal to the court the applicant shall not be required to pay any costs except his own, even if unsuccessful, unless the court considers that the appeal is unreasonable. . . ."

A. F. Topham, K.C., and *N. C. Armitage* for the applicants.—The applicants have suffered loss by reason of the rectification. By reason of s. 7 of the Land F Transfer Act, 1875, and s. 12 of the Land Transfer Act, 1897, the applicants acquired the land free from the rights of all persons whatsoever, including any person who had acquired a title by length of possession. The Land Registration Act, 1925, does not deprive persons registered before the Act came into force of the title which they had acquired, and as the applicants had acquired their absolute title before Jan. 1, 1926, they have been deprived, by the rectification, of something G to which they were legally entitled. They, therefore, ought to be indemnified.

The Solicitor-General (Sir Boyd Merriman, K.C.) and *Stafford Crossman* for the Attorney-General.—According to the judgment in *Chowood, Ltd.* v. *Lyall* (1) Mrs. Lyall acquired by adverse possession a title to the strips of woodland, and had acquired that title before April, 1925, when the applicants were registered with an absolute title. Therefore under s. 69 (1) and s. 70 (1) (f) of the Land Registration H Act, 1925, such title acquired by Mrs. Lyall was an overriding interest, and, therefore, the applicants have not suffered any loss, because they have been deprived of something to which they never were entitled.

Cur. adv. vult.

Feb. 27. **CLAUSON, J.**, read the following judgment.—On April 22, 1925, I Chowood, Ltd. (whom I will for convenience refer to as "Chowood"), having contracted to buy from certain vendors, whom I will call "Ralli," a tract of land which consisted of certain land (which I will call the "Ralli Estate") in the possession of Ralli, together with a strip of land in the possession of a lady whom I will refer to as "Lyall," and having obtained from Ralli a conveyance which was expressed to convey to Chowood the Ralli Estate, and also the strip, obtained registration of themselves (Chowood) as proprietors with absolute title of the Ralli Estate, and the strip. The attention of Chowood was not drawn to the fact that the strip was (as was afterwards held to be the fact by LUXMOORE, J., and the Court of Appeal) in the possession of Lyall. On Jan. 1, 1926, the Land Registration Act, 1925, became law and by reason of s. 69 of that Act the court thereupon became bound to deem Chowood (as being proprietors registered before Jan. 1, 1926) to have vested in them the legal estate in fee simple in possession of the Ralli Estate and of the strip, subject to the "overriding interests." Turning to s. 70, I find that the overriding interests to which the land is to be deemed to be subject are such of (inter alia) the following overriding interests as may be for the time being subsisting in reference thereto, namely: (f)

> "Subject to the provisions of this Act, rights acquired or in course of being acquired under the Limitations Acts,"

and (g)

> "The rights of every person in actual occupation of the land, or in receipt of the rents and profits thereof"

(with an immaterial exception).

The strip to which I have referred is a strip of woodland adjoining the Ralli Estate. In the year 1929 Lyall caused wood to be cut on the strip. Chowood thereupon sued to restrain Lyall from trespassing on the strip. When the action came on Chowood failed to prove possession; Lyall proved to the satisfaction of the court possession by herself and her predecessors in title from at least 1911; and Luxmoore, J., ordered rectification of the register by eliminating the strip from Chowood's registered title, the rectification being ordered under s. 82 of the Land Registration Act, 1925. The Court of Appeal upheld the decision of Luxmoore, J. Chowood then proceeded to claim indemnity under s. 83 in respect of loss alleged to have been suffered by reason of the rectification ordered by Luxmoore, J. The question has been referred to the court by the Land Registrar, and I have now to determine whether any loss has been suffered. The claim is opposed by the Attorney-General on behalf of the trustees of the statutory fund out of which the indemnity, if any, has to be provided.

Chowood suggest that the loss is to be measured by the difference between the value of the land which, when Chowood bought from Ralli, was described as comprising the strip and the value of that land less the strip.

I am, of course, in no way concerned with the rights as between Chowood and their vendor. I am concerned only to see what loss was occasioned by the rectification of the register by the elimination of the strip from Chowood's registered title.

Immediately before the rectification of the register the position, as I have indicated above, was that Chowood's estate was "subject to rights acquired or in course of being acquired under the Limitation Acts." On the facts as they appeared in *Chowood, Ltd.* v. *Lyall* (1) (and the findings of fact in that case are by agreement to be treated as binding between the present parties) Lyall was in possession of the strip when Chowood's title was registered, and, of course, also when the Land Registration Act, 1925, came into force, and also immediately before and at the date of the rectification of the register. Further, that possession was, at each of those dates, protected against any claim by Chowood to enter on it, the protection flowing from the fact, established by Lyall in the former litigation, that Lyall and her predecessors had had possession for such length of time as would be an answer under the Limitation Acts to any such claim by Chowood. It appears to me to follow that Lyall's rights were accordingly rights acquired under the Limitation Acts. It was suggested that the words "subject to the provisions of this Act" affect the matter; I cannot see why. The reference seems to be to s. 75, which contains very special provisions which prevent rights acquired under the Limitation Acts from operating under certain circumstances to extinguish the estate of the registered proprietor. This does not seem to have any operation upon the position in the case with which I am now dealing. It was further suggested that Lyall's title depended to some extent on what was called a paper title, and not solely on the Limitation Acts. I do not say what the position might have been if Lyall's paper title had disclosed, for example, a grant to her by Ralli's predecessor in title which could be used to defeat Chowood's claim to the strip without recourse to the Statute of Limitations. Such a case can be dealt with when it arises. In the present case Lyall's paper title was of value simply as some evidence of length of possession, and had no other operation; the paper title save in so far as it supported a plea of possession for the statutory period, would not have helped to defeat Chowood's claim. It results from this that Chowood's title was all along subject to the rights which Lyall has succeeded in establishing, and the loss, if it may properly be so called, which Chowood has suffered is that they have not got, and since the Act of 1925 came into force (whatever may have been the position before) have never had title to the strip, except subject to an overriding right in Lyall. That loss was occasioned by Chowood failing to ascertain that, when they bought, Lyall was in possession, and in possession under such circumstances that Ralli could not make a title to the strip. The loss was occasioned by paying Ralli for a strip to which Ralli could not make title. The rectification of the register merely recognised the existing position and put Chowood in no worse a position than they were in before.

In these circumstances I must hold that Chowood have suffered no loss by reason of the rectification of the register.

I ought to add that a number of points of interest and difficulty were discussed in the course of the hearing, including the question what would have been the position had similar circumstances occurred (a) between the passing of the Land Transfer Act, 1875, and the passing of the Act of 1897; (b) between the passing of the Act of 1897 and the coming into operation of the Act of 1925; (c) if there had been a finding in *Chowood, Ltd.* v. *Lyall* (1) that Lyall was in actual occupation, or a clear finding that Lyall was, at the crucial moment, in receipt of profits. In the view I take it becomes unnecessary for me to express opinions on the various points so discussed, some of them points of grave difficulty and, accordingly, any opinions I might express would be mere dicta. It appears to me to be wise that I should confine my remarks to the grounds on which I decide the case.

A convenient form of order will be to declare that the applicants, Chowood, Ltd., have no valid claim to indemnity under s. 83 of the Land Registration Act, 1925, this declaration being preceded by the words

> "the court being of opinion that the applicants have not suffered loss by reason of the rectification mentioned in the summons of the register of the title therein also mentioned."

Section 83 (7) does not deal directly with the present case, but I think I may properly treat it as indicating to me the lines upon which my discretion as to costs ought to be exercised. I propose, therefore, to leave the order silent as to costs, so that each party will bear their own.

Declaration ana order accordingly.

Solicitors: *Corsellis & Berney*; *The Treasury Solicitor.*

[*Reported by* J. H. G. Buller, Esq., *Barrister-at-Law.*]

COHEN AND ANOTHER *v.* INLAND REVENUE COMMISSIONERS

[KING'S BENCH DIVISION (Finlay, J.), January 13, 1933]

[Reported [1933] 2 K.B. 126; 102 L.J.K.B. 696; 149 L.T. 252]

Stamp Duty—Settlement—Oral declaration of trust of personalty on trusts of draft settlement—Subsequent execution of settlement in relation to other property—Appointment of trustees of settlement as trustees of personalty held by settlor as trustee—Liability to ad valorem duty—Stamp Act, 1891 (*54 & 55 Vict., c.* 39), *Sched.* 1.

On May 20, 1931, each of two settlors orally declared that he held and would thenceforth hold specified securities as trustee until new trustees were appointed on the trusts set out in a draft deed of settlement relating to other securities intended to be transferred pursuant to such deed. On June 24, 1931, the relevant settlement was executed, the securities specified by the two settlors in their oral declarations of trust being described in Sched. 1 and Sched. 2 to the deed, and other securities being described in two further schedules. The settlement recited the oral declarations of May 20, 1931, and the securities referred to in Sched. 3 and Sched. 4 were assigned to the trustees on the trusts therein set out. The settlors, also by the said deed, appointed the trustees of the settlement to be trustees of the securities mentioned in Sched. 1 and Sched. 2 thereto. The Inland Revenue Commissioners claimed stamp duty (under the head of charge "Settlement" in the Stamp Act, 1891, Sched. 1) at 5s. for every £100 (and part of £100) of the value of the securities mentioned in all four schedules to the deed. It was admitted that the trustees were chargeable to ad valorem duty as claimed in respect of the securities specified in Sched. 3 and Sched. 4 to the deed.

Held: the securities mentioned in Sched. 1 and Sched. 2 to the deed were liable to duty as claimed because the oral declarations and the subsequent settlement constituted one transaction, which was recorded in the settlement.

Horsfall v. *Hey* (1) (1848), 2 Exch. 778, and *Garnett* v. *I.R. Comrs.* (2) (1899), 81 L.T. 633, applied.

Notes. Considered: *Wigan Coal and Iron Co.* v. *I.R. Comrs.*, [1945] 1 All E.R. 392.

As to stamp duty in respect of a settlement, see 28 HALSBURY'S LAWS (2nd Edn.) 472, para. 996; and for cases on the subject see 39 DIGEST 295, 296, *755–762*.

Cases referred to:

(1) *Horsfall* v. *Hey* (1848), 2 Exch. 778; 17 L.J.Ex. 266; 11 L.T.O.S. 271; 154 E.R. 705; 39 Digest 280, *641*.

(2) *Garnett* v. *I.R. Comrs.* (1899), 81 L.T. 633; 48 W.R. 303, D.C.; 39 Digest 279, *636*.

Case Stated by the Commissioners of Inland Revenue.

On July 3, 1931, an instrument was presented on behalf of Barry Baruch Cohen and Harold Mead Moore (hereinafter called "the trustees") to the Inland Revenue Commissioners under s. 12 of the Stamp Act, 1891, for the opinion of the commissioners as to the stamp duty with which it was chargeable. The instrument (hereinafter called "the deed") was a deed described as a settlement dated June 24, 1931, and made between Solomon Millard of the first part, Rosetta Millard, his wife, of the second part, and the trustees of the third part.

The deed contained recitals that Solomon Millard for the same consideration as was thereinafter mentioned for those presents did on May 20, 1931, in the presence of William Frederick Tidyman and Ariel Lionel Solomon verbally declare that he would henceforth, until trustees were appointed in his place, hold the securities mentioned in the first schedule thereto as trustee on the same trusts as would be

A set forth in respect of the securities mentioned in the third schedule thereto when the same were formally transferred, and that Rosetta Millard for the same consideration as was thereinafter mentioned for those presents did on May 20, 1931, in the presence of W. F. Tidyman and A. L. Solomon, verbally declare that she would hold thenceforth and until trustees were appointed in her place the securities mentioned in the second schedule thereto as trustee on the same trusts as would B be set forth in respect of the securities mentioned in the fourth schedule thereto when the same were formally transferred.

The testatum and cl. 1, cl. 2 and cl. 3 of the deed were as follows:

> "Now this settlement witnesseth and it is hereby declared as follows: (i) In consideration of Solomon Millard and Rosetta Millard having agreed with one another to bring into settlement for the benefit of each other and/or their C issue the securities belonging to each of them respectively set out in the third and fourth schedules hereto to the intent that the said Rosetta Millard and/or her issue may have the benefit of an interest in the securities mentioned in the third schedule hereto to the extent hereinafter provided and that the said Solomon Millard and/or his issue may have an interest in the securities set out in the fourth schedule hereto to the extent hereinafter provided in the same D way as was provided by the said verbal declarations whereby in consideration of the interest given to Rosetta Millard and/or her issue in the securities mentioned in the first schedule hereto and the interest given to Solomon Millard and/or his issue in the securities mentioned in the second schedule hereto the said verbal declarations were made The said Solomon Millard hereby assigns and transfers unto the trustees the securities mentioned in the third schedule E hereto and the said Rosetta Millard hereby assigns and transfers unto the trustees the securities mentioned in the fourth schedule to hold the said securities mentioned in the third and fourth schedules hereto upon the following trusts, namely:
>
> "(ii) The trustees for the time being of the securities hereby settled and assigned and transferred to them shall stand possessed of all the property and F securities vested in them upon trust (a) To permit the same or any part thereof to remain in their present form condition or state of investment so long as they in their unfettered discretion shall think fit or may at any time or times at the like discretion sell the same or any part thereof and at the like discretion invest all moneys produced thereby as and when received in the names of the trustees in or upon any investments whatsoever whether a trust G security or not as they may think in their unfettered discretion desirable without being liable to account therefor or in respect of any loss arising in connection therewith (b) From time to time to pay the income of the trust funds brought into this settlement by the said Solomon Millard and whether vested in the trustees by this assignment herein contained or by the appointment of new trustees herein made to the said Solomon Millard to the said H Rosetta Millard or either of their two children, namely, Olgar Sadie Fisher and Derek Edward Millard or to one or more of them in such shares as the trustees may in their unfettered discretion think fit but no trust shall be deemed to be hereby constituted in favour of the said Solomon Millard Rosetta Millard or either of the said children and the trustees may in their unfettered discretion I instead of paying and distributing the income of the trust securities to or amongst one or more of the said persons hereinbefore mentioned postpone such payment and distribution or accumulate the said income or any part thereof during such period or periods as they may think fit and the law permit for the benefit of the issue of the children hereinbefore mentioned and after the death of both the said Solomon Millard and Rosetta Millard and their said two children and the survivor of them the trustees shall sell and realise the said trust funds and divide the same into two equal parts and the trustees shall hold one equal half part of the said trust funds upon trust to divide the same

> among the issue of the said O. S. Fisher and the other equal half part among the issue of the said D. E. Millard but if either the said O. S. Fisher or D. E. Millard shall die without issue then the issue of the other shall have such share added to their share for equal division (c) From time to time to pay the income of the trust funds brought into this settlement by the said Rosetta Millard and whether vested in the trustees by the assignment herein contained or by the appointment of new trustees herein made to the said Solomon Millard the said Rosetta Millard or any of their children, namely: Gerald Samuel Millard O. S. Fisher and D. E. Millard or to one or more of them in such shares as the trustees may in their unfettered discretion think fit but no trust shall be deemed to be hereby constituted in favour of the said Solomon Millard Rosetta Millard or any of the said children and the trustees may in their unfettered discretion instead of paying and distributing the income of the trust securities to or amongst one or more of the said persons hereinbefore mentioned postpone such payment and distribution or accumulate the said income or any part thereof during such period or periods as they may think fit and the law permit for the benefit of the issue of the children hereinbefore mentioned and after the death of both the said Solomon Millard and Rosetta Millard and their children and the survivor of them the trustees shall sell and realise the said trust funds and divide the same into three parts and the trustees shall hold one equal third part of the said trust funds upon trust to divide the same among the issue of the said children the issue of each of the said children taking one third share of the whole equally divided among them but if any of the said children shall die without issue then the issue of the other children shall have such share added to their share for equal division but if either of the said children shall die without issue then the issue of the other child shall have such share added to their share for equal division.
>
> "(iii) And the said Solomon Millard and Rosetta Millard hereby appoint the trustees of this settlement to be the trustees of the securities mentioned in the first and second schedules hereto."

The value at the date of the deed of the moneys, stocks and securities mentioned in the various schedules to the deed (not including therein the value of the freehold ground rents and the freehold property mentioned in the first schedule to the deed) was as follows (ignoring shillings and pence):

First schedule	£46,870
Second schedule	£8,474
Third schedule	£676
Fourth schedule	£836
	£56,856

The commissioners were of opinion that the deed was chargeable under the head of charge "Settlement" in Sched. 1 to the Stamp Act, 1891, with duty amounting to £142 5s., being ad valorem duty at the rate of 5s. for every £100 and every fractional part of £100 of the said sum of £56,856.

It was contended by the trustees that the deed was chargeable with ad valorem duty under the head of charge "Settlement" in Sched. 1 to the Stamp Act, 1891, on the values of the moneys, stocks and securities comprised in the third and fourth schedules only, and in support of their contention they submitted to the commissioners a memorandum or declaration by W. F. Tidyman and A. L. Solomon dated May 26, 1931.

The commissioners assessed the duty at £142 5s. in accordance with their opinion, and the deed had been stamped in conformity with that assessment. The trustees, being dissatisfied with that assessment, had called on the commissioners to state and sign a Case under s. 13 of the Stamp Act, 1891, and the commissioners stated and signed this Case accordingly.

The question for the opinion of the court was whether the instrument was

A chargeable with the duty of £142 5s. in accordance with the assessment of the commissioners, and if not with what duty the deed was chargeable.

The Stamp Act, 1891, provides:

> "Section 62: Every instrument . . . whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person, is to be B charged with duty as a conveyance or transfer of property. Provided that a conveyance or transfer made for effectuating the appointment of a new trustee is not to be charged with any higher duty than 10s."
>
> "Section 104: (1) Where any money which may become due or payable upon any policy of life insurance, or upon any security not being a marketable security, is settled or agreed to be settled, the instrument whereby the settlement is made or agreed to be made is to be charged with ad valorem duty in C respect of that money."
>
> "Schedule 1.—Stamp Duties on Instruments.— . . . Settlement: Any instrument, whether voluntary or upon any good or valuable consideration, other than a bona fide pecuniary consideration, whereby any definite and certain principal sum of money (whether charged or chargeable on lands or other D hereditaments or heritable subjects, or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects or not), or any definite or certain amount of stock, or any security, is settled or agreed to be settled in any manner whatsoever: For every £100, and also for any fractional part of £100, of the amount or value of the property settled or agreed to be settled, 5s."

E *Topham, K.C.*, and *Clement Edwards* for the taxpayers.

The Solicitor-General (*Sir Boyd Merriman, K.C.*) and *J. H. Stamp* for the Crown.

FINLAY, J.—In this case I have arrived at the conclusion that the view taken by the commissioners was correct. I have been greatly assisted in arriving at a conclusion by the two cases of *Horsfall* v. *Hey* (1) and *Garnett* v. *I.R. Comrs.* (2), and especially by the judgment in the latter case of CHANNELL, J., who always F discussed these subjects with great clearness and fullness.

The matter arises on the heading "Settlement" in Sched. 1 to the Stamp Act, 1891. [His Lordship read the definition of the term there given, and continued as follows:] The facts in this case are very clearly, and I think very fairly, set out in the Case Stated. The question is as to the stamp exigible on an instrument dated June 24, 1931, which is presented for adjudication. It is clear, and is G common ground, that with regard to certain securities which are set out in the third and fourth schedules to that instrument the instrument is a settlement, and is accordingly stampable ad valorem with reference to the securities set out in those two schedules. But the securities set out in those two schedules are of relatively small value. The exact details with regard to them are set out in the Case, which shows that the value of the securities in the third schedule is £676, H and the value of those in the fourth schedule is £836. In that deed there are two other schedules, the first and the second schedules, and in those schedules are set out a list of securities of very much greater value. It is proper to mention that three of the matters set out appear to be freehold ground rents of substantial value. The point to be decided is whether stamp duty is exigible ad valorem in respect of the securities and other matters set out in the first and second schedules.

I The contention which was ably put before me on behalf of the taxpayers was that stamp duty was not exigible in respect of the first and second schedules, for the reason that as regards the matters in those schedules there was by this deed no settlement at all. It was said that about five weeks previously to the date of the deed there had been a verbal declaration of trust with reference to those securities which was a valid and subsisting declaration of trust, and therefore the deed could not and did not operate with regard to them, or anyhow did not operate with regard to them except as an appointment of new trustees, and, possibly, as a record of an event which had actually occurred in the past. That, in substance, was the argument which was addressed to me on behalf of the taxpayers. In considering that argument it is necessary to look at a memorandum or record by two solicitors' clerks in which they say that they were present on May 20, 1931, at the offices of Messrs. Cohen & Cohen, that Solomon Millard and Rosetta Millard then made verbal declarations of trust, that Solomon Millard stated

> "that he held and would thenceforth hold the securities hereinafter mentioned in Sched. 1 of this our declaration as trustee until new trustees were appointed on the trusts set out in a draft deed of assignment settlement and trust relating to other securities intended to be transferred pursuant to such deed";

and that Rosetta Millard, the wife, then made a similar declaration with reference to the funds set forth in the second schedule. That, in substance, is the record which was tendered to the commissioners and is before me, of the transaction which took place on May 20, 1931. The record was apparently made on May 26, 1931, that is six days after the events which it records. It certainly is rather unfortunate that in the recital to the settlement (for it is admittedly a settlement as to the third and fourth schedules) of June 24, 1931, the transaction is somewhat differently stated. It is there set forth that the declaration of Solomon Millard was that

> "he would . . . hold the securities mentioned in the first schedule thereto as trustee upon the same trusts as would be set forth in respect of the securities mentioned in the third schedule thereto, when the same were formally transferred,"

and that the declaration of Rosetta Millard was in corresponding terms. That is not quite the same as the declaration expressed in the record of the clerks, though I am not prepared to decide this case on any such narrow point as that.

It was argued by the Solicitor-General on behalf of the Crown that there could not be a trust created in the terms in which it is said that this verbal trust was created. The argument was, if I rightly followed it, that inasmuch as there was an unfettered discretion in the trustees of the settlement, who were persons other than the settlors, and inasmuch as the husband and wife said that they held as trustee on the terms expressed in the draft of the deed which was apparently there in the office at the time, the unfettered discretion prevented any operation of the trust. I think that that submission might be right as to income, but it appears to me clear that as to the capital a valid trust might be, and could be, created; and I should not be prepared to decide the case on that basis. I think, however, that the Crown is right on what may be regarded as the main point in the case, viz., whether or not there was here a separate and independent transaction apart from the deed. That is a point which does not depend on a precise reading of any document or on differences such as there are here between one document and another. I think that when the facts of this case are considered, both the admitted facts and the facts which anybody who looks at the documents and who knows anything of the way these things are done must perceive to be the facts, it becomes a reasonably clear case coming within the principle of the two decisions of *Horsfall* v. *Hey* (1) and *Garnett* v. *I.R. Comrs.* (2).

I am disposed to agree with counsel for the taxpayers that the headnote in *Horsfall* v. *Hey* (1) is stated somewhat too widely, but the principles as laid down by PARKE, B., appear to me to be important. I need not discuss that case at length, because I think it is enough that I should refer to the judgment of CHANNELL, J., in *Garnett* v. *I.R. Comrs.* (2). I do not think it is necessary that I should read the whole judgment, but I will read one passage from it, which is as follows:

> "If this argument [for the appellant] is good, it seems to me that by paying your money first and executing your deed afterwards you could always get out of the ad valorem stamp. That cannot possibly be so. It seems to me that the question whether this is to be stamped as a conveyance is very much the same as the question which has arisen over and over again on that rather

> awkward definition in the Bills of Sale Act about a receipt being a conveyance; and the question is whether it is one transaction. If there is a clearly independent transaction and it is not all part of one transaction, then the thing would stand on a different footing. It seems to me that if the parties dissolved their partnership in 1896 and transferred all assets and wound the whole thing up, and then in the year 1897 it occurred to them that it would be rather better to have a release and a mutual document to set it all right; and in the year 1897 they had executed a document which said: Whereas the whole of the affairs in this partnership were wound-up in the year 1897 [he means in the year 1896] and everything was settled between the parties, and so and so, and whereas one of them has requested to have a release or to have a particular covenant, or something of the kind, put in (there are some particular covenants in this case), that then they executed a deed which was a separate transaction and appeared by the deed to be so, that would not be liable to be stamped with an ad valorem stamp; but where according to the appearance of the deed it is a deed which practically effects a transaction, just as this memorandum in *Horsfall* v. *Hey* (1) effected the transaction, then it is certainly a 'release upon a sale.' "

In the present case one has to take into account the fact that the verbal statement was, as proved by the evidence, made five weeks only before the deed was executed, or in other words, that five weeks after the statement this deed was made. One has to take into account the fact that the deed was certainly in draft at that time, because the declaration says that express reference was made to the draft deed of assignment and to the trusts therein set out. One takes into account the fact that in this deed the trust created with reference to the first and second schedules is set out. One takes into account the fact, which I think I ought to draw as an inference, that there was no real distinction between the securities and other matters set out in the first and second schedules and those set out in the third and fourth schedules except that the first two schedules contained the securities of much the greatest value. Having regard to these facts I cannot resist the view that what was being done here was that these securities in all the four schedules were being settled. I think that the splitting up of the securities was an artificial splitting up. I think that the transaction was really all one transaction, and that, being one transaction, the whole was recorded in the document—the only document which has been drawn up—which is the settlement. On this broad ground the argument on behalf of the Crown has mainly proceeded, and while I regard the case as by no means free from difficulty, I decide it on this broad ground and not on any of the narrower grounds which have been put forward. I think the Crown is entitled to succeed, and the appeal will accordingly be dismissed.

Solicitors: *Cohen & Cohen*; *Solicitor of Inland Revenue.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

ALEXANDER PIRIE & SONS, LTD.'S, APPLICATION

[HOUSE OF LORDS (Lord Tomlin, Lord Russell and Lord Wright), February 27, 28, March 2, 17, 1933]

[Reported 149 L.T. 199; 50 R.P.C. 147]

Trade Mark—Application for registration—Mark phonetically similar already registered—Knowledge of applicants—"Honest concurrent user"—Discretion of registrar—Trade Marks Act, 1905 (15 *Edw.* 7, *c.* 15), *ss.* 19, 21, *as amended—Trade Marks Act*, 1919 (9 *&* 10 *Geo.* 5, *c.* 79), *s.* 8 (2).

An application by A.P. & Sons, paper manufacturers, for registration of a trade mark in respect of paper goods in class 39, was opposed by the H. Paper Co., who manufactured paper in the United States of America, some of which was sold in this country. The H. Paper Co. had a trade mark in the United States, "Hammermill Bond," which they made use of in this country after 1920, from which time they exported goods to this country, and each year sold about £2,000 in value of goods in this country. On May 23, 1923, the H. Paper Co. registered their trade mark "Hammermill" in class 39 in respect of paper goods. From May 31, 1923, A.P. & Sons used the mark "Abermill Bond," and their trade under that mark had been over £20,000 a year. They chose the mark "Abermill" quite honestly in reference to the locality where their paper for stationery was produced near Aberdeen, without any thought of the word "Hammermill," though they were aware of the mark "Hammermill Bond." On July 17, 1928, and in May, 1929, A.P. & Sons applied to register the mark "Abermill Bond made in Great Britain." On June 13, 1931, the Assistant Controller decided that if the application had been for registration of a new mark he would have refused the application under s. 19 of the Trade Marks Act, 1905, on the ground that there was a resemblance calculated to deceive, but he exercised his discretion to allow registration where there had been honest concurrent user under s. 21 of the Act, treated the case as one of an honest concurrent user of the mark by A.P. & Sons, and made the order for registration. CLAUSON, J., on Nov. 26, 1931, agreed as to s. 19, but refused registration under s. 21.

Held: registration should be permitted because (i) the possibility of confusion was slender; (ii) the choice of the word "Abermill" was honestly made; (iii) five years' honest concurrent user had been proved; (iv) there was no proof of any confusion due to the concurrent user; (v) in view of the above findings, and of the fact that A.P. & Sons had built up with their trade mark a large and increasing business, the hardship to A.P. & Sons of refusing registration was out of all proportion to any hardship to the H. Paper Co. or inconvenience to the public which could possibly result from granting it.

Per LORD TOMLIN: (i) The House of Lords is entitled and bound to consider whether the discretion given to the Court of Appeal by the Trade Marks Act, 1919, s. 8 (2) (now s. 52 of the Act of 1938), was in fact properly exercised.

(ii) Knowledge of the registration of the opponents' mark may be an important factor where the honesty of the user of the mark sought to be registered is impugned, but when once the honesty of the user has been established, the fact of knowledge loses much of its significance, though it may be a matter not to be wholly overlooked in balancing the considerations for and against registration.

Notes. The Trade Marks Acts referred to in this case have been repealed: the current Act is the Trade Marks Act, 1938, s. 9 of which re-enacts s. 9 of the 1905 Act with amendments; s. 11 and s. 17 of which respectively replace s. 11 and s. 12 of the 1905 Act; and s. 18 (2)–(11) of which replaces s. 14 of the 1905 Act. Section 12 (1) of the 1938 Act is in substantially the same terms (save for the reference to trade marks in use before Aug. 13, 1875) as s. 19 of the 1905 Act;

s. 12 (3) is in similar terms to s. 20 of the 1905 Act; s. 12 (2) has the same effect as s. 21 of the 1905 Act, as amended by s. 12 of the 1919 Act and explained by LORD TOMLIN, ante; s. 39 of the 1905 Act has been replaced by ss. 4 and 5 of the 1938 Act; s. 1 (2) of the 1938 Act continues the division into Parts A and B made by the 1919 Act, s. 1. The requisites for registration in Part B are now set out in s. 10 of the 1938 Act, and s. 52 of the Act of 1938 reproduces s. 8 (2) of the Act of 1919. The differences between the present law and that in force when this case was decided do not appear to affect the validity of the propositions set out in the holding of the headnote.

Considered: *Re Darwins, Ltd.'s Applications* (1945), 63 R.P.C. 1; *Re Parkington & Co., Ltd.'s Application* (1946), 175 L.T. 181. Referred to: *Re Société des Usines Chimique Rhône-Poulenc*, [1937] 1 All E.R. 145; *Re Bainbridge and Green & Co. (Grimsby), Ltd.'s Applications* (1939), 57 R.P.C. 1.

As to refusing registration on the ground of resemblance to a registered mark, see 32 HALSBURY'S LAWS (2nd Edn.) 564–570, para. 873; and as to registration in case of honest concurrent user, see ibid. 573, para. 874, text and notes (g) and (h). For the Trade Marks Act, 1938, see 25 HALSBURY'S STATUTES (2nd Edn.) 1180.

Cases referred to:

(1) *Reddaway* v. *Banham*, [1896] A.C. 199; 65 L.J.Q.B. 381; 74 L.T. 289; 44 W.R. 638; 12 T.L.R. 295; 13 R.P.C. 218, H.L.; 43 Digest 278, *1098*.

(2) *McDowell* v. *Standard Oil Co. (New Jersey)*, [1927] A.C. 632; 96 L.J.Ch. 386; 137 L.T. 734; 43 T.L.R. 592, H.L.; sub nom. *Re McDowell's Application*, 44 R.P.C. 335, H.L.; 43 Digest 169, *248*.

(3) *Re Maeder's Application*, [1916] 1 Ch. 304; 85 L.J.Ch. 737; 33 R.P.C. 77; sub nom. *Re Joseph Emil Maeder*, 114 L.T. 393; 43 Digest 159, *167*.

(4) *George Banham & Co.* v. *F. Reddaway & Co.*, [1927] A.C. 406; 136 L.T. 485; 43 T.L.R. 138; 71 Sol. Jo. 34; sub nom. *Re F. Reddaway & Co.'s Application*, 96 L.J.Ch. 117; 44 R.P.C. 27, H.L.; 43 Digest 183, *337*.

Appeal from the decision of the Court of Appeal (LORD HANWORTH, M.R., LAWRENCE and ROMER, L.JJ.), reported 146 L.T. 493. The material statutory provisions and facts are summarised in the headnote and are fully stated in the opinion of LORD TOMLIN.

The Court of Appeal held (i) that the court ought to be very slow to upset the exercise of the discretion of the Controller or Registrar, who had to adjust various considerations: *Reddaway* v. *Banham* (1) and *McDowell* v. *Standard Oil Co. (New Jersey)* (2) applied. (ii) Accepting the view of the Controller and CLAUSON, J., that s. 19 alone did not avail to secure the admission of the mark to the register, as to s. 21 that, there having been an honest choice of the word "Abermill" and an honest user over a period of six years and no confusion having been proved, the court ought to permit the registration of the mark under s. 21, even if it were deemed to be identical or nearly identical with the trade mark of the H. Paper Co., the objectors, as that section was in no way controlled or limited by s. 19. The remarks of SARGANT, J., as to the limitation of s. 21 by s. 19 in *Re Maeder's Trade Mark Application* (3) ([1916] 1 Ch. at p. 310) disagreed with, the court holding that s. 21 could be applied, whether the possibility of deception was slight or great. The objectors appealed.

Trevor Watson, K.C., and *Lionel J. Heald* for the objectors, the appellants.

James Whitehead, K.C., and *F. E. Bray* for the applicants, the respondents.

The House took time for consideration.

March 17. The following opinions were read:

LORD TOMLIN.—In this case the appellant objectors complain of an order of the Court of Appeal permitting, notwithstanding the objectors' opposition, registration in the respondent applicants' name in Part B of the register of trade marks of a mark consisting of the words "Abermill Bond made in Great Britain."

The acting Registrar of Trade Marks decided in favour of the registration. His decision was reversed by CLAUSON, J., but was restored by the Court of Appeal by the order now under appeal to your Lordships' House.

The objectors are a company incorporated under their present name in 1899 in the United States of America. The objectors' business is that of paper manufacturers.

The objectors do not themselves sell their products outside the U.S.A. Such products are purchased by an American distributing company which re-sells in foreign countries. An English company, Frederick Johnson & Co., Ltd., and its predecessors, have always had, through the American distributing company, the exclusive right to handle the objectors' products in the United Kingdom.

The objectors' products were first put on the market in the United Kingdom in the year 1920, and the word "Hammermill," which had been theretofore used by the objectors as a trade mark in the U.S.A., was thereafter used by them as their trade mark in this country.

On May 23, 1923, the objectors' mark "Hammermill" was registered in Class 39 of the Trade Mark Register in respect of writing-paper, ledger paper, correspondence envelopes, and writing-pads.

The objectors have also become the registered proprietors of the same mark in the U.S.A., and in a number of other countries, including many British Dominions, Colonies, and Dependencies.

The objectors use their trade mark "Hammermill" with the additional words "Bond made in U.S.A." as a watermark upon their goods sold in Great Britain.

Under the Merchandise Marks Act, 1926, s. 1, an indication of origin is necessary where a trade mark is used on imported goods.

The retail value of the objectors' goods, sold under the mark "Hammermill" in the United Kingdom from 1920 to the end of 1928, was stated to be as follows:

1920–22 average for three years (per annum)	£8,239
1923	£2,512
1924	£2,029
1925	£1,889
1926	£1,860
1927	£2,310
1928	£1,744

The applicants are an old-established paper manufacturing company in Scotland.

From May 31, 1923, onwards the applicants have used in respect of a certain quality of writing-paper manufactured by them a trade mark consisting of the words "Abermill Bond made in Great Britain." It is admitted that the words "Bond made in Great Britain" are common to the trade. The mark is used, amongst other ways, as a watermark on the writing-paper in question.

The evidence as to the origin of this mark is that the applicants were about to produce a new quality of writing-paper and needed a new mark to indicate it. One of their travellers or managers suggested "Abermill" as a contraction of Aberdeen Mill, the applicants' mill being near Aberdeen. Mr. Pirie, chairman of directors of the applicants, said: "I had no doubt heard of the objectors' Hammermill Bond, but the suggestion of adopting Abermill Bond emanated from one of our managers in London, and when we adopted that name Hammermill Bond was in no way present to our minds." The manager who suggested the mark gave evidence to the same effect.

The value of the paper sold in Great Britain by the applicants under their "Abermill" mark from 1923 to the end of 1928 is stated to be as follows:

1923	£728
1924	£9,184
1925	£16,520
1926	£21,838
1927	£30,268
1928	£41,603

On Feb. 24, 1925, Frederick Johnson & Co., Ltd., the company having the exclusive right in the United Kingdom to handle the objectors' products, in the course of a letter to the sales company handling the applicants' products, acknowledged receipt of a sample book of Abermill Bond paper sent them by such sales company and observed that such book "specifically interested us owing to the name having a phonetic resemblance to our well-known Hammermill Bond." No complaint was, however, made in respect of the user of the word "Abermill." On the following day the sales company, in their reply, said: "It is true that Abermill Bond does resemble phonetically Hammermill Bond, but we need hardly assure you that this is accidental," and the way in which the word was selected was then explained.

Mr. Frederick Johnson, a director of Frederick Johnson & Co., Ltd., gave evidence to the effect that he was under the impression that he reported the correspondence to America, although he could not find a copy of his letter, but that if he omitted to do so he remembered clearly mentioning the matter to the representative of the American distributing company.

Towards the end of 1926 and the beginning of 1927 the objectors, who had registered their trade mark "Hammermill" in the Straits Settlements, made a complaint of the use of the "Abermill" mark in that territory, but after a full explanation had been given to them by the applicants' selling company of the origin of the "Abermill" mark and the nature of its user they took no further step in the matter. The objectors' assistant secretary says he permitted the matter to get side-tracked in the pressure of business.

On July 17, 1928, the applicants applied for registration in Part B of the register of the mark "Abermill Bond made in Great Britain" in connection with writing-paper made in Great Britain. For reasons that have no significance that application was abandoned, and a fresh application was launched in May, 1929, and notice of opposition was given by the objectors.

The Registrar of Trade Marks decided in exercise of the powers of s. 21 of the Trade Marks Act, 1905, as amended by the Act of 1919, to register the trade mark without any condition or limitation.

After saying, with reference to s. 19 of the Trade Marks Act, 1905, that the two words "Abermill" and "Hammermill" were so similar to one another phonetically that if the applicants' mark had been a new one he should have been obliged to refuse registration, he proceeded to consider the facts of the case in relation to s. 21, and reached the conclusion that the applicants' user had been honest and that registration should be allowed as already indicated.

Clauson, J., in reversing this decision, expressed his concurrence with the view of the registrar as to the phonetical similarity of the words, pointing out, however, that no actual confusion between the two marks was proved. He accepted the registrar's view as to the honesty of the applicants' user of the mark, but on a review of the whole case he held that the discretion vested in the court under s. 21 ought not to be exercised in the applicants' favour.

The Court of Appeal restored the registrar's decision. Their view was that, the registrar's opinion as to the phonetical resemblance of the two words being accepted as correct, the case was one in which the discretion under s. 21 could be, and ought to be, exercised in the applicants' favour.

Before examining the arguments which were addressed to your Lordships' House it is advisable to look more closely at the relevant provisions of the statutes.

Section 9 of the Act of 1905 specifies the essential particulars of a registrable trade mark. Section 11 provides that it shall not be lawful to register as a trade mark, or part of a trade mark, any matters the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a court of justice or would be contrary to law or morality or any scandalous design.

Section 12 provides for the mode of application to register and s. 14 deals with opposition to registration.

Sections 19, 20 and 21 are in the following terms:

> "19. Except by order of the court or in the case of trade marks in use before the thirteenth day of August, 1875, no trade mark shall be registered in respect of any goods or description of goods which is identical with one belonging to a different proprietor which is already on the register with respect to such goods or description of goods, or so nearly resembling such a trade mark as to be calculated to deceive." A
>
> "20. Where each of several persons claims to be proprietor of the same trade mark, or of nearly identical trade marks in respect of the same goods or description of goods, and to be registered as such proprietor, the registrar may refuse to register any of them until their rights have been determined by the court, or have been settled by agreement in a manner approved by him or (on appeal) by the Board of Trade." B
>
> "21. In case of honest concurrent user or of other special circumstances which, in the opinion of the court, make it proper so to do, the court may permit the registration of the same trade mark, or of nearly identical trade marks, for the same goods or description of goods by more than one proprietor subject to such conditions and limitations, if any, as to mode or place of user or otherwise, as it may think it right to impose." C

Section 39 provides as follows: D

> "Subject to the provisions of s. 41 of this Act and to any limitations and conditions entered upon the register, the registration of a person as proprietor of a trade mark shall, if valid, give to such person the exclusive right to the use of such trade mark upon or in connection with the goods in respect of which it is registered: Provided always that, where two or more persons are registered proprietors of the same (or substantially the same) trade mark in respect of the same goods, no rights of exclusive user of such trade mark shall (except so far as their respective rights shall have been defined by the court) be acquired by any one of such persons as against any other by the registration thereof, but each of such persons shall otherwise have the same rights as if he were the sole registered proprietor thereof." E F

Section 1 of the Trade Marks Act, 1919, provides for the division of the register into two parts, Part A and Part B. Bona fide user for not less than two years in the United Kingdom is, under s. 2 of the Act, necessary to justify an application to register in Part B. The effect of registration in Part B of the register is stated in that section as follows: G

> "(2) The registrar shall consider every such application for registration of a trade mark in Part B of the register, and if it appears to him, after such search, if any, as he may deem necessary, that the application is inconsistent with the provisions of s. 11 or s. 19 of the principal Act, or if he is not satisfied that the mark has been so used as aforesaid, or that it is capable of distinguishing the goods of the applicant, he may refuse the application, or may accept it subject to conditions, amendments or modifications as to the goods or classes of goods in respect of which the mark is to be registered, or to such limitations, if any, as to mode or place of user or otherwise as he may think right to impose, and in any other case he shall accept the application." H

By s. 8 (2) of the Act of 1919 it was provided that in any appeal from the decision of the registrar to the court under the Act of 1905 or the Act of 1919 the court (which was defined by s. 3 of the Act of 1905 as the High Court) should have and exercise the same discretionary powers as under either of the Acts are conferred upon the registrar. I

By s. 12 of the Act of 1919 certain amendments specified in Sched. 2 to the Act were made in the provisions of the Act of 1905. These amendments include one whereby the powers of s. 21 of the Act of 1905 were made exercisable by the registrar as well as by the court.

It will be convenient first to dispose of two points of construction which were indicated to your Lordships' House by one side or the other.

The objectors suggested that as, when s. 21 was amended by the Act of 1919 so as to confer on the registrar the power to exercise the discretion under that section, no modification was made in the opening words of s. 19 of the Act of 1905, namely, "Except by order of the court," it is only the court and not the registrar who can exercise the discretion so as to defeat the prohibition of s. 19 and that the proceedings in the present case were therefore irregular and ineffectual unless Clauson, J.'s decision can be treated as the real operative exercise of the discretion. It is enough to say that in my opinion s. 21, as amended by the Act of 1905, gives to the registrar a specific power to permit registration which is sufficient to override the generality of the prohibition in s. 19.

The second point was raised by the applicants. They called attention to the fact that s. 8 (2) of the Act of 1919 applies only to the High Court, that s. 27 (1) of the Judicature Act, 1925, confers on the Appeal Court all the powers of the High Court, but that there is no statutory provision conferring any power on your Lordships' House comparable to that conferred on the High Court by s. 8 (2) of the Act of 1919. The inference sought to be drawn from this state of things was apparently that the power of your Lordships' House to disturb or interfere with the decision of the Court of Appeal was in some way limited. I am unable to discover any ground for drawing any such inference. The function of your Lordships' House is to examine the decision of the Court of Appeal and consider whether they have properly discharged the task which fell to them under the statutes. The Court of Appeal had a discretion which it was bound to exercise itself, and the question which I think your Lordships are entitled and bound to consider, and which I invite you to consider, is whether that discretion was in fact properly exercised.

This is not to say that any court, even with an unfettered discretion, in reviewing the decision of an experienced officer such as the Registrar of Trade Marks, should not attach great weight to his conclusion on any matter which falls pre-eminently within his experience, but, in my opinion, in such a case the court, while determining the weight to be attached to the registrar's view, must exercise its own mind upon the solution of the problem under consideration. The observations of Viscount Dunedin in *George Banham & Co., Ltd.* v. *Reddaway & Co., Ltd., and another* (4), as explained by him in *McDowell* v. *Standard Oil Co.* (*New Jersey*) *and another* (2) ([1927] A.C. at p. 640), must be read with s. 8 (2) of the Act of 1919 in mind and are not, I think, intended to convey anything inconsistent with what I have said.

The question, therefore, is whether having regard to the language of s. 21 and the facts which have been proved the case is one to which the section applies, and if so, how under the section the discretion ought to be exercised.

There is little authority on the section. A passage from the judgment of Sargant, J., in *Re Joseph Emil Maeder* (3) was cited by Lord Hanworth, M.R. I agree with the Master of the Rolls that the adjective "slight" appearing in that passage would have been better omitted, but that otherwise the passage is unexceptionable. The existence of the possibility of deception or confusion seems to me to be one of the conditions contemplated by the section as giving rise to the power to exercise the discretion.

The user and its honesty is not in question in this case, and I cannot doubt that the section applies.

Should the discretion be exercised in the applicants' favour? The objectors say no, and they put their case, as I understand it, in two ways.

First, the objectors say that where, as here, the opponents are already on the register they have a vested right of property which ought not to be cut down, at any rate except in circumstances of an exceptional kind, and certainly not in the circumstances of this case. The answer to this point seems to be that the right conferred by registration is only a right subject to the provisions of the Acts which confer on the registrar the power to register another mark under s. 21, and that logically there is no distinction between the case where the opponents have already a mark on the register and the case where they are themselves applying to register.

Secondly, the objectors say, and this is their main line of attack on the conclusion of the Court of Appeal, that though the applicants were honest in their user in the sense that they never intended to cause confusion or to pass off their goods as the goods of the objectors, yet inasmuch as they knew of the objectors' mark when they adopted their own and as the marks have been used on the same goods in the same market, the user of the applicants' mark cannot be treated as honest within the meaning of the section, and that in any case by refusal of registration there would not in these circumstances be the hardship to the applicants which the section is intended to prevent.

It has never been suggested throughout this case that the conduct of the applicants has in the slightest respect been open to criticism, and I should be sorry to place upon this statute a construction which would brand as statutory dishonesty conduct justified in the eyes of honourable men. There is in fact no ground for doing so. Knowledge of the registration of the opponent's mark may be an important factor where the honesty of the user of the mark sought to be registered is impugned, but when once the honesty of the user has been established the fact of knowledge loses much of its significance, though it may be a matter not to be wholly overlooked in balancing the considerations for and against registration.

In the course of his judgment, CLAUSON, J., said:

> "Above all, I should deem it my duty so to weigh the competing factors as to avoid giving any colour to the idea that a trader, who knows of a competing trade mark, and knows that he can get his trade mark registered only if he can show within s. 19 that it is not calculated to deceive, can put himself in a more advantageous position by taking the risk of building up commercial claims on his doubtful mark, and, after due time, coming to the court to claim indulgence under s. 21."

With all respect to the learned judge, I think in that passage he is attributing to the factor of knowledge an importance which it had lost the moment the honesty of the user was recognised and that it is this mal-attribution which has coloured his ultimate conclusion.

In my opinion, when once the two factors, namely, the previous registration of the objectors' mark and the applicants' knowledge of the objectors' mark have fallen into their right perspective, the case becomes easy of decision, and should, in my opinion, be determined in favour of registration for the following reasons:

(i) While recognising the possibility in certain, perhaps somewhat remote, contingencies of confusion from phonetic similarity between the two words and giving due weight to the possibility of mistake arising from inaccurate or ill-remembered impression on the mind of one or other of the marks, I am of opinion that the possibility of confusion is slender.

(ii) The choice of the word Abermill was honestly made.

(iii) Five years' honest current user has been proved.

(iv) It is the user and not the registration which is liable to cause confusion, and the commercial user has not produced any proof of confusion. This fact cannot be regarded as unimportant even though allowance be made for difficulty of proof; and

(v) The objectors' trade is small, and for some years has remained more or less stationary. The applicants, on the other hand, have built up with their trade mark a large and increasing business.

Bearing these matters in mind the hardship to the applicants of refusing registration appears to be out of all proportion to any hardship to the objectors or inconvenience to the public which can possibly result from granting it.

I may add that I think, differing in this respect from CLAUSON, J., that it is open to the applicants to set up hardship and that there is nothing in the evidence to justify the learned judge's finding that the applicants had taken the risk of building up their commercial claims on a mark for which they did not venture to claim registration when they began using it.

I do not think that the applicants, though aware of the objectors' mark, had it in mind at all when they adopted their own mark.

Further, I desire to say that without further consideration I am not prepared to accept the view that regard should be had under s. 21 to the effect in foreign countries of registration here. In the present case, even if I were satisfied that the applicants, by registration here, were placed in a better position for registering in foreign countries where the objectors' mark is already registered, and that that matter was proper to be taken into account, I should reach the same ultimate conclusion.

The result is that, in my opinion, the order of the Court of Appeal was right, and I recommend to your Lordships that this appeal should be dismissed with costs.

LORD RUSSELL and **LORD WRIGHT** concurred.

Appeal dismissed.

Solicitors: *Simons*; *Piesse & Sons.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

BISHOP *v.* CONSOLIDATED LONDON PROPERTIES, LTD.

[KING'S BENCH DIVISION (du Parcq, J.), January 20, 27, 1933]

[Reported 102 L.J.K.B. 257; 148 L.T. 407]

Landlord and Tenant—Repair—Landlords' covenant—Covenant to keep exterior of premises in good repair—Obstruction in water pipe, causing overflow of water—Landlord ignorant of defect—Cause of defect beyond landlords' control.

A lease of a fourth-floor flat contained a covenant that the tenant would permit the landlords, or their agents, or others, to enter upon the premises demised for the purpose (inter alia) of seeing to and repairing any defects in the water pipes or watercourses passing through the premises or communicating with or affecting other parts of the building. By another covenant: "[The landlords] will keep the exterior of the premises, and all parts of the building, including halls, staircases, and passages not the subject of this or some other letting in good repair." At a higher level than the flat was a boxroom, under the roof and on the outside of which water was conveyed in an open gutter into a lead trough, thence into another lead trough, and ultimately into a downfall pipe. The boxroom, gutter, troughs, and pipes were not the subject of the above or any other letting, and remained under the landlords' control. The landlords permitted pigeons to nest in the boxroom, and a young dead pigeon got into the water system and was eventually carried into the downfall pipe, where it caused a serious obstruction and overflow of water through the ceiling of the flat let to the tenant. Damage was thereby caused to the tenant. On a claim by the tenant against the landlords for damages for breach of covenant and, alternatively, damages for negligence,

Held: the landlords were liable to the tenant in damages for breach of this covenant to repair because

(i) this covenant included the water system outside the flat;

(ii) a pipe which is choked and not able to do its duty as a pipe is out of repair;

(iii) the covenant bound the landlords to have the pipe in repair at all times during the tenancy, and it was, therefore, irrelevant to consider whether it became out of repair suddenly or by a slow accumulation of debris, or whether it became choked with or without any fault on the part of the landlords.

Melles & Co. v. *Holme* (1), [1918] 2 K.B. 100, applied.

Semble, the landlords, as the persons in charge and control of the water supply, apart from any contractual duty were under a common law duty as occupiers of adjacent premises to take reasonable care to prevent the escape of water, and on the facts found would have been liable in tort for negligence.

Notes. The liability of occupiers of dangerous premises has now been modified by the Occupiers Liability Act, 1957, but these modifications do not affect the validity of this decision, save that s. 4 (1) of the Act would have given the tenant's husband the same rights of action against the landlords as the tenant had.

Considered: *Greg* v. *Planque*, [1935] All E.R. Rep. 237.

As to the liability of a landlord of flats for cisterns and water pipes, see 20 HALSBURY'S LAWS (2nd Edn.) 338, para. 405, text and note (a); as to his liability for injury to third parties, see ibid. 207, para. 227; and as to his liability for injury to the tenant, see 23 HALSBURY'S LAWS (2nd Edn.) 596–598, para. 847. For the Occupiers Liability Act, 1957, s. 4 (1), see 37 HALSBURY'S STATUTES (2nd Edn.) 382.

Cases referred to:

(1) *Melles & Co.* v. *Holme*, [1918] 2 K.B. 100; 87 L.J.K.B. 942; 119 L.T. 191; 62 Sol. Jo. 704, D.C.; 31 Digest (Repl.) 346, *4774*.

(2) *Luxmore* v. *Robson and another* (1818), 1 B. & Ald. 584; 106 E.R. 215; 31 Digest (Repl.) 369, *5008*.

(3) *Main's Case* (1596), 5 Co. Rep. 20 b.; Jenk. 256; 77 E.R. 80; sub nom. *Maine* v. *Scot*, Moore, K.B. 452; sub nom. *Maynie* v. *Scot*, Cro. Eliz. 479; sub nom. *Scot* v. *Mayn*, Cro. Eliz. 449; 2 And. 18; 31 Digest (Repl.) 71, *2275*.

(4) *Makin* v. *Watkinson* (1870), L.R. 6 Exch. 25; 40 L.J.Ex. 33; 23 L.T. 592; 19 W.R. 286; 31 Digest (Repl.) 346, *4768*.

(5) *Torrens* v. *Walker*, [1906] 2 Ch. 166; 75 L.J.Ch. 645; 95 L.T. 409; 54 W.R. 584; 31 Digest (Repl.) 344, *4752*.

(6) *Tredway* v. *Machin* (1904), 91 L.T. 310; 53 W.R. 136; 20 T.L.R. 726; 48 Sol. Jo. 671, C.A.; 31 Digest (Repl.) 383, *5105*.

(7) *Cockburn* v. *Smith*, [1924] 2 K.B. 119; 93 L.J.K.B. 764; 131 L.T. 334; 40 T.L.R. 476; 68 Sol. Jo. 631, C.A.; 31 Digest (Repl.) 104, *2484*.

(8) *Donoghue* v. *Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; 48 T.L.R. 494; 76 Sol. Jo. 396; 37 Com. Cas. 850, H.L.; 36 Digest (Repl.) 85, *458*.

(9) *Gill* v. *Edouin* (1894), 71 L.T. 762; 11 T.L.R. 93; 39 Sol. Jo. 98; 15 R. 109; affirmed (1895), 72 L.T. 579; 11 T.L.R. 378, C.A.; 36 Digest (Repl.) 295, *411*.

(10) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 283, *334*.

Action tried by DU PARCQ, J., without a jury.

The tenant of a flat at Hyde Park Mansions, London, W., claimed damages from her landlords for breach of a covenant contained in the lease, and, alternatively, damages for negligence in and about the cleansing and repairing of a gutter and pipe. The facts, which are summarised in the headnote, appear fully in the judgment.

R. J. Sutcliffe for the tenant.

S. Cope Morgan for the landlords.

The arguments appear from the judgment.

Cur. adv. vult.

Jan. 27. **DU PARCQ, J.,** read the following judgment.—In this case, Mrs. Josephine Bishop, a married woman, sues her landlords, Consolidated London Properties, Ltd., for damage which she suffered owing to an overflow of water from the upper part of a block of flats owned by the landlords through the ceiling and into the flat on the top floor occupied by her. The facts were that the plaintiff was the tenant of the flat in question, which is situated at Hyde Park Mansions in the Marylebone Road, under a lease dated Feb. 9, 1926, whereby she was to hold the premises for five years from March 25, 1929, paying a rent of £130 in addition to payments to cover increased rates. The lease contained the following covenants which appear to be material. One was that the tenant was to permit the landlords or their agents or others to enter upon the premises demised for the purpose, among others, of seeing to and repairing any defects in the water pipes and watercourses passing through the premises or communicating with or affecting other parts of the building. Another, which is the most material covenant in this case, was the following covenant by the landlords; they covenant with the tenant in these terms:

> "And also will keep the exterior of the premises and all parts of the building including halls, staircases, and passages, not the subject of this or some other letting in good repair."

On Sept. 18, 1932, it was found that water was coming through the ceiling of the flat occupied by the tenant and doing considerable damage. A visit to the boxroom above showed that water was overflowing from the gutter which in these premises conveyed water into a lead trough, from which the water eventually reaches another lead trough, and then down a downfall pipe. Under the roof in the boxroom, and outside the boxroom also, the water is for some distance conveyed, not in the ordinary way in pipes, but in open gutters or gullies, and it eventually turned out that an obstruction had been caused in an unusual and somewhat peculiar way. I am satisfied that in the ordinary way, although the gutters and troughs had not been cleaned out since the preceding March, there would not have been any serious obstruction from the ordinary accumulation of London dirt; but in some way a young pigeon, probably dead, had got into the water system and was eventually carried into the downfall pipe accompanied by a certain quantity of straw and feathers, whether its own or those of other birds I do not know, which came, as I think, from a nest which the pigeons had built in the boxroom. That caused a serious obstruction and an overflow. The presence of the pigeon was discovered on Sept. 20, it having been temporarily dislodged by tapping the pipe on the 19th. The man who removed it ultimately, a man called Patching, who was called by the landlords and who struck me as a sensible and intelligent man, said that he formed the opinion that the pigeon had fallen from a nest in the boxroom, the remains of which he found. It is clear that the system adopted on these premises for conveying the water to the downfall pipe and away was very unusual. Mr. Barking, a surveyor and a gentleman of experience, who was called for the tenant, told me that it was a most peculiar construction because it was usual to have pipes. He thought that the landlords had omitted to take what he called an elementary precaution, in that they had not placed wire meshing over the lead trough or the inlets to the lead trough. It appeared from the evidence of the tenant's husband that there was some netting, as he put it, against pigeons. I do not know that those who placed it there had pigeons in their minds, but no doubt it was placed there to keep foreign substances out of the water system. Apart from that, to some extent the gutters and the inlets to the lead trough were left inadequately protected and, indeed, unprotected against the invasion of foreign bodies.

The tenant puts her case first on the ground that there was a breach of the landlords' covenant which I have read. Her counsel said, as I understood him, that he preferred to put his case on that ground. Although he rests his case on other grounds too, he preferred to put it chiefly on that ground and, as he contended, in order to establish his case on that ground it was quite irrelevant to consider whether there had been negligence on the part of the landlords or not. He submitted that there was a breach of covenant even if the pigeon had got into the water pipe without any negligence on their part at all, and he asks me to construe the covenant in this way: he asks me to say that the covenant to keep the exterior of the premises and all parts of the building not the subject of this or some other letting in good repair applied to these troughs, gutters and pipes; and as to that there was no dispute. Counsel for the landlords agreed that the covenant included the water system outside the flat occupied by the tenant. Counsel for the tenant then said that the covenant to keep in repair was broken if at any time the portions of the premises mentioned in the covenant were out of repair, even though the landlords had done their best to keep them in repair. Finally he said that if a pipe is blocked by some foreign body so that it cannot perform its functions, it is out of repair; and he referred me to some authorities in support of his contention.

I will deal shortly with the authorities on the point, and I think it is convenient to begin with a case in which, as long ago as the year 1818, the Court of King's Bench construed a covenant by the lessee to keep in repair: that is *Luxmore* v. *Robson and another* (2). It was argued in that case, in support of a demurrer, that a covenant by a lessee to keep in proper repair was not broken if at some time during the term the buildings concerned were out of repair, provided they were put into proper repair at the end of the tenancy. The argument was based on *Main's Case* (3), a case of apparently doubtful authority, and Lord Ellenborough, then Chief Justice, said this:

> "The common sense, the practice, and the general convenience of mankind, require that a construction different from that in the case cited [that is *Main's Case*] should be adopted. By the terms of the covenant the lessee is bound to keep the premises in repair; then to keep them in repair he must have them in repair at all times during the term; and if they are at any time out of repair, he is guilty of a breach of covenant, which is the proper subject of an action."

Bayley, J., delivered a judgment to the same effect, and the other learned judges concurred.

That being the law with regard to a covenant to keep in repair by the lessee, the question next arose as to a covenant by a lessor to keep in repair the main walls, and it was seen that it would be a hardship to the lessor to say that he was bound by his covenant to have the main walls in repair at all times during the term because, in the case of the letting of an ordinary house, the lessor would not normally have any knowledge of the existence of defects in the main walls; the tenant has access to the premises and, apart from covenant, can exclude the lessor from the premises and therefore knows of defects and must be expected to have the earliest possible notice of them, the lessor being in a different position. That covenant was dealt with in two well-known cases, *Makin* v. *Watkinson* (4) and *Torrens* v. *Walker* (5). In the latter of those cases there is a judgment by Warrington, J., in which he deals with the earlier decision in *Makin* v. *Watkinson* (4) and says this ([1906] 2 Ch. at p. 171):

> "It is settled—at least, so far as I am concerned—that a covenant by a lessor to repair the external wall or any part of a building is a covenant to repair on notice, and not otherwise. In *Makin* v. *Watkinson* (4) the point came before the Court of Exchequer in a very neat form,"

and then the learned judge, having referred in more detail to that decision, says this:

> "It is rather important to see how Baron Bramwell, who gave his judgment with some reluctance, felt himself bound to come to this conclusion. He said:
> 'I am also of opinion that the plea is good. To hold it to be so we must hold the defendant's covenant to be a covenant to repair on notice. I have the strongest objection to interpolate words into a contract, and think we ought

> never to do so unless there is some cogent and almost irresistible reason for it, arising from the absurdity of the contract if it is read without them. Does such a reason, then, exist here? I think it does. I think that we are irresistibly driven to say that the parties cannot have intended so preposterous a covenant as that the defendant should keep in repair that of which he has no means of ascertaining the condition.' "

Then Warrington, J., goes on to deal with a case in the Court of Appeal, to which I need not refer, in which the Master of the Rolls had treated *Makin* v. *Watkinson*. (4) as being settled law.

Then the Divisional Court in 1918 had to deal with a case very similar to the present case, where there was a covenant by the landlord to keep in repair not the main walls of a house which he had demised, but, as in this case, a part of a building separately let in floors which he retained in his own possession. That was *Melles & Co.* v. *Holme* (1). In that case the defendants, who were the owners of a house in Wood Street, Liverpool, had demised the front rooms on the first and second floors to the plaintiffs, who carried on business there, and had covenanted with their tenants that they, the lessors, would during the term

> "keep the outside of the demised premises and the roof and walls and drains thereof other than those within the demised rooms in good and tenantable condition."

It was argued—and I think the learned county court judge accepted the contention —that the landlord was not liable to repair unless he had received notice, and the learned county court judge, considering himself bound by the decision in *Makin* v. *Watkinson* (4) and the cases following it, held that as he had not received notice he was under no liability. On appeal, the Divisional Court, consisting of Salter and Roche, JJ., allowed the appeal, holding that the principle established by *Makin's Case* (4) had no application where the covenant was concerned not with a part of the demised premises, but with a part of a building outside the demised premises which the landlord kept under his own control. Salter, J., delivered the judgment of the court, with which Roche, J., agreed, and he said ([1918] 2 K.B. at p. 104):

> "It is said that the plaintiffs cannot enforce that covenant because they gave no notice of the breach. In some cases no doubt there must be read into a covenant by a landlord to repair a condition that the tenant must give him notice of the want of repair before he can be entitled to complain of it. The principle of that rule is thus laid down by Bramwell, B., in *Makin* v. *Watkinson* (4)."

—then the learned judge reads the words, which I have already read, which were used by Bramwell, B., in that case. The learned judge then refers to *Tredway* v. *Machin* (6), and goes on to say:

> "To justify the court in reading into a covenant a condition which is not there, there must be very strong grounds for their doing so. Here there are no such grounds. The roof was in the possession and control of the defendants, not of the plaintiffs. Therefore, there is no justification for saying that they cannot enforce the covenant in the absence of notice."

In those circumstances it was held that there had been a breach of covenant and that the plaintiff was entitled to recover. There is only one distinction between that case, which is, of course, binding upon me, and the case I now have to decide, and that is that in *Melles & Co.* v. *Holme* (1) the covenant was not to keep in repair, but to keep in good and tenantable condition. In that case, as in this case, there was an overflow of water owing to the presence of foreign matter in a gutter. There the foreign matter had apparently got into the gutter and into a pipe because materials of different kinds, materials of trade carried on by other persons, not the defendants, had been thrown into the gutter or its neighbourhood by workmen.

I have to consider—and really it is the only question for me, being bound as I am by that decision—whether it can properly be said that in this case the water system was out of repair; in other words, whether there was a breach of the covenant to keep it in good repair. I have come to the conclusion that a pipe which is choked and not able to do its duty as a pipe is out of repair, and that the landlords are none the less liable as for a breach of their covenant though they may show that the cause of the defect in the pipe is fortuitous and beyond their control. I think one must remember that "to repair" after all merely means to prepare or make fit again to perform its functions; it means to put in order, and, I think, means no more. When once it is seen, as the Divisional Court held, that the lessor under such a covenant as this is bound to have the gullies, pipes, and the rest of the system for conveying water in repair at all times during the tenancy, then it is irrelevant to consider whether the pipe became out of repair suddenly or by a slow accumulation of débris, or whether it became choked with or without any fault on the part of the lessor.

That is enough to dispose of the case, because I have come to the conclusion that counsel for the tenant's contention is right and that on those facts there was a breach of the covenant so that the tenant is entitled to damages as for a breach of covenant. However, I think that I ought, as not only my judgment but also the decision of the Divisional Court in *Melles & Co.* v. *Holme* (1) may be the subject of review in the Court of Appeal—because although that decision is binding upon me it is not binding upon the Court of Appeal—to say a few words about the other contentions of the tenant. They were two, although, as I have said, her counsel preferred to rely on the first with which I have dealt; but the other two points were taken by him and are, of course, open to him hereafter. He said that, even apart from this express covenant, and assuming that he was wrong on the construction of this express covenant, the landlords would be liable on one or other of two grounds, if not on both of them. First he said that from the relation of landlord and tenant there was to be implied a covenant on the part of the landlords to take reasonable care that no damage should result to the tenant by an escape of water from that boxroom which was under their control. And, secondly, he said that, apart altogether from the relation of landlord and tenant and from any question of contract, there was at common law in the circumstances a duty on the landlords, not because they were lessors at all, but because they were occupiers of this boxroom above the upper flat, to take reasonable care to prevent damage to a neighbour. I am not going to decide anything in this case except what I have already decided, but I want to say something about both those points because, although I am not inviting an appeal, it may be that there will be an appeal, and it is right that the Court of Appeal should have the benefit of such views as I have formed, for what they are worth; and it is certainly right that the Court of Appeal should know how I find facts that may possibly, on another view of the case, become material.

With regard to the first of those two latter points, I think that counsel for the tenant is in some difficulty, because the answer to it would be that where you have express covenants relating to the duty of the landlord with regard to a part of the building which is outside the demised premises, expressum facit cessare tacitum, and there is no room for any implied term. So, if counsel for the tenant had failed to satisfy me on the construction of the express covenant, I think it would have been impossible for him to rely on any implied covenant. That answer, however, cannot be given to the contention that there is a duty on the occupiers of the boxroom who have under their control this water system—true, for the benefit not only of themselves but of the persons occupying the flats beneath them—to take reasonable care to prevent damage to their neighbours. It was pointed out to me by counsel that in *Cockburn* v. *Smith* (7) the Court of Appeal had before them a case where, through the negligence, as they held, of the owner of a block of flats in his dealings with the roof of the building, rain water escaped and did damage to the tenant of the top flat. There the Court of Appeal held that the defendants, in the circumstances of the case, were under an obligation to take reasonable care, and they expressly abstained—or, at any rate, two of the members of the Court of Appeal expressly abstained—from deciding what Sargant, L.J., described as the difficult question

> "whether the landlord's duty is founded on some implied covenant or obligation in the contract of tenancy or from the circumstances that the landlord retains physical possession of the roof and lets the flat to the tenant."

Bankes, L.J., also declined to decide that question because it was not necessary to decide it. But Scrutton, L.J., took the view, as I read his judgment, that in that case the liability of the landlord did depend on a common law duty apart from contract, express or implied, and reserved the question whether there was also a contractual liability.

In those circumstances, I think I should be unwise if I did anything but follow the example of the Court of Appeal, and I propose, therefore, also to abstain from deciding that difficult question, because on the view I take of counsel for the tenant's first contention it does not arise. I will only, with great respect, venture to say this, that I have considered the cases which were before the Court of Appeal on that occasion; I have considered and read the judgments of their Lordships with care; and I should think that on a further consideration of the point, if ever it does arise, it may be found that there is really no answer to the reasoning which led Scrutton, L.J., to the view that the liability of the landlord in those circumstances depended not on any contractual liability, but on the common law duty of an occupier of adjacent premises to his neighbour, and I would respectfully suggest that it may be that this will be found to be one of those cases which come within the principle which has quite recently been laid down by Lord Atkin in his speech in the House of Lords in *Donoghue* v. *Stevenson* (8), a case which has aroused great interest both in this country and in Scotland. I refer to the passage where Lord Atkin says this ([1932] A.C. at p. 580):

> "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

In a case like this, where the owner of the boxroom is in charge and in control of the water supply, or part of it, and knows that any failure on his part to take reasonable care may result in most serious damage to the tenant of the flat below, I think there is—and I say no more than this—the very strongest ground for saying that he is bound on that principle to take reasonable care as a matter of law.

I would only add this about *Cockburn* v. *Smith* (7). In the headnote to the case, and in the judgments, stress is laid on the fact that the landlord had notice of the defect, but was dilatory and negligent in remedying it. In this case there was no notice of the defect to the landlord, but, as I understand the decision, stress is laid on that aspect of the case only because the negligence of the landlord in that case consisted of failing to remedy the defect of which he had notice, and I do not understand the court to have decided that that is the only way in which a landlord or an occupier in the circumstances may be negligent. I understand the principle to be quite clear, and it is stated by Scrutton, L.J., in these words. Referring to the judgment of Wright, J., in the case of *Gill* v. *Edouin* (9) he says:

> "As was pointed out by Wright, J., in *Gill* v. *Edouin* (9), there are exceptions which modify the rule in *Rylands* v. *Fletcher* (10) and reduce the duty of

> insuring against damage [that is the duty in cases which come within *Rylands* v. *Fletcher* (10)] to an obligation to take reasonable care that damage does not occur."

If that was the duty—and I only say it may have been—under which the landlords were, then it may become a material question to consider whether they failed to take reasonable care to prevent damage. I have stated the facts, and I would only add this: I do not think it was negligent to clean the gutters out, as it was proved they were cleaned out, twice a year only, once in March and once in November; that apparently had been found sufficient for very many years, and I am not prepared to say it was not often enough. I have no doubt there was a good deal of dirt in the water by September when the gutters had not been cleaned out since March, but, as I say, I do not think that there would have been enough to block the pipes or anything like that. I do not think it is necessarily negligent at all to have this rather peculiar and not very satisfactory system in which there were not pipes but open gutters, but what I do think is this, that, knowing that they had this system which was peculiarly liable to become choked, it was incumbent on them to take rather special care, and that, although they could perhaps hardly anticipate that a young pigeon was likely to fall into the water supply, it was obvious to anybody who thought about it that with these open inlets and gutters it was very unwise to be so hospitable to the pigeons of the neighbourhood, which were apparently plentiful, as to allow them to come and nest in the boxroom. One of the witnesses—Ernest Cole, one of the men who helped to do the cleaning—told me that, although he was not very clear whether this particular boxroom was one of the boxrooms on the premises which he visited, it was his recollection that they found pigeons' nests in different parts of the boxrooms; and inasmuch as Patching found the remains of a nest in this particular boxroom and formed the opinion, which I think was probably correct, that it was out of that nest that the pigeon fell, I think I am bound to say that there was a lack of care in not either taking greater precautions to cover up the watercourses or to prevent the presence of such foreign bodies as were likely to be in the neighbourhood if pigeons were allowed to build nests there, because the straw and other materials which the pigeons used, and the feathers, and possibly the infant pigeons, were all potential dangers. I have already referred to the fact that there was some attempt made, as the evidence of the tenant's husband satisfies me, to net against foreign bodies, but it was a very partial and inadequate one. That shows that the landlords were alive to the danger of foreign bodies entering the gutters and, as I think, took inadequate means to deal with them. In those circumstances, if it had become necessary, I should have been prepared to find that there was a failure to take reasonable care. On the view I take of this case it is not necessary to find that as a fact, but it is right that I should indicate my view on that point.

That leaves only the question of damages to be considered. The claim was admitted, subject to liability of course, to the extent of £80 1s. 8d., but there was a further claim for loss of use of the flat for an estimated period of eleven weeks at £2 a week, making £22, which, on the whole, does not seem to me to be unreasonable, or, at any rate, not to be very much exaggerated. Then there was a claim for £70 for the extra costs of meals obtained away from the flat. About that the tenant was in a difficulty: she claimed for herself and her husband, but she does not pay for her husband's meals—on the contrary he pays for hers—and I am unable to see that she has suffered any serious damage in respect of that. It is a little unfortunate for her, because undoubtedly the family budget was affected, and if the tenant's husband was put to considerable expense, as I think he was, because instead of having meals at home they had to have them in restaurants—and everybody knows that the expense of a similar meal in a restaurant is very greatly in excess of a meal at home—I think I am entitled to say that having had to spend so much more on his wife's food he would be unable to give his wife as much money as otherwise. However that may be, for that I think I can only allow a purely nominal sum. The result is that I propose to award as damages to

A the tenant, taking all those matters into consideration, a total sum of £115. There will be judgment for the plaintiff for £115, with costs.

Judgment for plaintiff.

Solicitors: *Butcher & Burns*; *William Hurd & Son.*

[*Reported by* T. R. F. Butler, Esq., *Barrister-at-Law.*]

B

C

ATTORNEY-GENERAL v. SOUTHPORT CORPORATION

[King's Bench Division (Finlay, J.), July 24, 1933]

D [Court of Appeal (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), December 5, 1933]

[Reported [1934] 1 K.B. 226; 103 L.J.K.B. 117; 150 L.T. 273; 98 J.P. 51; 49 T.L.R. 584; 50 T.L.R. 122; 77 Sol. Jo. 899; 32 L.G.R. 71]

E *Entertainments Duty—Bathing pool—Admission of non-bathers—Liability of payments by non-bathers to entertainments duty—Finance (New Duties) Act*, 1916 (6 *Geo.* 5, *c.* 11), *s.* 1 (1), (6).

A local corporation were the proprietors of a sea bathing lake and grounds at Southport. The charge for admission of non-bathers between 2 p.m. and 5 p.m. was 4d., and at any other time 3d. Admission was by a ticket obtained at a turnstile. The sea bathing lake and grounds included (a) the lake, 330 ft. F at its greatest length, and with a maximum width of 212 ft.; (b) two large areas reserved for sun-bathing, which were private to the sun-bathers; (c) dressing accommodation for about 1,000 bathers; (d) terraces with seating accommodation for several thousands of non-bathers, sheltered from the wind and forming a sun-trap; and an upper terrace promenade connecting the dressing pavilions. That accommodation gave non-bathers a view not only of G the bathing lake, but also of the adjacent parks, recreation ground and seashore. The bathing was not organised, save that there were galas on special occasions, for which a special charge was made, in respect of which entertainments duty was paid. The sheltered seats, terraces, lawns, gardens, and café were open and used at the same prices whether or not there was bathing or expectation of bathing. From April 30, 1932, to Oct. 1, 1932, inclusive, 185,773 non-bathers H were admitted to the sea bathing lake and grounds, of whom 127,722 made payments of 4d. each for tickets of admission. Treating the payments of 3d. and 4d. respectively as having been made inclusive of any duty payable, the Commissioners of Customs and Excise claimed, under the Finance (New Duties) Act, 1916, s. 1 (1), ½d. duty in respect of each 3d. payment and 1d. duty in respect of each 4d. payment, making a total duty claimed of I £653 2s. 3d.

Held (by the Court of Appeal): no duty was payable because, on the facts (a) no entertainment was provided, since the bathing did not constitute "any exhibition, performance, amusement, game or sport" within s. 1 (6) of the Act of 1916, and (b), even if the bathing were entertainment, the corporation were not persons "responsible for the management" of the bathing so as to be proprietors of the entertainment within s. 1.

Notes. Referred to: *Allen* v. *Emmerson*, [1944] 1 All E.R. 344.

For the Finance (New Duties) Act, 1916, s. 1, see 21 HALSBURY'S STATUTES (2nd Edn.) 813. As to Entertainments Duty, see 28 HALSBURY'S LAWS (2nd Edn.) 352–355, paras. 681–684; and for cases on the subject see 39 DIGEST 300, 301, *784–791*.

Cases referred to:

(1) *Cordiner* v. *Stockham*, [1920] 1 K.B. 104; 89 L.J.K.B. 21; 121 L.T. 664; 83 J.P. 246; 35 T.L.R. 689; 17 L.G.R. 654; 26 Cox, C.C. 517, D.C.; 39 Digest 301, *788*.

(2) *A.-G.* v. *Valentia* (1924), 41 T.L.R. 78; 69 Sol. Jo. 140, C.A.; 39 Digest 300, *786*.

(3) *Terry* v. *Brighton Aquarium Co.* (1875), L.R. 10 Q.B. 306; 44 L.J.M.C. 173; 32 L.T. 458; 39 J.P. 519; 15 Digest (Repl.) 909, *8756*.

(4) *A.-G.* v. *McLeod*, [1918] 1 K.B. 13; 87 L.J.K.B. 89; 117 L.T. 631; 34 T.L.R. 29; 62 Sol. Jo. 105; 15 L.G.R. 881; 39 Digest 300, *784*.

(5) *J. Lyons & Co., Ltd.* v. *Fox*, [1919] 1 K.B. 11; 88 L.J.K.B. 241; 119 L.T. 763; 83 J.P. 101; 35 T.L.R. 6; 16 L.G.R. 880, D.C.; 39 Digest 300, *787*.

Writ of subpœna, dated Feb. 4, 1933, by the Attorney-General, on behalf of His Majesty, claiming £653 2s. 3d. for duties, due to His Majesty under the Finance (New Duties) Act, 1916, s. 1, and other the statutes relating to the revenue of excise, and the parties concurred in stating the questions of law arising on the following agreed facts in the form of a Special Case:

"1. The Mayor, Aldermen and Burgesses of the County Borough of Southport are the proprietors of the enclosed sea bathing lake and grounds hereinafter described situated in Princes Park, Southport, and adjoining the seashore.

"2. The said sea bathing lake and grounds are open from April 30 to Oct. 1 inclusive from 7 a.m. to 8 p.m. on weekdays, and 7 a.m. to 9 a.m. and 2 p.m. to 6 p.m. on Sundays, on terms of admission contained in the following notice exhibited at the entrance to the same:

'County Borough of Southport.
Sea Bathing Lake.
Charges

Bathers	6d.
Children under sixteen years of age ...	4d.
Non-bathers, between 2 p.m. and 5 p.m.	4d.
Any other time	3d.
Sundays	6d.
Use of costume	3d.
Use of towel	2d.
Use of deck chair	2d.

Season tickets: Adult, 15s.; child, 10s.
Special books of tickets at reduced rates.
Reduced charge for children in parties when in charge of teacher or instructor (twelve or over in number): for terms apply ticket office.
Children's tickets not available between 2 p.m. and 4 p.m. during July and August.
Swimming lessons, Swedish drill, &c.'

"Admission is by ticket obtained at a turnstile.

"3. The said sea bathing lake and grounds include: (a) the lake, which takes the form of an oval, 330 ft. at its greatest length, with a maximum width of 212 ft. (b) Two large areas reserved for sun-bathing, which are private to the sun-bathers. (c) Dressing accommodation for about 1,000 bathers. (d) Terraces with seating accommodation for several thousands of non-bathers, sheltered from the wind and forming a sun-trap, and an upper terrace promenade connecting the dressing pavilions at the south and north ends of the lake for ladies and gentlemen respectively. This accommodation gives non-bathers a view not only of the bathing lake, but also of the adjacent parks, recreation ground and seashore. (e) A pergola with climbing roses, lawns, flower-beds, rock-gardens, sea water falls, &c. (f) A café.

"Eight photographs of the sea bathing lake and grounds are annexed to and form part of this Case.

"4. The bathing is not organised save that there are galas on special occasions for which a special charge is made in respect of which entertainments duty is paid.

"5. The sea bathing lake and grounds are widely used by visitors and residents in Southport as a meeting place and resort for sheltered sitting and resting in the sun.

"6. The sheltered seats, terraces, lawns, gardens and café are open and used at the same prices whether or not there is bathing or expectation of bathing.

"7. During the season, from April 30, 1932, to Oct. 1, 1932, inclusive, 185,773 non-bathers were admitted to the said sea bathing lake and grounds, of whom 58,051 made payments of 3d. each for tickets of admission and 127,722 made payments of 4d. each for tickets of admission. Treating the said payments of 3d. and 4d. respectively as having been made inclusive of any duty payable, the Commissioners of Customs and Excise have claimed ½d. duty in respect of each 3d. payment and 1d. duty in respect of each 4d. payment as follows:

3d. payments	58,051	½d. duty	£120	18s.	9d.
4d. payments	127,722	1d. duty	£532	3s.	6d.
			£653	2s.	3d.

"8. The question for the opinion of the court is whether the payment for a ticket of admission by a non-bather to the said sea bathing lake and grounds is a payment for admission to an entertainment within s. 1 of the Finance (New Duties) Act, 1916.

"9. If the court pronounce in the affirmative, judgment shall be entered for His Majesty for the sum of £653 2s. 3d. with costs. If the court pronounce in the negative judgment shall be entered for the defendants with costs."

The Solicitor-General (*Sir F. Boyd Merriman, K.C.*) and *W. Bowstead* for the Attorney-General.

J. E. Singleton, K.C., and *Maxwell Fyfe* for the corporation.

FINLAY, J.—I have arrived at the conclusion that the corporation are entitled to succeed on the particular facts as they are here.

By the Finance (New Duties) Act, 1916, s. 1, a duty called the entertainments duty is imposed, and it is necessary to look at sub-s. (6) of s. 1, which contains certain definitions. It says:

> "The expression 'entertainment' includes any exhibition, performance, amusement, game or sport to which persons are admitted for payment; and the expression 'admission to an entertainment' includes admission to any place in which the entertainment is held; the expression 'admission' means admission as a spectator or one of an audience, and the expression 'payment on admission' includes any payment made by a person who, having been admitted to one part of a place of entertainment, is subsequently admitted to another part thereof for admission to which a payment involving duty or more duty is required."

This case relates to the bathing pool at Southport, and one sees from the photographs attached to the Case that this bathing pool, like the bathing pools of many of the big watering places now, is a large and rather elaborate affair. The facts with regard to it are found in the Case. It is found that this bathing pool and the grounds attached are open from April 30 to Oct. 1 for certain hours—which do not matter—and open on certain terms, viz., it is open to bathers for 6d., to non-bathers between 2 p.m. and 5 p.m. for 4d., and at any other time for 3d. There are special provisions with regard to Sunday which do not appear to be material. The Solicitor-General appeared to attach importance to the circumstance that the charge for non-bathers was higher between 2 p.m. and 5 p.m. I do not think that that is important. It may be true that there is more bathing between 2 p.m. and

5 p.m.; I do not know; it may also be true that between 2 p.m. and 5 p.m. is the time when a large number of people are likely to be out and about, and I do not really think that much importance attaches to that, though I mention it because the Solicitor-General placed some reliance on it. [His Lordship read paras. 3, 4, 5, 6 and 7 of the Case Stated, and continued:] The question for me to consider is whether the payment for a ticket of admission by a non-bather is a payment for admission to an entertainment within the Finance (New Duties) Act, 1916, s. 1.

Substantially, counsel for the corporation said that, in the first place, this was not an entertainment, because it connotes something organised, and he said, further, that it cannot be said that the non-bathers going in pay as spectators of an entertainment.

This place primarily is a place for people to bathe in; nobody doubts that that is the object of a bathing pool; but there are, in addition, considerable other facilities. There are a large number of sunny seats from which a view of the bathing pool is obtained; there is a café; there are rock-gardens; there are waterfalls, and so on. I think it follows from paras. 4, 5, and 6 of the Case that a large number of people go to this place for the purpose of watching bathing; in some cases I suppose they go because it amuses them to watch their relations and friends bathing; in other cases they go simply because it is a gay scene, with a number of people diving and bathing in the lake. That is one thing. But there is another side to it, I think. I do not doubt, and, indeed, it is expressly found in paras. 5 and 6, that a substantial number of people go there not in order that they may see bathing, but in order that they may sit in the sun or drink coffee or meet their friends, or for a thousand purposes.

I was referred to several authorities, none of them directly in point, though more than one of them of some use. *Cordiner* v. *Stockham* (1) is a case about a band hall on one of the piers at Brighton, and the case is useful, I think, for what it decides and also for what it does not decide, for the judgments—and particularly the judgment of DARLING, J.—show that the court was careful not to go beyond what actually had to be decided, viz., that if 2d. was paid for a seat in a hall where a band was playing that was payment for an entrance to an entertainment. *Attorney-General* v. *Valentia* (2) seems to me, as to its actual decision, to have little to do with this case, but the Solicitor-General admitted that the line on which the case went was rather against him, because the case does seem to suggest that as regards what I may call the ordinary tennis and polo and the ordinary games of croquet played there, that would not be an entertainment, and that entertainment tax was attracted only by what one may call the more highly organised games. Although I agree that the decision in no way covers the present case, I think that to that extent the case favours the corporation's view. *Terry* v. *Brighton Aquarium Co.* (3) does not seem to me to touch the present case. I should have thought that what the Brighton Aquarium did was quite clearly the provision of an entertainment.

Attorney-General v. *McLeod* (4) is the case about the Freemasons' dinner. There, again, I do not think that that is of any very direct assistance to me. Finally, I was referred to a case about the Trocadero—*J. Lyons & Co., Ltd.* v. *Fox* (5). In that case the facts were very remote from the present, but I think that the general principles laid down in the judgment, and especially in the judgment of A. T. LAWRENCE, J., do to some extent favour the view which I have taken.

Here one has to take the facts as they are. There is no question of any sort of organised entertainment; there is no question of any band—nothing of the sort. These cases are nearly always near the line, and I should be disposed to take a different view if that came into question. There is nothing, except, so to speak, mere bathing by persons who are willing for their own pleasure and their own health to go and bathe there. There is no organised diving, no entertainment of any sort, for it is found that when there is anything of that sort a special charge is made, and it is admitted that the entertainment tax is attracted.

On the whole, I arrive at the conclusion that this is not an entertainment, and it follows that if it is not the persons are not spectators of an entertainment. I should not be at all disposed, having regard to the findings of the commissioners in paras. 5 and 6, to say that all the persons who pay to get into the bathing pool as non-bathers could be said to pay in order that they might see the bathing. It seems to me that to say that would be to fly in the face of what is found in the Case. If I were of opinion that the bathing was an entertainment, I should certainly be of opinion that some people paid to see the bathing, and if, therefore, bathing were an entertainment, an inquiry, and a very troublesome inquiry, I should think, might well have to be held under sub-s. (4). But it is not necessary that I should go into that, because for the reasons which I have indicated, though not without doubt, I arrive at the conclusion that entertainment does mean something in the nature of an organised entertainment, not necessarily organised by the persons who are to receive payment for the seat (the illustration of the Boat Race, which is a clear one, or the Lord Mayor's Show, which is equally clear, show that), but nevertheless, something in the nature of an organised entertainment; and I do not think that where, as here, what is to be looked at is not anything of that sort, but is simply people in an unorganised way bathing for their own health and amusement, that that can properly be said to be an entertainment. Numerous illustrations were put. I think that an illustration I suggested about the seashore is a good one. If the corporation, having rights on the foreshore, were to provide some sort of enclosure and seats where people could sit and look at the sea and enjoy the sun and so on and look at the people who might be bathing in the sea, I cannot think in that case entertainments duty would be attracted. That case is, I think, rather close to the present, and the result is that I arrive at the conclusion that the Crown have failed to make out their case, and there must accordingly be judgment for the defendants.

The Crown appealed.

Sir Donald Somervell, K.C., and *W. Bowstead* for the Attorney-General.

J. E. Singleton, K.C., and *Maxwell Fyfe* for the corporation.

LORD HANWORTH, M.R.—This case has provoked a very interesting argument from the Solicitor-General, who has contended that the learned judge came to a wrong conclusion. We have come to the conclusion that FINLAY, J., was right, but the matter is one on which I should like to give attention to the arguments which have been presented by the Solicitor-General, although I confess I find little assistance from any other case that has been decided under the statute, nor do I predicate that the decision in this case will be helpful with regard to the facts of another case.

Let us look at the statute itself to see what is the sort of case in which entertainments tax is imposed. It is provided by the Finance (New Duties) Act, 1916, s. 1 (1), that there shall be, as from a certain date,

> "charged, levied and paid on all payments for admission to any entertainment as defined by this Act an excise duty."

Then it is provided by s. 1 (2), by way of sanction:

> "If any person is admitted for payment to any place of entertainment and the provisions of this section are not complied with, the person admitted and the proprietor of the entertainment to which he is admitted"

are liable as having committed an offence. It is provided by s. 1 (3) that entertainments duty is to be recoverable, unless paid otherwise, from the proprietor. On that clear indication of the charge of the tax I look at s. 1 (6), which is the interpretation clause:

> "The expression 'entertainment' includes any exhibition, performance, amusement, game, or sport to which persons are admitted for payment; and the expression 'admission to an entertainment' includes admission to any place in

> which the entertainment is held; the expression 'admission' means admission as a spectator or one of an audience; [and, lastly] the expression 'proprietor' in relation to any entertainment includes any person responsible for the management thereof."

It seems that at Southport there has been built by the Corporation of the County Borough of Southport a large bathing lake or pool, and a large number of persons bathe in it. Surrounding it, there is an arena which is made suitable for persons to sit in and gaze upon the water, and to see the bathing that is going on; also, there is a promenade round it. It is decorated with some flowers and shrubs, and there is at one part a waterfall, and there is a café where people can obtain refreshments. This is probably a very attractive feature at Southport. It seems to provide an amenity which can be enjoyed by a very great number of persons. It provides an easy method of comfortable bathing to those who wish to bathe, and it provides an opportunity for a walk dolce far niente of the people who are not inclined to bathe, but who find pleasure in taking a little promenade and meeting others, and sitting in the sun and going to the café.

The way in which admission is obtained is this: bathers pay 6d., but non-bathers pay at all times 3d., except during three hours, between 2 p.m. to 5 p.m., when they pay an extra 1d.; they pay 4d. It is perhaps remarkable—one must apply one's common sense—that those hours between 2 p.m. and 5 p.m. are probably hours when less bathing is going on, for certainly a large number of persons bathe in the morning, and I should think that the time after lunch was probably less suitable for bathing than other times; but it is at that time when people may go for a promenade and meet their friends that the highest price is paid, the likelihood being that the temptation to meet their friends, and so on, would be sufficient to make them willing to pay the extra 1d. We are told that the grounds include not only the lake but two large areas reserved for sun-bathing,

> "terraces with seating accommodation for several thousands of non-bathers, sheltered from the wind and forming a sun-trap, and an upper terrace promenade connecting the dressing pavilions at the south and north ends of the lake for ladies and gentlemen respectively. This accommodation gives non-bathers a view not only of the bathing lake, but also of the adjacent parks, recreation ground, and seashore,"

and there is "a pergola with climbing roses, lawns, flower-beds, rock-gardens, sea water falls," and a café.

> "The bathing is not organised save that there are galas on special occasions for which a special charge is made, in respect of which entertainments duty is paid. The sea bathing lake and grounds are widely used by visitors and residents in Southport as a meeting place and resort for sheltered sitting and resting in the sun. The sheltered seats, terraces, lawns, gardens and café are open, and used at the same prices, whether or not there is bathing or expectation of bathing."

On these agreed facts, can it be said that the mayor and corporation are persons responsible for the management of the bathing? There is no indication that they take any steps to secure that there shall be bathing or diving spread out over any particular hours of the day. They are responsible for the management of the bathing in the sense that it is under their control, and the facilities offered by them must not be misused, but there is no evidence that they responsibly manage the bathing which is undertaken voluntarily and at the will and pleasure of the bathers. Is there, then, any exhibition or sport in relation to which they are proprietors and managers? I cannot so find. It appears to me that there is abundant ground for asking for this price of admission in respect of the other amenities, and that it is impossible to say that here there is an exhibition which is an integral and prominent factor attracting the visitors to the exhibition. There is, incidentally, something that some people may be interested in and others not interested in, but it must be entirely ancillary to the other amenities which are provided and which are

A of such a nature that they may be used by a number of the visitors or residents at Southport attracted thereto by these other amenities and not necessarily attracted by any exhibition or sport of which there is a proprietor and which is provided for their entertainment as an attraction. It is noticeable that there are from time to time galas on special occasions, and, on those special occasions, special charges are made, and, in respect of those charges, there is no question that entertainments B tax is attracted and is quite readily paid.

For these reasons, on the facts of the present Case, I do not find a charge to tax which falls to be paid by the respondents and the result is that the appeal must be dismissed with costs.

SLESSER, L.J.—I agree. In para. 6 of the Case it says that the terraces—I C mention particularly the terraces, because in para. 3 (d) it is said that the terraces are places where the non-bathers can get their view of the bathing lake—"are open and used at the same prices, whether or not there is a bathing or expectation of bathing." The reality of the case is that the proprietors, the Mayor, Aldermen and Burgesses of the County Borough of Southport, are quite unable, as I read the Case, to say from day to day or from time to time whether there are going to be any D bathers there or not. It seems to me to be impossible in those circumstances to say that there is in any sense provided an entertainment, or that this is a place of entertainment. The distinction is shown very clearly by contrasting what here happens with the case where special contests are arranged by the proprietors, and therefore where they are managing an entertainment and for which they have always paid the tax.

E For myself, it seems to me that this is no more a place of entertainment than if these stands had been erected on the seashore, and, similarly, persons were admitted who might or might not, as the case may be, see persons bathing in the sea. The mere provision of a structure for bathers does not make that into an entertainment that otherwise would not be an entertainment.

F **ROMER, L.J.**—I agree. In my opinion, an entertainment to come within the provisions of the Finance (New Duties) Act, 1916, must be some "exhibition, performance, amusement, game or sport," provided, though not necessarily, by the owner of the place of entertainment, for the purpose of entertaining those who pay to see or to hear it. In the present case the place that we have to deal with is a place, as it seems to me, provided by the Southport Corporation for the purpose of affording a number of amenities to the public—amenities that are referred to in G the Special Case, and which have been specially referred to by the Master of the Rolls, including, amongst the amenities, the possibility or opportunity of bathing in the pool there provided. But bathing is merely one of the amenities, and is not provided for the purpose of entertaining people who go there to enjoy the other amenities.

Appeal dismissed.

H

Solicitors: *Solicitor of Customs and Excise*; *Sharpe, Pritchard & Co.*, for *R. Edgar Perrins*, Southport.

[*Reported by* J. H. G. BULLER, ESQ., *and* G. P. LANGWORTHY, ESQ., *Barristers-at-Law.*]

Re ROOKE (DECEASED). JEANS *v.* GATEHOUSE

[Chancery Division (Maugham, J.), May 25, 26, 1933]

[Reported [1933] Ch. 970; 102 L.J.Ch. 371; 149 L.T. 445]

Administration of Estates—Expenses—Upkeep and preservation of house and chattels—Specific devise and bequest—Expense incurred before assent—Incidence.

The expense, incurred by the executors, from the date of the deceased's death to the date of the assent, of the upkeep and preservation of a dwelling-house and its contents which are specifically devised and bequeathed, falls on the specific devisee and legatee and does not form part of the administration expenses payable out of the general estate of the deceased.

Re Pearce (1), [1909] 1 Ch. 819, applied.

Sharp v. *Lush* (2) (1879), 10 Ch.D. 468, not applied.

Notes. As to liability of specific legatee to bear expenses since the death of the testator, see 16 Halsbury's Laws (3rd Edn.) 320, para. 618.

Cases referred to:

(1) *Re Pearce, Crutchley* v. *Wells*, [1909] 1 Ch. 819; 78 L.J.Ch. 484; 100 L.T. 699; 25 T.L.R. 497; 53 Sol. Jo. 419; 23 Digest (Repl.) 482, *5500*.

(2) *Sharp* v. *Lush* (1879), 10 Ch.D. 468; 48 L.J.Ch. 231; 27 W.R. 528; 24 Digest (Repl.) 751, *7385*.

(3) *Perry* v. *Meddowcroft* (1841), 4 Beav. 197; 49 E.R. 314; 23 Digest (Repl.) 322, *3901*.

(4) *Re De Sommery, Coelenbier* v. *De Sommery*, [1912] 2 Ch. 622; 82 L.J.Ch. 17; 107 L.T. 253; 57 Sol. Jo. 78; 23 Digest (Repl.) 481, *5491*.

(5) *Re Scott, Scott* v. *Scott*, [1915] 1 Ch. 592; 84 L.J.Ch. 366; 112 L.T. 1057; 31 T.L.R. 227, C.A.; 21 Digest 130, *959*.

(6) *Re Grosvenor, Grosvenor* v. *Grosvenor*, [1916] 2 Ch. 375; 85 L.J.Ch. 735; 115 L.T. 298; 60 Sol. Jo. 681; 23 Digest (Repl.) 397, *4676*.

(7) *I.R. Comrs.* v. *Hawley*, [1928] 1 K.B. 578; 97 L.J.K.B. 191; 138 L.T. 710; 13 Tax Cas. 327; Digest Supp.

(8) *Barnardo's Homes* v. *Income Tax Special Comrs.*, [1921] 2 A.C. 1; 90 L.J.K.B. 545; 125 L.T. 250; 37 T.L.R. 540; 65 Sol. Jo. 433; sub nom. *R.* v. *Income Tax Acts Special Purposes Comrs., Ex parte Barnardo's Homes National Incorporated Association*, 7 Tax Cas. 646, H.L.; 23 Digest (Repl.) 398, *4697*.

Adjourned Summons.

Susannah Georgina Rooke, by her will dated Aug. 7, 1931, after appointing executors, provided (inter alia) as follows:

> "I give and bequeath to Margaret Hine Gatehouse . . . my freehold dwelling-house . . . and its contents. . . ."

The testatrix died on Sept. 26, 1932. The executors incurred certain expenses in the upkeep of the house and the preservation of its contents. By this summons, which was taken out by one of the executors, it was asked (inter alia) whether the expenses and outgoings incurred in the upkeep and preservation of the dwelling-house and its contents pending the assent to the specific devise and bequest ought to be borne by the specific devisee and legatee or by the general estate of the testatrix. At the date when the summons was issued no assent had been made either in respect of the house or its contents.

L. W. Byrne for the specific devisee and legatee.—It is not reasonable that the cost of maintaining and preserving the property before assent should be paid by the beneficiary. In *Sharp* v. *Lush* (2) Sir George Jessel, M.R., held that the expense of warehousing specific legacies pending the distribution of the assets was an expense incident to the proper performance of the duty of an executor. [He also referred to *Re Pearce* (1), *Perry* v. *Meddowcroft* (3), *Re De Sommery* (4), *Re Scott* (5), *Re Grosvenor* (6), *Inland Revenue Comrs.* v. *Hawley* (7), and *Barnardo's Homes* v. *Income Tax Special Comrs.* (8).]

Beebee, for the Parish Council of Breamore and churchwardens of Breamore Church, referred to *Re Grosvenor* (6).

Henry Johnston for pecuniary legatees.

D. Ll. Jenkins for the rector and churchwardens of Studland Church.

J. M. Paterson for an executrix and legatee.

H. O. Danckwerts for the Attorney-General.

MAUGHAM, J.—It is curious that there is a difference of opinion between learned judges on the comparatively simple question whether the costs of preservation of a specific legacy ought to be borne by the legatee until the legacy has been assented to, or whether the costs of the upkeep and preservation of the legacy, from the date of the testator's death to the date of assent, ought to be paid as part of the administration expenses, and to be borne by the estate. One would have expected that such a matter had been settled by decisions for hundreds of years. That, however, is not so. In *Sharp* v. *Lush* (2) Sir George Jessel, M.R., had to deal with expenses incurred by executors in warehousing, before distribution, certain furniture which had been specifically bequeathed. The matter came before him on further consideration, and he said (10 Ch.D. at p. 472):

> "The remaining item is for warehousing specific legacies. It is the duty of the executor, as such, to take care of specific legacies. It is his duty, as such, not to assent to the payment of them until he ascertains there are sufficient assets; therefore, it must be a duty incident to his office to take care of them during the intervening period. I am of opinion, therefore, that the expenses incurred for warehousing these legacies is an expense incident to the office of the executor, and is therefore an 'executorship expense.'"

In *Re Pearce* (1) a similar question came before Eve, J. The plaintiffs in that case, who were executors, had incurred considerable expenses in the upkeep of furniture and effects which had been bequeathed by the testator to his wife, and in paying wages and expenses in connection with a yacht bequeathed to his wife. The case was an important one, and many authorities were cited on both sides, though *Sharp* v. *Lush* (2) seems to have evaded the vigilance of counsel, and Eve, J., said:

> "Now it seems to be settled law that when an executor gives his assent to a specific legacy the assent relates back to the death of the testator, and the specific legatee is entitled to the profits accrued due from the time of the testator's death. That being so, it seems to me to be right and fair that the specific legatee should be charged with the costs of the upkeep, care, and preservation of the specific legacy from the time of the death until the executor's assent, and I shall make a declaration to that effect, and direct an inquiry what expenses were properly incurred in and for such upkeep, care, and administration."

Re De Sommery (4) is a well-known case which came before Parker, J. There was an elaborate judgment, in the course of which the learned judge had to deal with the question whether executors and trustees, who had paid certain sums claimed by the French government as succession duty with regard to certain shares, were entitled to get back those expenses from the persons to whom the shares were bequeathed or whether the costs came out of the general estate. The learned judge said:

> "With regard to the costs, they were, in my opinion, all costs incurred in carrying into effect the trusts of the twenty-one shares, and not costs of the general administration. They should, therefore, be borne by the property in respect of which they were incurred, and not by the estate generally. Even costs incurred in respect of a specific gift before the assent of the executors

> are, sometimes at any rate, chargeable against the property the subject of the gift: see *Re Pearce* (1). The only difficulty is occasioned by *Perry* v. *Meddowcroft* (3), in which a testator is stated to have specifically bequeathed some costs due to him, and it was held that the expense of recovering the costs was payable out of the residue. This might well be right if the subject-matter of the specific gift were the amount the executors should recover, but if the specific gift was, according to the true construction, a gift of the right to sue for costs, I doubt the correctness of the decision. I cannot think that where there is a specific gift of a right of action, the costs of legal proceedings to enforce the right are payable out of residue."

The decision in *Perry* v. *Meddowcroft* (3) was cited in the Court of Appeal in *Re Scott* (5), and it should be observed that the Court of Appeal in that case expressed approval of the judgment in *Re De Sommery* (4), in which reliance is placed on *Re Pearce* (1) without intimating any doubt as to the correctness of that decision. I do not think that the other cases which have been cited before me are directly in point, and in some of them costs with regard to specific legacies had been incurred after assent.

In these circumstances it seems to me that I must follow the judgment of EVE, J., in *Re Pearce* (1), a decision which seems to have been approved. At any rate, I have not been referred to any case in which it has been doubted, and the decision of SIR GEORGE JESSEL, M.R., in *Sharp* v. *Lush* (2) is open to the criticism that the learned judge did not have to deal with the argument that, if a legacy is of a profit-earning character, the specific legatee is entitled to the profits which it earns from the date of the testator's death to the date of the assent. In my opinion it is difficult to explain on what principle the profits in such a case ought to be paid to the legatee, if he is not also to be made liable for the preservation and upkeep of the legacy. For those reasons I hold that, as from the date of the testatrix's death to the date of the assent, the costs of preservation and upkeep fall on the legatee.

Declaration accordingly.

Solicitors: *Lovell, Son, & Pitfield*, for *R. E. Druitt*, Christchurch; *Bartlett & Gregory*, for *Bartlett & Son*, Sherborne; *Payne & Co.*; *Lithgow & Pepper*; *Treasury Solicitor*.

[*Reported by* MISS B. A. BICKNELL, *Barrister-at-Law*.]

Re SMITH (DECEASED). BULL *v.* SMITH

[CHANCERY DIVISION (Clauson, J.), May 9, 1933]

[Reported [1933] Ch. 847; 102 L.J.Ch. 359; 149 L.T. 382]

Will—Copyhold land—Gift to "right heirs"—Borough English—Heir at common law entitled.

By her will made in 1873, a testatrix who died in 1883, exercised a power of appointment, conferred on her by a settlement, over copyhold land (which was enfranchised before her death) and freehold land in favour of a named nephew and named nieces, and their issue, in tail, and she appointed an ultimate trust for "my own right heirs (other than and except my nephew [R.J.S.] and his issue)." In default of and subject to the exercise of the power of appointment, the land was directed by the settlement to be held on trust for the testatrix absolutely. The testatrix devised and bequeathed her residuary estate on trusts which failed. The copyhold lands, at the date of the will, were subject to descent according to the custom of borough English. In 1929 the entailed interests failed. R.J.S. had predeceased the testatrix, and her heir (at common law) was J.R.S., the eldest son of R.J.S. On the question what was the effect of the ultimate trust,

Held: the ultimate trust failed, and J.R.S. took the appointed land under the partial intestacy of the testatrix because

(i) (as regards the copyhold land) the "right heirs" of the testatrix meant her heir at common law and not her heirs according to the custom of borough English;

Garland v. *Beverley* (1) (1878), 9 Ch.D. 213, followed.

(ii) the ultimate trust was expressed to be in favour of the right heirs of the testatrix, i.e., in the events which had happened, J.R.S., but he was excluded in the same sentence, thus rendering the trust ineffective.

Goodtitle d. Bailey v. *Pugh* (2) (1787), 3 Bro.P.C. 454, followed.

Notes. As to meaning of "heir," see 34 HALSBURY'S LAWS (2nd Edn.) 309–311, paras. 358, 359; and for cases on the subject see 41 DIGEST 861, *7167* et seq.

Cases referred to:

(1) *Garland* v. *Beverley* (1878), 9 Ch.D. 213; 38 L.T. 911; 26 W.R. 718; sub nom. *Re Garland*, *Garland* v. *Beverley*, 47 L.J.Ch. 711; 18 Digest 15, *144*.

(2) *Goodtitle d. Bailey* v. *Pugh* (1787), cited in 2 Jac. & W. at p. 102, H.L.; sub nom. *Pugh* v. *Goodtitle*, Bro. Parl. Cas. 454; 1 E.R. 1429; sub nom. *Doe d. Bailey* v. *Pugh*, cited in 2 Mer. at p. 348; 44 Digest 861, *7170*.

(3) *Marquis of Cholmondeley* v. *Lord Clinton* (1817), 2 Mer. 171; 35 E.R. 905; subsequent proceedings (1820), 2 Jac. & W. 1; (1821), 4 Bli. 1, H.L.; 21 Digest 278, *945*.

(4) *Lightfoot* v. *Maybery*, [1914] A.C. 782; 83 L.J.Ch. 627; 111 L.T. 300; 58 Sol. Jo. 609, H.L.; 44 Digest 864, *7189*.

Adjourned Summons.

By her will made in 1873 the testatrix, Mrs. Charlotte Maria Smith, having a power of appointment over certain copyhold and freehold property, devised such property to the use of her trustees, their heirs and assigns, on trust for a named nephew and named nieces and their issue in tail. The trusts thus declared determined in 1929 on the death of the last tenant for life without issue. There was an ultimate trust for "my own right heirs (other than and except my nephew Robert John Smith and his issue)." The testatrix devised and appointed her residuary estate on trust to sell the same and stand possessed thereof on trusts, which, in the events which happened, failed to take effect. All the copyholds were enfranchised in 1875. The testatrix died in 1883. The testatrix's nephew, Robert John

Smith, predeceased her, leaving his eldest son, John Robert Smith, who was the A heir-at-law of the testatrix.

The trustees took out this summons for the determination, inter alia, of the question what was the true meaning of the ultimate limitation in the will and whether the person should take who would be the heir of the testatrix, if her nephew, Robert John Smith, and his issue were excluded, or whether the limitation had no effect. B

R. R. Formoy for the plaintiffs.

J. W. M. Holmes for John Robert Smith, the eldest son of Robert John Smith, deceased, and heir-at-law of the testatrix.—By using the expression "for my own right heirs" the testatrix meant her heir at common law, and not her heir according to the custom of the manor, which was borough English: *Garland* v. *Beverley* (1). The House of Lords decision in *Goodtitle d. Bailey* v. *Pugh* (2) clearly establishes C that the devise creating the ultimate trust had no effect whatever, for the testatrix devised the property in trust for her right heirs and at the same time excluded the person who ultimately became her right heir. The devise having had no effect, the property devised by it passed in default of appointment to the testatrix absolutely under the terms of the settlement, and therefore formed part of her residuary estate. As her residuary estate has become undisposed of, there is an intestacy with D reference to it, and therefore the devised property goes to the heir-at-law of the testatrix, who is John Robert Smith. [He also referred to *Cholmondeley* v. *Clinton* (3) and *Lightfoot* v. *Maybery* (4).]

R. J. T. Gibson for the personal representative of Alfred William Smith, who died in 1907, the next younger brother of Robert John Smith.—The testatrix intended to exclude Robert John Smith and his issue, and expressed that intention E clearly by the words she used. Robert John Smith and his issue having been excluded, the property passed to the next heir in succession of the testatrix, namely, her nephew, Alfred William Smith. [He referred to JARMAN ON WILLS, 7th Edn., p. 1539.]

H. V. Casson (*L. M. Jopling* with him) for the personal representative of George Smith, the youngest brother (who survived the testatrix and died in 1890) of Robert F John Smith, and, as such, the heir of the testatrix according to the custom of the manor of which the copyhold lands were held.—At the date of her will the testatrix, by using the expression right heirs, meant the copyhold lands to go to the customary heir, who as the lands were held by the custom of borough English was the youngest brother of Robert John Smith, namely, George Smith. The fact that the copyholds were subsequently enfranchised could not alter what was the testatrix's intention G at the date of the will.

Meyrick Beebee for the personal representative of the last surviving tenant for life of the testatrix's residuary estate, on whose death without issue the trusts thereof came to an end, and in whom the legal estate in the lands was vested.

CLAUSON, J.—Mrs. Charlotte Maria Smith, having a power of appointment over H copyhold lands, exercised that power by devising those lands by her will to trustees in trust for various persons with an ultimate trust for "my own right heirs (other than and except my nephew Robert John Smith and his issue)." Having regard to the tenure of the lands so devised, which at the date when the testatrix made her will was copyhold descendible according to the custom of borough English, I pause here to consider what is the meaning of the expression in this will of "my own I right heirs." Do the words mean her heirs according to the custom of the manor or her heir at common law? The answer to that question is to be found in a decision of FRY, J., in *Garland* v. *Beverley* (1), that in a devise of customary land, gavelkind land, or borough English land to the testator's right heirs, the words mean his heir at common law. But then the trust continues with these additional words, "other than and except my nephew Robert John Smith and his issue." Had Robert John Smith not predeceased the testatrix, he would have been her heir-at-law; but, as he in fact predeceased her, her heir-at-law was the eldest son of Robert John Smith, namely, the defendant John Robert Smith. If I were at liberty to construe the words of the limitation in question without reference to decided cases, I should be tempted to decide that the effect of the words was to give the lands to such person as would be the testatrix's heir-at-law, if Robert John Smith and his issue had been wiped out of the family pedigree. But I am precluded from so deciding by the decision of the House of Lords in 1787, in *Goodtitle d. Bailey* v. *Pugh* (2). In that case the devise was to

> "the right heirs of me, the testator, for ever my son excepted, it being my will he shall have no part in my estate either real or personal."

The testator left one son and three daughters. In an action of ejectment in the Court of King's Bench, the daughters contended that they must be the personæ designatæ, because the son who was the proper heir was plainly and manifestly excluded, not only by the intention but by the express words; and that court decided that, on the proper construction of the words used, the devise was to the persons who would be the testator's right heirs, if his son were excluded from the pedigree. But there was a possible alternative construction, namely, that the devise was to the son—who was in fact the testator's heir-at-law—followed by words which took the property away from him, with the result that no person took the property under the devise, and that accordingly no effect whatever could be given to it. And that was the construction which the House of Lords put on the words when the case came before it on a writ of error, and the House so decided. There is no reported case in which that decision has been questioned. The case was referred to in *Cholmondeley* v. *Clinton* (3) and the decision accepted by Grant, M.R., and it was cited in *Lightfoot* v. *Maybery* (4) and no doubts were cast on it. True, it is cited in Jarman on Wills (7th Edn. at p. 1539) with the following comment:

> "This is an extraordinary decision; and high as is the authority of the court by which it was ultimately decided, its soundness may be questioned, as the will contains not merely words of exclusion in reference to the son (which, it is admitted, would not alone amount to a devise), but a positive and express disposition in favour of the person who would be next in the line of descent, if the son were out of the way. In this case, we trace but very faintly the anxiety, generally imputed to judicial expositors of wills, ut res magis valeat quam pereat."

With great respect for that learned author, I confess I find it difficult to understand what he meant by saying that the will contained a "positive and express" disposition in favour of the person who would be the next heir, if the son were out of the way.

I thought I might be able to find some sufficiently material distinction between the words used by this testatrix and the words in *Goodtitle d. Bailey* v. *Pugh* (2), but I can find none. I feel compelled, therefore, to follow the decision of the House of Lords in that case and hold that (having regard to the fact that the testatrix's right heir in whose favour the devise was made was the eldest son of Robert John Smith, who and whose issue she in the same sentence excluded) the devise must be treated as having no effect whatever.

Accordingly, the lands over which the testatrix had the power of appointment (including the investments representing the proceeds of sale of such of the lands as have been sold), being unappointed, passed, in default of appointment, under the trusts of the settlement to the testatrix absolutely, and being (in the events which happened) undisposed of by the devise and bequest of the testatrix's residuary estate, passed to her heir-at-law, who is the defendant, John Robert Smith.

Declaration accordingly.

Solicitors: *Pothecary & Co.*; *C. W. Letts*, for *Wilkins & Son*, Aylesbury; *King, Wigg, & Brightman*; *Bull & Bull.*

[*Reported by* J. H. G. Buller, Esq., *Barrister-at-Law.*]

SMITH (INSPECTOR OF TAXES) *v.* YORK RACE COMMITTEE

[KING'S BENCH DIVISION (Finlay, J.), December 20, 1933]

[Reported [1934] 1 K.B. 517; 103 L.J.K.B. 518; 151 L.T. 52; 50 T.L.R. 156; 78 Sol. Jo. 29; 18 Tax Cas. 541]

Income Tax—Occupation of land—Racecourse—"Building"—Exception from charge of building occupied for purpose of trade—Exclusion of paddocks, lawns and enclosures—Income Tax Act, 1918 (8 *& 9 Geo. 5, c.* 40), *Sched. B, r.* 1, *proviso* (*b*).

A racecourse committee were the occupiers of properties of about eleven acres in extent consisting of racecourse stands and other buildings (covering three acres) and also paddocks, lawns, and enclosures situated by the side of the racecourse. It was admitted by the inspector of taxes that the stands and other buildings were occupied for the purpose of carrying on a trade or profession within the meaning of the Income Tax Act, 1918, Sched. B, r. 1, proviso (b), and, therefore, that such stands and other buildings were not to be charged with tax under Sched. B. As regards the remainder of the properties, viz., the paddocks, lawns and enclosures,

Held: the remainder was liable to tax under Sched. B, and was not excepted by proviso (b) to r. 1 thereof because it did not constitute a "building" within the proviso, even if the word "building" were construed so as to include adjuncts to a building.

Notes. The Income Tax Act, 1918, Sched. B, r. 1, was replaced by the Income Tax Act, 1952, s. 83, and exception (b) in s. 83 is wider than proviso (b) to r. 1 of Sched. B in the Act of 1918.

Referred to: *Croft* v. *Sywell Aerodrome, Ltd.*, [1942] 1 All E.R. 110.

As to the charge to tax under Sched. B, see 20 HALSBURY'S LAWS (3rd Edn.) 87, para. 146; and for cases on the subject see 28 DIGEST 15, 16, *75–83*.

Case Stated under the provisions of s. 149 of the Income Tax Act, 1918, by the Commissioners for the General Purposes of the Income Tax for the Division of the City of York for the opinion of the King's Bench Division of His Majesty's High Court of Justice.

"1. At a meeting of the Commissioners for the General Purposes of the Income Tax for the Division of the City of York held at the Board Room, Museum Street, York, within the said division on March 4, 1932, the York Race Committee (hereinafter called "the committee") appealed against an assessment of £113, being one-third of the estimated annual value, made upon the committee under Sched. B of the Income Tax Act, 1918, for the year ending April 5, 1930, in respect of the occupation of lands, tenements, hereditaments, and heritages, situated on the Knavesmire, within the said City of York.

"2. The committee has for many years carried on the trade of racecourse proprietors on the Knavesmire, York.

"3. For the year ending April 5, 1930, the committee was the occupier of properties which consisted of stands, stables, weighing-room, paddocks, lawns and enclosures, situated on the east side of the racing track near the finishing post, and held under a lease for thirty-five years from Jan. 1, 1908, granted by the York Corporation under the York (Micklegate Strays) Act, 1907, as amended by an agreement dated Dec. 14, 1922. The whole of these properties were enclosed and had an extent of approximately eleven acres, part of which, of a total area of approximately three acres, was covered by buildings such as stands, stables and weighing-room. The whole was occupied for the purpose of the committee's trade of racecourse proprietors, the profits of which had been charged to income tax under Sched. D.

A "4. The committee as occupier of the above-mentioned properties was assessed to income tax under Sched. A in the sum of £3,200 gross, for the year ending April 5, 1930, and was also rated as occupier for local rating purposes.

"5. The question of the amount of the Sched. B assessment was reserved, the appeal heard by the commissioners being confined to the issue whether on the facts of the case any assessment at all under Sched. B was due to be made. It B was, however, explained to the commissioners that the amount of £113 assessed was intended to represent one-third of the annual value of the properties after exclusion therefrom of the stands, stables, weighing-room and other buildings, leaving only the paddocks, lawns and enclosures of a total area of approximately eight acres, of which the paddocks, garden and grass in front of stands and en- C closures comprise approximately five acres, the remainder being yards and roads of gravel or macadam comprising approximately three acres. None of the grass is suitable for grazing, there being steps and obstacles of various kinds. The ground is not flat, the whole of the paddocks, for instance, being terra-planed from the back wall to the track. The properties in question were well known to the commissioners who heard the appeal.

D "6. Mr. Teasdale, on behalf of the committee, reviewed the rules of the Jockey Club with which the committee were bound to comply as a condition of obtaining a licence from the Jockey Club. The commissioners were informed that the Jockey Club did not merely confine its attention to the suitability of the track and accommodation necessary for horses and jockeys, but also supervised the general lay-out of the buildings, stands and enclosures, and the amenities provided for racegoers. E No plans could be passed which showed tunnels or congested places, and the provision of open spaces round the stands was compulsory. The rules required the provision of a paddock, and all horses running are required to be brought in whenever a charge is made for the admission of the public to the paddocks.

"7. Mr. Teasdale referred to the rules of Sched. B, and particularly to proviso (b) of r. 1. He contended: (a) That the exception in favour of 'any warehouse or F other building occupied for the purpose of carrying on a trade or profession' covered not only the buildings themselves, but also the paddocks, lawns and enclosures in the same curtilage as the buildings, these adjuncts being essential to the committee's trade and the whole being used for the purpose of racing. (b) That in the circumstances of the case there was no liability to assessment to income tax Sched. B on the part of the committee in respect of the properties referred to.

G "8. It was contended by the inspector of taxes on behalf of the Crown (inter alia): (a) That the whole of the properties comprised in the Sched. A assessment were liable also to assessment under Sched. B, subject only to the exception in proviso (b) to r. 1 of Sched. B in favour of 'any warehouse or other building occupied for the purpose of carrying on a trade or profession.' (b) That the exception aforesaid applied only to buildings such as the stands, stables, and weighing- H room, and did not extend to the substantial areas of paddocks, lawns and enclosures. (c) That, subject to the question of its amount, the assessment under Sched. B should be confirmed.

"9. The commissioners considered that the interpretation of Sched. B, r. 1, proviso (b), contended for on behalf of the race committee, was correct and that the paddocks, lawns, and enclosures fell within the description 'other building I occupied for the purpose of carrying on a trade or profession.' They therefore allowed the appeal and discharged the assessment."

The inspector of taxes thereupon expressed his dissatisfaction with this decision as being erroneous in point of law and duly required the commissioners to state and sign a Case for the opinion of the High Court.

The only question for the opinion of the court was whether the commissioners had rightly interpreted the words "other building occupied for the purpose of carrying on a trade or profession" in proviso (b) aforesaid as applying to the paddocks, lawns, and enclosures occupied by the York Race Committee.

The Solicitor-General (*Sir D. B. Somervell, K.C.*) and *Reginald Hills* for the Crown.

A. M. Latter, K.C., and *J. H. Bowe* for the taxpayers.

FINLAY, J.—This case is not free from difficulty, but I have arrived at the conclusion that the decision which was arrived at by the Commissioners for the Division of the City of York cannot be supported.

The Case relates to a dispute between the revenue and a body called the York Race Committee, who conduct on a well-known racecourse at York race meetings from time to time. The facts are found in the Case, and the details can be seen from a plan which is annexed to the case, and from a series of photographs. There is the racecourse itself; there are two paddocks; and there are a number of buildings, stands, refreshment rooms, and things of that sort, which are attached to the course and form part of the property of the York Race Committee. The Case finds that the various properties (and they are found to be stands, stables, weighing-room, paddocks, lawns and enclosures) amounted to an extent of approximately eleven acres. Of those eleven acres, three acres were covered by buildings, stands, stables and weighing-room, and the whole eleven acres, it is found, were occupied for the purpose of the committee's trade of racecourse proprietors, and in respect of the profits of their trade they are chargeable under Sched. D to the Income Tax Act, 1918.

The question that arises is with reference to that part of the eleven acres which is not covered by buildings, that is to say, about eight acres, comprising paddocks, lawns and enclosures. The general rule of Sched. B is that the tax is laid on "in respect of the occupation of all lands, tenements, hereditaments, and heritages in the United Kingdom." The York Race Committee claims that these paddocks, lawns and enclosures are excepted from the application of Sched. B by proviso (b) to r. 1. The proviso to r. 1 is in these terms:

> "Provided that there shall not be charged under this schedule (a) any dwelling-house or the domestic offices thereunto belonging, unless occupied, by virtue of one and the same demise, together with a farm of lands, or with a farm of tithes, for the purpose of farming the same; or (b) any warehouse or other building occupied for the purpose of carrying on a trade or profession."

At first sight the matter looks perfectly simple. One looks at the photographs and at the plan, and one sees that there is, for instance, a large lawn, and one says: "Whatever that lawn may be, it certainly is not a building." But it is said that the commissioners made no error in law; it is said that, having regard to the construction which ought to be put on the words "any warehouse or other building," the commissioners were entitled to arrive at the conclusion that "building" meant not merely, so to speak, the four walls, but meant adjuncts, courts, and things of that sort occupied with the building and for the necessary use of the building; and it is said that whatever criticism one might think the view of the commissioners was open to, nevertheless it was a finding of fact and that this court could not, therefore, interfere.

The first thing to ascertain is whether the commissioners correctly directed themselves in point of law. In para. 9 of the Case it is said that the commissioners considered that the interpretation contended for on behalf of the race committee was correct. That interpretation is expressed in this way in para. 7:

> "That the exception in favour of 'any warehouse or other building occupied for the purpose of carrying on a trade or profession' covered not only the buildings themselves, but also the paddocks, lawns and enclosures in the same curtilage as the buildings, these adjuncts being essential to the committee's trade and the whole being used for the purpose of racing."

It seems to me that the contention was being put forward that if one found a lawn being used, as the building was used, for the purpose of the trade of conducting race meetings, then both lawn and building fall within the exception.

A That cannot possibly be right. To take the instance of the lawn, it is clear that it is not sufficient that the lawn should be used for the purpose of the trade. What is essential is that the lawn should be a building, and, putting the contention as favourably as it can be put for the York Race Committee, all that could be said would be that "building" must cover adjuncts, e.g., a courtyard, necessarily used in connection with the building. The view which the commissioners accepted is B infinitely wider than that.

It was urged before me that a generous construction must be given to the word "buildings," for otherwise double taxation would arise. Two answers were given by the Solicitor-General. The first answer seems to me to be clearly right. The Solicitor-General said:

> C "That proves a great deal too much, because there might be an area of land used in connection with the trade which had no possible connection with any building, and the difficulty, if difficulty it be, which counsel for the taxpayers raised, would arise with regard to that."

That is, I think, a sufficient answer with regard to that argument. But I think I ought to say that I do not desire to go into any question of double taxation which D might be raised in a suitable case. I am not satisfied that the course which, as I was informed, is taken of deducting the Sched. B assessment is not a correct and proper course, and one which may be justified on general principles; but, however that may be, having regard to the fact that, as the Solicitor-General said, the argument on behalf of the taxpayers proved too much, I am not prepared to give effect to the view which he urged, because it seems to me that that view, if one E carried it out fully, would involve that all land used for the purpose of the trade was entitled to come within the exemption. That cannot possibly be right.

The view of the law which the Commissioners appear to have taken was wrong. They failed to observe that anything outside the four walls, if it was to come within the exemption, must be an adjunct to the building. I do not here propose to decide anything with regard to various cases which were suggested; a factory with a fore- F court used for loading, and things of that sort. It may well be that in such cases the "building" would include something beyond the four walls. It would include the court necessary for the proper use of the building and, therefore, in the strict sense, an adjunct to the building. My attention was called to several cases on different branches of the law which show that a construction of that sort may often properly be adopted, and nothing that I am saying will preclude the construc- G tion being adopted that not merely the four walls, but adjuncts to the four walls, things necessary for use in connection with the building, may fall to be exempted as part of the building. But here one has only to look at the plan and the facts to see at once that the lawns, and so forth, cannot possibly be regarded as adjuncts of the building. I do not think that the commissioners could have found that they were if they had not misdirected themselves in the manner which I have tried H to indicate. I think that the commissioners, for reasons which I have tried to explain, misdirected themselves in point of law. If they did not misdirect themselves in point of law, then I think that they found that these things, the lawns, and so forth, were buildings when there was no evidence which could justify such a finding.

On these grounds I feel bound to differ from the view which was taken in the I Case by the commissioners, and the result is that this appeal will be allowed, and the case remitted to the commissioners to fix the assessment.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue*; *Charles Russell & Co.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

Re WALPOLE (DECEASED).
PUBLIC TRUSTEE *v.* CANTERBURY

[CHANCERY DIVISION (Farwell, J.), December 14, 15, 1933]

[Reported [1933] Ch. 431; 102 L.J.Ch. 209; 148 L.T. 526]

Administration of Estates—Partial intestacy—Income from accumulations undisposed of—Accumulations representing income from real property—Rights of heir-at-law to income.

A testatrix, who died in 1901, by her will created a discretionary trust of part of her residuary estate for the benefit, maintenance and support of her daughter who was of unsound mind, and under such trust she directed the accumulation of the surplus income during the life of her said daughter. It was also provided that, if the daughter recovered, the income was to be paid to her during her life, with remainders over. The trust for accumulation determined twenty-one years after the death of the testatrix under the provisions of the Accumulations Act, 1800. The court held that as from the expiration of twenty-one years from the date of the death of the testatrix the surplus income (including the income from accumulations properly made) was, until the daughter recovered, undisposed of. The further question arose who was entitled, as between the heir-at-law and the next-of-kin, to the income from accumulations so far as those accumulations represented income from real property or the proceeds of sale of real property.

Held: the income produced by those accumulations belonged to the heir-at-law, because he was entitled to the realty and the fruits of the realty except so far as his rights were ousted by the will; the accumulated income of realty (or the proceeds of sale of realty) would belong to the heir but for the terms of the will, and he was, accordingly, entitled to enjoy accumulated income except so far as the will provided otherwise.

Eyre v. *Marsden* (1) (1838), 2 Keen 564, followed.

Notes.

Cases referred to:

(1) *Eyre* v. *Marsden* (1838), 2 Keen 564; 7 L.J.Ch. 220; 2 Jur. 583; 48 E.R. 744; on appeal (1839), 4 My. & Cr. 231, L.C.; 20 Digest 381, *1184*.

(2) *Edwards* v. *Hall* (1855), 6 De G.M. & G. 74, L.C.; 23 Digest (Repl.) 492, *5589*.

(3) *Thomas* v. *Howell* (1874), L.R. 18 Eq. 198; 43 L.J.Ch. 511; 30 L.T. 244; 44 Digest 481, *2993*.

(4) *Ackroyd* v. *Smithson* (1780), 1 Bro.C.C. 503; 28 E.R. 1262; sub nom. *Akeroid* v. *Smithson*, 2 Dick. 566; 3 P.Wms. 22, n., L.C.; 20 Digest 389, *1268*.

(5) *Green* v. *Gascoyne* (1865), 4 De G.J. & Sm. 565; 5 New Rep. 227; 34 L.J.Ch. 268; 12 L.T. 35; 11 Jur.N.S. 145; 13 W.R. 371; 46 E.R. 1038, C.A.; 44 Digest 541, *3581*.

(6) *Re Richerson, Scales* v. *Heyhoe*, [1892] 1 Ch. 379; 61 L.J.Ch. 202; 66 L.T. 174; 40 W.R. 233; 36 Sol. Jo. 200; 20 Digest 386, *1232*.

Adjourned Summons.

The testator by her will dated June 27, 1895, and by a codicil thereto dated March 15, 1897, gave to her trustees her residuary real and personal estate on trust for sale, and as to three-quarters thereof to pay certain legacies and annuities, and to apply the income of the balance or such part of such income as they in their uncontrolled discretion might think fit for the benefit, maintenance, and support of her daughter, the defendant Lady Canterbury, who was of unsound mind, and during the life of the said daughter from time to time to accumulate all the residue and income not applied under the discretionary trust in the way of compound interest by investing the same and resulting income thereof in or on such investments as therein mentioned. There was also a provision that if her daughter recovered and became capable of managing her affairs, the trustees were to pay the said income and the income of such accumulations (if any) to such daughter during her life and after her death to pay the said income, &c., to the grandson of the testatrix during his life as therein mentioned.

The testator died on Jan. 19, 1901. The heir-at-law of the testatrix, namely, her son Lord Orford, died on Sept. 27, 1931. The daughter, namely, Lady Canterbury, was still alive, but was still under a disability. By the provision of Thelluson's (Accumulations) Act, 1800, the trust for accumulations determined at the expiration of twenty-one years from the death of the testatrix, i.e., it determined on Jan. 19, 1922.

A summons was taken out by the trustee of the will and codicil of the testatrix and the first question to be determined was whether Lady Canterbury was absolutely entitled to: (i) the income of three-fourths of the residuary real and personal estate of the testatrix arising after the expiration of twenty-one years from her death until the death or previous recovery of Lady Canterbury so far as that income was not applied on the trusts for the benefit of Lady Canterbury and otherwise declared concerning the same by the codicil, and the cash and investments representing accumulations of the income so arising; (ii) the income arising after the expiration of the twenty-one years until the death or previous recovery of Lady Canterbury (so far as not applied as above mentioned) of accumulations of the income of the three-fourths made up to the death or previous recovery of Lady Canterbury and the cash and investments representing accumulations of the income so arising, or whether they or any and which of them were undisposed of. His Lordship held that they were all undisposed of. The next question for determination was whether, the income and accumulations being undisposed of, they were wholly divisible among the next-of-kin of the testatrix according to the Statute of Distributions or whether the personal representative of her heir-at-law was entitled to: (i) the income and accumulations so far as representing or derived from the income of her residuary real estate; (ii) the income and accumulations so far as representing or derived from the income of accumulations of income of her residuary real estate.

Eardley-Wilmot for the plaintiff.

C. E. E. Jenkins, K.C., and *P. M. Walters* for Lady Canterbury.—After the expiration of twenty-one years the accumulations are undisposed of and are divisible among the next-of-kin. In GRAY ON THE RULE AGAINST PERPETUITIES (2nd Edn.), p. 545, para. 706, it is stated that accumulations of the income of realty (unless ordered to be invested in realty) would seem, in spite of their origin, to be personalty, and their income must, therefore, go to the residuary legatees or next-of-kin. *Eyre* v. *Marsden* (1), which is against that proposition, should not be relied on, as the point was not considered very thoroughly in that case. [They also referred to *Edwards* v. *Hall* (2), *Thomas* v. *Howell* (3), and JARMAN ON WILLS (7th Edn.), p. 366.]

Daynes, K.C., and *R. F. Roxburgh* for the representative of Clare Horatio Walpole, one of the next-of-kin of the testatrix.—The accumulations are personalty by their own inherent nature. The trust was to collect rents, that is to say, money which is personalty, and the money was invested in personalty. The principle contained in *Ackroyd* v. *Smithson* (4) does not apply to this case and does not prevent these accumulations going to the next-of-kin. [They also referred to *Green* v. *Gascoyne* (5) and *Re Richerson* (6).]

Vaisey, K.C., and *H. S. G. Buckmaster* for the representative of the heir-at-law of the testatrix. The heir-at-law would clearly take all the rents not used for the purposes of the will. If there has been a conversion into personalty the doctrine of *Ackroyd* v. *Smithson* (4) clearly provides that the conversion is not to prejudice the heir-at-law. The case is fully covered by *Eyre* v. *Marsden* (1).

FARWELL, J.—The question which I now have to decide is as to the destination of the income produced by the accumulations so far as the accumulations represent

income of what was converted real estate or unconverted real estate. There is no A
doubt that as from the expiration of the twenty-one years when the trust for accumulation determined, there is an intestacy, and the heir-at-law is entitled to any income which is produced from either the real estate itself or the proceeds of sale of the real estate until the death of Lady Canterbury, when the intestacy will come to an end. The question which I have to determine is: who is entitled to the income of the accumulations, those accumulations being accumulated income B
of the real estate or of the proceeds of sale of the real estate? It is said, on the one hand, that the heir-at-law is entitled to the produce of those investments, which represent, as I have said, the accumulated rents and profits of the real estate. On the other hand, it is said that they are personalty and must be treated for all purposes as personalty and go to the next-of-kin.

The trust for conversion contained in the will was undoubtedly valid, and the C
property, so far as all the persons who take under the will are concerned, whether actually sold or not, must be treated as having been validly converted and as being personal estate. Moreover, during the period of twenty-one years from the death of the testatrix, the accumulations were properly made and properly added to capital. As from the expiration of the twenty-one years, the trust for accumulations comes to an end by virtue of law, and the income can no longer be accumu- D
lated; it must be disposed of, and, there being no effective dispositions by the will, it must go to the persons who are entitled as on an intestacy. But the trust for conversion being one which is perfectly valid and effective for all purposes as among the persons who are interested under the will, the question I have to determine is how far, if at all, it affects the interests of the heir-at-law, as between himself and the next-of-kin of the testatrix. In the case of a total intestacy the E
whole will is inoperative and there is no conversion, and the heir takes the real estate and the next-of-kin takes the personal estate; but if there is only a partial intestacy, as in this case, and the trust for conversion is a valid trust, it undoubtedly affects the position of the heir to this extent: that although it does not defeat his right as heir-at-law to whatever is real estate undisposed of, for the purpose of the devolution of his estate it is treated as personalty and will pass as F
such. I think that is quite plainly established by the decision of CHITTY, J., in *Re Richerson* (6). So far as the persons who claim through the heir on an intestacy of the heir are concerned, the property is personalty and not realty, because the trust for conversion has affected the position to that extent even as against the heir; but, except to that extent, as between the heir of the testator or testatrix and the next-of-kin of the testator or testatrix, in my judgment the trusts G
of the will do not affect their respective rights in so much of the property as is undisposed of.

If that be the true view, what are the respective rights of the heir-at-law and the next-of-kin in the income produced by the accumulations of the rents and profits of the real estate made during the period in which they were lawfully made? The accumulations represent the income of real estate subject to a trust for con- H
version, but real estate so far as the right of the heir was concerned as against the next-of-kin. They represent the fruit of that real estate properly accumulated, but none the less something which belonged to the heir at law except in so far as he was effectively ousted by the trusts of the will. If there had been no trust for accumulation, but an intestacy as from the death of the testatrix, for a limited period, the heir-at-law beyond all doubt would have been entitled to the rents and I
profits or the income of the proceeds of sale of the real estate; he did not receive them, in fact, because under an effective trust to accumulate they were accumulated for twenty-one years, but at the end of that period the trust to accumulate terminated. What has been accumulated is property which to some extent represents the heir's property, except in so far as he has been ousted. I cannot see myself that there is anything in the trust to accumulate which can have the effect of preventing the heir—although he is not entitled to the actual rents and profits of the real estate, because they have been properly accumulated and added to the

capital—from claiming that whatever those accumulations produce, so far as it is not disposed of by the will, as between himself and the next-of-kin is his property. It is said on behalf of the next-of-kin that rents, when they are once received and in the hands of the trustees, are personalty, and personalty for all purposes, but in my judgment, if it be true to say that the heir's rights are only ousted so far as is necessary to give effect to the valid dispositions of the testator, then the fact that in the hands of the trustees the rents and profits may be personalty cannot affect the right of the heir to claim that if the produce of those rents and profits is not disposed of by the will he is entitled to them. That seems to me, apart from authority, to be the true view of this matter, but in my judgment the case is covered by the decision in *Eyre* v. *Marsden* (1). It is said that in that case this question of the income of accumulations was never argued. I am not at all satisfied that that is so, but in any event the decree which is set out in terms in the judgment, not as something appended to the end of the report as a note but as part of the judgment of LORD LANGDALE, M.R., seems to me to be precisely in point and to decide this question. That being so, both on the authority of that case and for the reasons which I have expressed above, I hold that the income of the accumulations so far as they represent the accumulations of the income of the real estate belong and go to the personal representatives of the heir-at-law and not to the next-of-kin.

Order accordingly.

Solicitors: *Dawson & Co.*; *Burch & Co.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

MacCARTHY *v.* AGARD

[COURT OF APPEAL (Scrutton, Greer and Romer, L.JJ.), June 14, 1933]

[Reported [1933] 2 K.B. 417; 102 L.J.K.B. 753; 149 L.T. 595]

Practice—Judgment—Amendment—Defendant wrongly described in writ, proceedings and judgment—Judgment therefore in wrong form—Mistake due to defendant's fraud—Power to amend judgment—Order XXVIII, r. 11.

Wherever a judgment is founded on some misrepresentation of facts, it cannot be set aside by application to the judge. Where the court has intentionally given a judgment and there has been no mistake in drawing it up—no mistake in words—the only way to correct it is either by appeal, or, in certain cases, by an action to set it aside. *Ainsworth* v. *Wilding* (1), [1896] 1 Ch. 673, followed.

The plaintiff sued the defendant, whom he knew as Mrs. A., a married woman, in respect of a sum of money which she had borrowed from him, and for which she had given him a post-dated cheque which had been dishonoured. Judgment was signed against her in the form appropriate to a married woman, as that she was not liable personally but only as to her separate property. In fact the defendant was not Mrs. A., a married woman, but was Mrs. W., a widow, which fact she had kept back from the court. The plaintiff thereupon took out a summons before the Master to amend the judgment into the form appropriate to a feme-sole, which would render the defendant liable personally.

Held: per GREER and ROMER, L.JJ. (SCRUTTON, L.J., dissenting), the court could not amend or set aside the judgment, either under the "slip" rule (R.S.C., Ord. 18, r. 11) or under its inherent jurisdiction. The only way to correct the judgment was either by appeal or by bringing an action to have it set aside.

Ainsworth v. *Wilding* (1), [1896] 1 Ch. 673, and *Preston Banking Co.* v. *Allsup & Sons, Ltd.* (2), [1895] 1 Ch. 141, followed.

Lazard Bros. & Co. v. *Banque Industrielle de Moscou* (3), [1932] 1 K.B. 617, and *Tetlow* v. *Orela, Ltd.* (4), [1920] 2 Ch. 24, distinguished. Observations of Buckley, L.J., in *Oxley* v. *Link* (5), [1914] 2 K.B. at p. 742, explained.

Appeal allowed.

Notes. The Law Reform (Married Women and Tortfeasors) Act, 1935, s. 1, has now abolished the "separate property" of married women and has placed them in the same position as a feme-sole. The circumstances in this case could therefore no longer arise, but the case retains its importance as an authority on the slip rule and on the correct mode of dealing with a judgment in the wrong form.

Distinguished: *Pearlman (Veneers) S.A. (Pty.), Ltd.* v. *Bartels*, [1954] 3 All E.R. 659. Considered and applied: *Thynne* v. *Thynne*, [1955] 2 All E.R. 377.

As to the amendment of or setting aside judgments, see 22 Halsbury's Laws (3rd Edn.) 784.

Cases referred to:

(1) *Ainsworth* v. *Wilding*, [1896] 1 Ch. 673, 677; 65 L.J.Ch. 432; 74 L.T. 193; 44 W.R. 540; 12 T.L.R. 270; 40 Sol. Jo. 354; Digest, Practice 473, *1539*.

(2) *Preston Banking Co.* v. *William Allsup & Sons*, [1895] 1 Ch. 141, 144; 64 L.J.Ch. 196; 71 L.T. 708; 43 W.R. 231; 39 Sol. Jo. 113; 12 R. 51, C.A.; Digest, Practice 815, *3764*.

(3) *Lazard Bros. & Co.* v. *Banque Industrielle de Moscou, Lazard Bros. & Co.* v. *Midland Bank, Ltd.*, [1932] 1 K.B. 617; 101 L.J.K.B. 65; 146 L.T. 240; 49 T.L.R. 94, C.A.; affirmed, [1933] A.C. 289; 102 L.J.K.B. 191; 148 L.T. 242; 49 T.L.R. 94; 76 Sol. Jo. 888, H.L.; Digest, Practice 326, *458*.

(4) *Tetlow* v. *Orela, Ltd.*, [1920] 2 Ch. 24; 89 L.J.Ch. 465; 123 L.T. 388; Digest, Practice 267, *50*.

(5) *Oxley and others* v. *Link*, [1914] 2 K.B. 734, 746; 83 L.J.K.B. 602; 110 L.T. 248, C.A.; Digest, Practice 473, *1540*.

(6) *Scott* v. *Morley* (1887), 20 Q.B.D. 120; 57 L.J.Q.B. 43; 57 L.T. 919; 52 J.P. 230; 36 W.R. 67; 4 T.L.R. 56; sub nom. *Re Morley, Ex parte Morley, Scott* v. *Morley*, 4 Morr. 286, C.A.; 27 Digest (Repl.) 169, *1242*.

(7) *Re Frances Handford & Co., Ex parte Frances Handford & Co.*, [1899] 1 Q.B. 566; 68 L.J.Q.B. 386; 80 L.T. 125; 47 W.R. 391; 15 T.L.R. 197; 43 Sol. Jo. 259; 6 Mans. 131, C.A.; 4 Digest 32, *265*.

(8) *Re Swire, Mellor* v. *Swire* (1885), 30 Ch.D. 647; 53 L.T. 205; 1 T.L.R. 623; 33 W.R. 785, C.A.; Digest, Practice 472, *1534*.

Interlocutory Appeal from a decision of Goddard, J. The defendant, who was then known as Mrs. Agard, but was in fact Mrs. Watts, had borrowed a sum of £175 from the plaintiff on a post-dated cheque drawn in the name of E. H. Agard, payable on March 30, 1933. That cheque not having been paid on the due date, the plaintiff issued a writ against Mrs. Agard. Before an appearance had been entered to the writ the defendant had executed a bill of sale of all her furniture in the name of E. H. Watts. The solicitor who was then acting on her behalf, being in ignorance of the fact that she was then Mrs. Watts, a widow, entered an appearance to the writ in the name of Mrs. Agard, married woman, and an affidavit was then made by her in which she described herself as E. H. Agard, married woman. The defendant did not disclose to the plaintiff or his solicitor the fact that she was not Mrs. Agard until after judgment had been entered against her in the *Scott* v. *Morley* (6) form. Upon the true facts being then ascertained, the plaintiff took out a summons before the Master to have the judgment amended by making it a personal judgment against the defendant. The Master held that he had no power to set it aside or to amend it, but on appeal Goddard, J., held that the matter could be put right by discharging the judgment and amending the title of the action by substituting Mrs. Watts for Mrs. Agard.

The defendant appealed.

Wilfred Lewis for the defendant.
J. P. Eddy for the plaintiff.

SCRUTTON, L.J.—This is rather a curious case, and it has given the court some trouble, but when the facts are ascertained, the course which the court ought to take is to my mind clear. The defendant was married to a Mr. Watts, but they separated, and for about seven years the defendant had been living as the wife of a Mr. Agard and had become known as Mrs. Agard, in which name she borrowed a sum of £175 from the plaintiff, giving him a post-dated cheque in the name of E. H. Agard. On the due date—March 30, 1933—the cheque was not paid, and on April 6 the plaintiff issued a writ against Mrs. E. H. Agard, married woman, that being the name under which the defendant had been living for the last six or seven years. Her husband, Mr. Watts, died in February, 1933, and consequently the defendant then became a widow. She heard of her husband's death at the end of March, just about the time when the cheque in question became due. Before an appearance was entered to the writ against her she had executed a bill of sale of all her furniture in the name of E. H. Watts, having then learnt that her husband was dead. The solicitor who was then acting on her behalf was instructed to enter an appearance to the writ; he had not been told about Mr. Watts, and, knowing nothing of her real position, he entered an appearance for her in the name of E. H. Agard, married woman. The plaintiff thereupon, not knowing the fact that she was a widow, and believing her to be Mrs. E. H. Agard, took out a summons under Order XIV, and on May 3 the defendant made an affidavit in the name of E. H. Agard, married woman. That statement was quite untrue. She was not a married woman, and she kept back from, and actively misrepresented to, the court her real position. Judgment was entered against her on the Order XIV summons in the *Scott* v. *Morley* (6) form.

It is almost unnecessary to say that there are two forms of judgment against a woman—the ordinary form where she is a feme-sole, and the other, in the *Scott* v. *Morley* (6) form, when she is a married woman, under which she is not personally liable, but, to use the language of Bowen, L.J., in *Scott* v. *Morley* (6), is only subject to a "proprietary liability," the judgment being against her separate property. The Married Women's Property Act, 1893, has relieved a plaintiff from showing whether the female defendant who is being sued had any separate property when the debt was incurred. The result is that in the present case a judgment has been entered against the defendant in a way much more favourable to her than if she had told the truth, and there is no doubt that if the court had known the facts on May 3, when judgment was entered against her, that judgment would have been entered not in the *Scott* v. *Morley* (6) form but in the absolute form—namely, against her as a feme-sole. The court was led to give a judgment which it would not have given if it had known the facts. On the judgment as entered the plaintiff tried to obtain an order in bankruptcy against the defendant, but was told by the bankruptcy officials that such an order could not be made on a judgment in the *Scott* v. *Morley* (6) form: see *Re Frances Handford & Co.* (7). As the judgment would not have been in the form in which it was if the real facts had been known, how is it to be put right?

When the real facts were ascertained a summons was taken out before the Master to amend the judgment. The Master held that he had no power to set it aside or amend it, but on appeal Goddard, J., took the view that the matter could be put right by discharging the judgment and amending the title of the action by substituting Watts for Agard. The defendant comes to this court and says that the judge had no power to make that order, and it is contended that the only way to get rid of the judgment is to bring an action to have it set aside. In my opinion, although my learned brethren do not agree with me, the appeal should be dismissed on one of two grounds.

First, I think that on facts like those with which we are dealing, it is within the inherent jurisdiction of the court to correct an error caused by the misrepresentation of a party. That inherent power has been exercised in many cases, and generally, I hope, for the purpose of doing justice between the parties and to the public, because misrepresentation by a party is a matter of public as well as of private interest. One of the cases in which this inherent power has been exercised is where the nominal plaintiff turns out to be dead and where in ignorance of that fact judgment has been entered in his favour. Similarly the court has exercised its inherent power where a writ has been issued against or by a company which at the time is non-existent. In *Lazard Bros. & Co.* v. *Banque Industrielle de Moscou, Lazard Bros. & Co.* v. *Midland Bank, Ltd.* (3) I said:

> "If it comes to the knowledge of the court that it has entered judgment in default of appearance against a man who was at the time dead, or a company which was at the time dissolved, or non-existent according to the law of its country of origin, the court is bound, after hearing the parties interested, of its own motion to set the judgment aside."

I took the view that it was within the inherent power of the court to set aside the judgment even where no claim to have it set aside was made by one of the parties. That decision was subsequently affirmed in the House of Lords. A similar case came before RUSSELL, J., in *Tetlow* v. *Orela, Ltd.* (4). There a writ was issued in the name of the plaintiff claiming an injunction in a passing-off action. It turned out that the plaintiff had been dead for nearly eight years, and that the person who was using his name was his widow, whom he had appointed executrix, and who was carrying on the business. RUSSELL, J., on being asked to substitute the widow for the dead man, declined to do so. There, again, the inherent power of the court was being used to set aside the writ and all subsequent proceedings, because the fact was brought to the attention of the court that there was no such person as the plaintiff, and consequently the whole proceedings were a nullity. In my view this is the class of case in which the court is entitled to say: "You, the appellant, have deceived us and have thereby induced us to give a judgment in a form to which you were not entitled; we therefore decline to allow you to retain the judgment obtained in that form by your deception." I should be sorry to think that the inherent power of the court is to be in any way limited by rules.

The second ground on which I think this appeal should be dismissed is that the judge was justified in the view he took by the observations of BUCKLEY, L.J., in *Oxley and others* v. *Link* (5). That was the converse of the present case, the judgment having been drawn up as a personal judgment against a married woman instead of one in the *Scott* v. *Morley* (6) form. The plaintiff took out a summons for leave to amend. BUCKLEY, L.J., there said ([1914] 2 K.B. at p. 742):

> "I should have no doubt myself that the only proper order in this case is to discharge this judgment and leave the plaintiffs, if they are so entitled, to obtain some other judgment. That is what the order of the Master has done."

That appears to me to be exactly what GODDARD, J., has done here, the judgment entered not representing the judgment which ought to have been given. He has discharged the judgment which was given and left the plaintiff to obtain, if he can, a judgment in the form in which, if the defendant had stated the real facts, he would have been entitled. On these two grounds the appeal should, in my opinion, be dismissed.

GREER, L.J.—I have with regret come to a different conclusion. The plaintiff issued his writ against E. H. Agard, a married woman, and obtained judgment against her in the *Scott* v. *Morley* (6) form, as he asked. The court was represented by the Master, who has jurisdiction to try cases under Order XIV, but the position is the same as if the case had been tried out in court with witnesses. If a judge has been misled by the evidence, the only way the aggrieved party can deal with it is to appeal to this court asking to have the judgment set aside and entered for the right party, or to obtain an order for a new trial. Instead of appealing from the judgment that was entered in this case and saying that it should be reversed because it was given in the form in which it was, and the action was brought in the form it was by reason of the false pretence of the defendant that she was Mrs. Agard, a married woman, the plaintiff applied by summons to the Master to amend the judgment. If proper proceedings had been taken at the time I cannot conceive that this judgment would have been allowed to stand, but that is not the question we have to determine.

The question for us is whether under the rules relating to procedure the court can either under the slip rule (Order XXVIII, r. 11) or under its inherent jurisdiction set aside a judgment which has been deliberately entered in the way it was, or whether the court is bound to leave the party aggrieved to the remedy of appealing or bringing an action to set aside the judgment. With regard to the slip rule, that applies when it is found that a clerical mistake has been made in drawing up a judgment. That rule, however, has no application to the present case. No doubt the judgment was drawn up by a clerk in the office, but as drawn up it accurately represented what the Master decided, namely, a judgment in the *Scott v. Morley* (6) form. In the Annual Practice for 1933 the statement on p. 480 (p. 633 of the 1958 Annual Practice) accurately represents the position. It is there said:

> "The error or omission must be an error in expressing the manifest intention of the court; the court cannot correct a mistake of its own in law or otherwise, even though apparent on the face of the order such as a mistake due to a misunderstanding of a rule or statute. If the order as drawn correctly expressed the intention, it cannot be corrected under this rule or the inherent jurisdiction, even if the decision of the court is procured by fraud or misrepresentation."

Various cases are there cited to this effect. It seems to me that apart from the cases it is very difficult to put together words which would enable the order asked for in this case to be made without completely upsetting the practice, which has hitherto prevailed, of leaning to the view that, wherever a judgment is founded on some misrepresentation of the facts, it cannot be set aside by application to the judge. For example, if a judgment has been obtained by a statement which can be proved to be false, made by a party, and it is held to be right to set it aside in the way the judge did, it would be difficult to say that the court might not set aside a judgment on the ground that the judge was wrongly misled by the evidence given before him. If that is true as regards a judgment obtained by false evidence, where are we to stop? It would be equally true in a case in which it was demonstrated that the judge mistook the effect of the evidence. The proper course is to appeal to the Court of Appeal, and not to apply to the judge to set aside the judgment on the ground that he has made a mistake either in fact or in law. The decisions in *Re Swire, Mellor* v. *Swire* (8), *Oxley and others* v. *Link* (5), and the others cited by counsel show that this cannot be done, and that the true view is that where the court has intentionally given a judgment and there has been no mistake in drawing it up—no mistake in words—the only way to correct it is either by appeal, or, in certain cases, by an action brought to have it set aside. That was laid down in *Ainsworth* v. *Wilding* (1), where, on a motion to discharge a judgment given at the trial which had been passed and entered, Romer, J., said ([1896] 1 Ch. at p. 676):

> "I think that a fresh action must be brought and that I have no jurisdiction to hear the matter on motion, at any rate without the consent of the parties."

That observation applies to the facts of this case.

As I have said, I regret having to come to this conclusion, because I cannot help thinking that the remedy by appeal or by a fresh action to set aside the judgment when the facts are so clear is unfortunately a cumbrous and expensive way of correcting a wrong judgment. It looks like using a steam-hammer to crack a nut. In my opinion there should be some rule appropriate to a case like the present so that a judgment might be corrected without the necessity of appeal or of a fresh action.

ROMER, L.J.—I also come with regret to the conclusion that this appeal should A be allowed. I should like, if possible, to find a short and inexpensive cut for arriving at the result which the plaintiff may eventually reach by a longer and more expensive route, but I think it is impossible to affirm the decision of GODDARD, J., without departing from the principle which has been laid down by authorities which are binding on this court. The principle was stated thus by ROMER, J., in *Ainsworth* v. *Wilding* (1) ([1896] 1 Ch. at p. 677): B

> "So far as I am aware, the only cases in which the court can interfere after passing and entering of the judgment are these: (i) Where there has been an accidental slip in the judgment as drawn up—in which case the court has power to rectify it under Order XXVIII, r. 11; (ii) when the court itself finds that the judgment as drawn up does not correctly state what the court actually decided and intended." C

ROMER, J., obviously had in mind the decisions in *Re Swire, Mellor* v. *Swire* (8) and *Preston Banking Co.* v. *Allsup & Sons, Ltd.* (2). I will not refer again to the judgments in *Re Swire* (8), and will only say this, that no one can read the observations of COTTON and LINDLEY, L.JJ., in that case without realising that they were intending to define and limit the circumstances in which a judgment can be D corrected or discharged after it has been passed and entered. I should like, however, to refer to *Preston Banking Co.* v. *Allsup & Sons, Ltd.* (2) for this reason, that in that case the court was brought face to face with an order which it was alleged had been obtained from the court by misrepresentation. An order had been made as to certain costs which were directed to be paid in a certain event by the applicant. At a later date one Lindsay, a receiver and manager of the defendant E company, applied by summons for a variation of that order so that they should be made part of his costs in the action on the ground that when the original order was made there had been a misrepresentation as to the value of the company's assets. Notwithstanding that, the Court of Appeal affirmed the decision of the Vice-Chancellor of the County Palatine of Lancaster. LORD HALSBURY, who was a member of the court, said this ([1895] 1 Ch. at p. 143): F

> "If by mistake or otherwise an order has been drawn up which does not express the intention of the court, the court must always have jurisdiction to correct it. But this is an application to the Vice-Chancellor in effect to re-hear an order which he intended to make, but which, it is said, he ought not to have made. Even when an order has been obtained by fraud, it has been held that the court has no jurisdiction to re-hear it. If such a jurisdiction existed it would be G most mischievous. The fact that in the present case the application to re-hear is made to the particular judge who made the order is immaterial; for if one judge can re-hear the order another can."

It has been contended on behalf of the plaintiff that in the present case the court intended to give an effective judgment against the defendant. Having regard to the facts before him the Master was led to believe that the defendant was a married H woman, and in those circumstances the judgment against her was in the *Scott* v. *Morley* (6) form. That was the intention of the court, and in those circumstances it is impossible to alter that order and make it one under which the defendant should be unconditionally liable. SCRUTTON, L.J., from whose opinion I differ with the greatest hesitation, has referred to *Lazard Bros. & Co.* v. *Banque Industrielle de Moscou*, *Lazard Bros. & Co.* v. *Midland Bank, Ltd.* (3) and other cases where I one of the parties was non-existent; but in those cases there was no judgment before the court at all. The court did not set aside the judgment; it disregarded it because there was no party in existence. The present case does not fall within that category, for here there certainly is a judgment against the defendant. The judgment as drawn up gave effect, and no more than effect, to the intention of the court, and in those circumstances it is impossible for us to interfere with it.

In *Oxley and others* v. *Link* (5), as I understand it, there is nothing inconsistent with the views I have expressed. In that case, two summonses were taken out:

A (i) To have a judgment which had been obtained some years previously amended by making it a *Scott* v. *Morley* (6) judgment; and (ii) a summons by the defendant —the judgment having been signed against her by default—to have that judgment set aside. The Master had made an order on that summons setting aside the judgment. It is to that part of the order that Buckley, L.J., was, as I understand, referring, when, after stating that the slip rule did not apply, he said ([1914] B 2 K.B. at p. 742):

> "Further, even if the order did apply to it, I should have no doubt myself that the only proper order in this case is to discharge this judgment and leave the plaintiffs, if they are so entitled, to obtain some other judgment. That is what the order of the Master has done."

C What he is there saying is, that if the slip rule had applied, what he would do would be not to alter the judgment but to set it aside as the Master had done on the defendant's summons. For these reasons I do not think that *Oxley and others* v. *Link* (5) is an authority for the order made by Goddard, J.

Appeal allowed.

D Solicitors: *T. R. Frost & Co.*; *Bartlett & Gregory*, for *Bartlett & Sons*, Sherborne.

[*Reported by* Edward J. M. Chaplin, Esq., *Barrister-at-Law.*]

E

Re RUSS AND BROWN'S CONTRACT

F [Chancery Division (Clauson, J.), May 18, 1933]

[Court of Appeal (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), October 6, 1933]

[Reported [1934] Ch. 34; 103 L.J.Ch. 12; 150 L.T. 125; 49 T.L.R. 443; 50 T.L.R. 19; 77 Sol. Jo. 749, Ch.D. & C.A.]

G *Sale of Land—Misdescription—Property described as leasehold—Vendor holding underlease only.*

By a memorandum of agreement in writing dated Nov. 23, 1932, a purchaser acknowledged that he had bought some dwelling-houses which were described in the particulars of sale as "leasehold dwelling-houses," and some of them were stated to be held "for a term of ninety-nine years (less seven days)" H from a stated date. The conditions of sale referred to "the leases" under which the various properties were held, and provided that the "purchaser shall be deemed to purchase with full knowledge of their contents both with regard to the term, rent and otherwise, and no objection shall be raised to them of any nature whatsoever." The conditions also provided that "where the property sold is held by underlease no objection or requisition shall be made on that I account or on account of the covenants by the tenant not corresponding with the covenants by the lessee in the superior lease or of any superior lease comprising other property than that sold." When the abstract of title was delivered it appeared therein that the houses were held by underleases and not by leases. The purchaser thereupon took the objection that the property had been misdescribed, and he refused to complete.

Held: the purchaser was entitled to treat the offer as one to sell to him houses held for terms of years from a freeholder and not houses held under underleases, and, therefore, he was not bound to accept the title.

Notes. Referred to: *Cunningham* v. *Shackleton* (1935), 79 Sol. Jo. 389.

As to misrepresentation as to quality, see 29 Halsbury's Laws (2nd Edn.) 253–255, para. 338; and for cases on the subject see 40 Digest 106, 108, *833–836*, *860–862*.

Cases referred to:

(1) *Camberwell and South London Building Society* v. *Holloway* (1879), 13 Ch.D. 754; 49 L.J.Ch. 361; 41 L.T. 752; 28 W.R. 222; 30 Digest (Repl.) 507, *1468*.

(2) *Charles Hunt, Ltd.* v. *Palmer*, [1931] 2 Ch. 287; 100 L.J.Ch. 356; 145 L.T. 630; 75 Sol. Jo. 525; Digest Supp.

(3) *Re Beyfus and Masters's Contract* (1888), 39 Ch.D. 110; 50 L.T. 740; 53 J.P. 293; 37 W.R. 261; 4 T.L.R. 590, C.A.; 30 Digest (Repl.) 507, *1469*.

(4) *Madeley* v. *Booth* (1848), 2 De G. & Sm. 718; 64 E.R. 321; 40 Digest 108, *860*.

(5) *Hayford* v. *Criddle* (1855), 22 Beav. 477; 52 E.R. 1192; 40 Digest 141, *1111*.

Adjourned Summons.

By a memorandum of agreement in writing dated Nov. 23, 1932, a purchaser acknowledged that he had purchased lot 1, described in the particulars annexed thereto as "leasehold dwelling-houses," and he agreed to complete in accordance with conditions of sale which incorporated the National Conditions of Sale. Number 7 of the special conditions was:

> "The originals of the leases under which the various properties are held can be seen at the vendors' solicitors' office at any time during office hours, and the purchaser shall be deemed to purchase with full knowledge of their contents both with regard to the term, the rent, and otherwise, and no objection shall be raised to them of any nature whatsoever."

In special condition No. 9 the following words occurred: "The title to lot 1 shall commence with the leases under which the respective properties are held." Clause (3) of condition No. 6 of the National Conditions provided as follows:

> "Where the property sold is held by underlease no objection or requisition shall be made on that account or on account of the covenants by the tenant not corresponding with the covenants by the lessee in the superior lease comprising other property than that sold."

When the abstract of title was delivered the purchaser discovered for the first time from such abstract that the property was held by underleases and not by leases. He accordingly took the objection that the property had been misdescribed, and he refused to complete. This summons was taken out by the vendors for a declaration that the purchaser's objections had been sufficiently answered, and that a good title to the property had been shown in accordance with the contract.

G. P. Slade for the vendors.—It is not a misdescription to describe property held by underleases as held by leases: see the remarks of Jessel, M.R., in *Camberwell and South London Building Society* v. *Holloway* (1); Fry on Specific Performance, 6th Edn., p. 580, para. 1250; Williams on Vendor and Purchaser, 3rd Edn., vol. 1, p. 339. Whether that proposition is a correct one or not the purchaser expressly bound himself by condition No. 7, and, as he did not inspect the deeds before the sale, he must be deemed to have bought with full notice that the properties were held by underleases. Moreover, cl. (3) of condition No. 6 of the National Conditions precludes the purchaser from sustaining the objection that he has made.

C. R. D. Richmount.—There has been a misdescription. The purchaser was offered one thing and he is now asked to take something else. The purchaser was entitled to have property held directly from the freeholder and not from an intermediate landlord. The misdescription makes the title a bad one, and the purchaser is entitled to refuse to complete. [He referred to *Camberwell and South London Building Society* v. *Holloway* (1), *Charles Hunt, Ltd.* v. *Palmer* (2), *Re Beyfus and Masters's Contract* (3), *Madeley* v. *Booth* (4), and *Hayford* v. *Criddle* (5).]

CLAUSON, J.—This is a summons taken out by the vendors in respect of a contract of sale, for a declaration that the requisitions and objections to the title in respect of the property comprised in the contract have been sufficiently answered by the vendors, and that a good title has been shown in accordance with the contract of sale.

The contract consists of a memorandum at the end of printed particulars, whereby the purchaser acknowledges that he has purchased lot 1 described in the particulars, and he undertakes to complete the purchase in every respect according to the auction conditions of sale. Lot 1 is described as "the eight leasehold dwelling-houses known as," and then there are certain even and certain odd numbers; that description is followed by this:

> "Nos. 11, 13, 15, 17, and 19 are held for a term of ninety years from June 24, 1849, at a total ground rent of £42 per annum; [and then] Nos. 12, 14, and 20 are held for a term of ninety-nine years (less seven days) from March 26, 1846, at a total ground rent of £24 per annum on Nos. 12 and 14, and £6 per annum on No. 20."

The special conditions incorporate the National Conditions of Sale, and special condition No. 9 says, omitting irrelevant words:

> "The title to lot 1 shall commence with the leases under which the respective properties are held."

The National Conditions incorporated in the contract contain amongst others this condition:

> "No. 6 (1) Leaseholds. The abstract of title to leasehold property shall (unless otherwise provided) commence with the lease or underlease creating the term sold. The lease or underlease or a copy thereof may be examined at the office of the vendor's solicitors, during office hours, on the five working days preceding the day of sale, and the purchaser (whether or not he inspects the same) shall be deemed to have bought with full notice of the contents thereof. The production of a receipt for the last payment of rent accrued due under the lease under which the property sold is held, before completion, shall be accepted as conclusive evidence that all the covenants and conditions contained in the said lease and in every superior lease (if any) have been duly performed and observed, or that any breach thereof has been effectually waived down to the time of actual completion of the purchase, and whether or not they have in fact been so performed and observed or waived as aforesaid; and it shall be assumed without proof that the person giving such receipt, though not the original lessor, is the reversioner expectant on the said lease or his duly authorised agent. (3) Where the property sold is held by underlease no objection or requisition shall be made on that account or on account of the covenants by the tenant in the underlease not corresponding with the covenants by the lessee in the superior lease or of any superior lease comprising other property than that sold."

Several points were taken on the title, but counsel agreed before me that the only outstanding requisition, and the only one with which I have to deal, is that which is contained in passages from three letters of Jan. 2, 3, and 4, 1933, which I will proceed to read. The first letter is from the purchaser's solicitors, and is dated Jan. 2, 1933, and the relevant passage is this:

> "From perusal of same [the abstract] it would appear that the houses are held by underlease and not leases as mentioned in the special condition, No. 7."

The answer to that on Jan. 3 from the vendors' solicitors, is this:

> "So far as the vendor is aware, only Nos. 12, 14, and 20 are held by underleases, and this is quite apparent from the particulars of sale which mention the term as being ninety-nine years less seven days. The word 'lease' in the special conditions of sale is a generic term including underleases, and, we

> submit, is quite regularly used in that sense. You refer to special condition No. 7, which, together with condition No. 6 (3) of the National Conditions of Sale, seem to us to put your objection entirely out of court. Your client could before the sale have inspected the leases for himself."

That letter was written under a misapprehension to this extent, that not only were Nos. 12, 14, and 20, which are stated to be "held for a term of ninety-nine years less seven days," held by underlease, but the odd-numbered lot stated in the particulars to be "held for a term of ninety years from June 24, 1849," were also held by underlease. The reply to that answer is contained in a paragraph in the letter of Jan. 4, 1933, from the purchaser's solicitors as follows:

> "From the abstract it appears that Nos. 11 to 19, All Saints Street are held on an underlease as the superior landlords are referred to therein. We cannot agree that the word lease in the special conditions of sale is a generic term, or that the same is quite regularly used in that sense. In our view, National Condition No. 6 (3) is not applicable, and it is not for a purchaser to inspect documents prior to contract to ascertain that statements made by the vendors are accurate. He is entitled to rely upon the vendors' representation."

The first point that I have to consider in my view is: What is it that the vendors offered for sale in the particulars of lot 1? The question is, in offering that which he described as lot 1, was he offering houses held by lease from the freeholder, or was he offering something else? SIR GEORGE JESSEL, M.R., on Nov. 20, 1879, in *Camberwell and South London Building Society* v. *Holloway* (1), said (13 Ch.D. at p. 759):

> "The word 'lease' in law is a well-known legal term of well-defined import. No lawyer has ever suggested that the title of the lessor makes any difference in the description of the instrument, whether the lease is granted by a freeholder or a copyholder with the licence of the lord or by a man who himself is a leaseholder. It being well granted for a term of years, it is called a lease. It is quite true that where the grantor of the lease holds for a term the second instrument is called either an underlease or a derivative lease, but it is still a lease, and consequently when a man sells a thing by its known and proper legal description, it does not appear to me that he can be charged with misrepresentation. If he says, 'I sell you a house held under a lease for a term of twenty-one years,' every word of that is true, though the lessor may hold under a lease himself."

If that statement of SIR GEORGE JESSEL could be held by me in this court, sitting as I am as a judge of first instance, to represent the law, the vendors would be entitled to succeed on this summons, because I should be entitled, and, indeed, bound to read the description of lot 1 as amounting to an offer for sale of houses held for a term of years which might or might not be carved out of the estate of the freeholder. The matter does not stop there, and I must read the next words of SIR GEORGE JESSEL. He said (13 Ch.D. at p. 760):

> "As I understand the decisions, it has been decided that where a man sells a lease for a defined term of years, and nothing more is said on either side, he does not make a good title to the lease unless he shows that he holds direct from the freeholder, or, I suppose, the copyholder under licence from the lord. I am not in a position to overrule these decisions. There are too many of them. Whatever the reasons may be, as I understand the matter, standing alone, and without anything being said beyond, you do not make a good title unless you show what has been called an original lease; but when we come to something else beyond being said, there is no such decision."

SIR GEORGE JESSEL is saying this: Contrary to my opinion of what the law ought to be, the law in fact is that when a man, without saying anything more, offers for sale a leasehold dwelling-house he must be understood to be offering for sale a dwelling-house held for a term of years carved immediately out of the estate of the

A freeholder. That that is the correct view of the law, so far as a court of first instance is concerned, seems to me now to be settled by not perhaps actual decisions, but by certain statements made quite deliberately by two judges of eminence sitting in the Court of Appeal. In *Re Beyfus and Masters's Contract* (3) BOWEN, L.J., said (39 Ch.D. at p. 115):

> B "Great stress was laid on a dictum of the late Master of the Rolls in *Camberwell and South London Building Society* v. *Holloway* (1), dissenting from *Madeley* v. *Booth* (4). It must, however, be observed that the remark of the Master of the Rolls was not material to his decision, for in that case the purchaser had notice at the auction of the true nature of the interest which he was going to buy. This remark, therefore, though made by a great judge, C cannot, in my opinion, displace the decision in *Madeley* v. *Booth* (4). In *Hayford* v. *Criddle* (5) LORD ROMILLY says, 'A contract to assign a lease is not satisfied by granting or assigning an underlease,' and he gives as the reason that an underlessee is exposed to the risk of forfeiture through acts done by his immediate lessor."

BOWEN, L.J., appears there to approve and affirm LORD ROMILLY'S view. FRY, L.J., D in the same case, said (39 Ch.D. at p. 115):

> "It was urged that an underlease is the same thing as a lease, or better. In some respects it may be better, but it is not the same, and in some respects it is worse."

Having regard to those decisions, in my view, the purchaser at this auction in E purchasing lot 1 was entitled to treat the description of lot 1 as offering to him houses held for terms of years from a freeholder.

A further question which I have to decide is whether that primâ facie meaning of what is contained in that statement is to some extent, and if so to what extent, qualified by the fact that the contract contains not only the description of the property, but also condition No. 6 (3) of the National Conditions, which provides:

> F "Where the property sold is held by underlease, no objection or requisition shall be made on that account. . . ."

Counsel for the vendors argued that one must read the particulars and that condition together, and the net result is that in this contract to sell a dwelling-house held by lease, the expression "lease" means either underlease or lease, and that is a fair construction of the contract. In my view, the question is whether, with G those particulars, if the vendors offer an assignment of a sub-lease the purchaser will get that which he may fairly be taken to have agreed to buy? It appears to me that the law on the matter is best expressed in a sentence that I borrow from WILLIAMS ON VENDOR AND PURCHASER (3rd Edn.), vol. 1, p. 339:

> "A purchaser is entitled to require an assignment to him of a lease from the H freeholder unless the contract distinctly specifies that an underlease is the subject of sale."

Accordingly, I have to consider the question whether this contract distinctly specified an underlease as the subject of the sale. In my view it did not. It will be observed that my view is consistent with the proposition that on a careful study of everything in the contract it may be that on its true construction the contract I might be held to amount to a contract by the purchaser to be content with an underlease; but unless the contract distinctly specifies that that which is offered for sale is an underlease, it will not be enforced against the purchaser. I have been referred to a decision of my own, *Charles Hunt, Ltd.* v. *Palmer* (2), where the vendor failed to enforce the performance of the contract of sale because the court came to the conclusion, on a fair reading of the particulars, with, of course, the rest of the contract, that if the contract were to be enforced, the court would be forcing the purchaser to take something different from that which he was led by the vendor to expect that he would get under the contract. If I were to enforce this contract against the purchaser, I should be forcing him to take something different from that which he was led to believe he got under the contract, because, in my view, it was not distinctly specified in the particulars that it was an underlease that was being sold, and he was entitled to treat the particulars as offering a lease.

In those circumstances I propose to make a declaration that the requisitions and objections to the title to the property comprised in the contract have not been sufficiently answered by the vendors, and that no such title to the said property has been shown as the purchaser is bound to accept.

The vendors appealed.

G. P. Slade for the vendors.

C. R. D. Richmount for the purchaser.

LORD HANWORTH, M.R.—Counsel for the vendors has presented a very interesting argument, but the terms of the conditions of sale are too plain to enable him to succeed. The law stated by Sir George Jessel, M.R., in *Camberwell and South London Building Society* v. *Holloway* (1) (13 Ch.D. at p. 760) is plain enough that where the word "lease" is used, it is not satisfied by an underlease, and in the present case we have the word "lease" used. It is true that the conditions of sale provide for the National Conditions of Sale to be introduced where they would be appropriate, and are not inconsistent with the special conditions; but that is a limited introduction and I see no means of coming to a conclusion such as Sir George Jessel reached in the particular case before him in *Camberwell and South London Building Society* v. *Holloway* (1), that there was an indication that "lease" included "underlease."

For the reasons given by Clauson, J., I think that his decision is right, and this appeal must be dismissed with costs.

LAWRENCE, L.J.—I agree.

ROMER, L.J.—I agree.

Appeal dismissed.

Solicitors: *C. A. Russ & Son*; *Hardcastle, Sanders & Co.*

[*Reported by* J. H. G. Buller, Esq., *and* Geoffrey P. Langworthy, Esq., *Barristers-at-Law.*]

BIBL.